



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 28 OF 2009

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's court criminal case No. 3318 of 2006 delivered by P.N. Gichohi - PM on 16/4/2009)

AMOS KIBETAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. This matter has had a long history. The same was heard by a 2 bench Judge and dismissed. The appellant appealed and the Court of Appeal ordered that the appeal be heard afresh.
2. The appellant had been charged with 3 counts of Robbery with Violence contrary to Section 296 (2) of the Penal Code. He was convicted on all the three counts and sentenced to suffer death.
3. Before looking at the merits or otherwise of the appeal it shall be appropriate to summarise the evidence as presented during trial.
4. **PW1 Joseph Thuo Maina** testified that he was a taxi driver of Motor vehicle Reg. No KAM 842D owned by one Samuel Kamau. The same operated within Kitale town. That on 29/9/2006 he was approached by some people who wanted to be taken to Kibomet. He obliged and charged them Kshs 150. As they approached Kibomet they decided to change cause and told him that they should go to Ambwere Stalls a place they call Kwa Mayor. He obliged and agreed to charge the Ksh 250. They went upto a place near somebody's house where he was told to stop and put off the vehicle lights.
5. Suddenly, he was ordered to lie down and his hands tied from the back. They then put him in the car boot and drove off. After a while they stopped and he learned some women talking. He screamed and they opened for him. He realised that he was at Kesogon area. The police were called as well as the owner of the vehicle. The photographs of the vehicle were taken by the scene of crime officers.
6. Later while at Kitale town he was called by someone to identify his driving licence from a person they had arrested. He rushed to the scene and realised that it was the person who had robbed him earlier own. The appellant was searched and other assorted items recovered. He was then taken to the station and subsequently charged.
7. PW1 was adamant that he knew the appellant as he was the one who had requested for the taxi and that even while fueling at Kiboswa petrol station he was able to identify him. He sat in the front seat.
8. **PW2 Samuel Kamau Kamuki** testified that he was the owner of the motor vehicle KAM 842D which he had given PW1 to use as a taxi that night. He was to travel to Kisumu the following day. PW1 did not return the vehicle in the morning and he decided to look for him. PW1 telephoned him that he had been hijacked and was at Kesogon. He went there with the police and had the vehicle photographed. He was however unable to get his driving licence which was behind the sun riser of the vehicle.
9. Later while in town on 4/10/2006 a tout came asking him whether he had lost his driving licence. He told him that someone had been arrested with it. He rushed to the scene and while searching the appellant, among the items recovered were his driving licence. There was equally an expired Insurance licence. The appellant was then arrested and taken to the police station.
10. **PW3 Josephine Nyaboke Ongera** a trader at Kesogon testified that she had closed her shop at 5.30 pm and was at her house which was behind the shop 3 youths came asking for milk. Earlier she had sold milk to them. She complied. In the process one of them remained behind and told her that she was to be killed. He had a pistol. That they had been paid Kshs 20,000/=. The rest of his friends were armed with pangas. They tied her with sisal and forced her to lie down. They took several assorted items as enumerated in the charge sheet.

11. She stated that she was able to identify one of them who had a pistol as he had earlier bought soda from her shop. He had told her that he worked at Posta at Kesogon.

12. She reported the matter at the police station. While at the police some information came that some suspects had been arrested. She went to Kitale police station where she identified the appellant. She said that he had taken soda at her place 4 days ago.

13. **PW4 P.C. Luke Malwa** attached to CID Kitale produced the exhibits on behalf of CPL Paul Ambuto who had carried out the investigations.

14. When put on his defence the appellant gave unsworn evidence denying the charge. He said that on 5/12/2006 at 10.30 PM he was at Villa club when he was arrested by 3 police officers. He was with his girlfriend called Elizabeth. He was taken to Kitale police station and booked and placed in the cells. The following morning he was interrogated concerning Elizabeth and he told then that she was his girlfriend. Later he attended a identification parade. Elizabeth was arrested but released Elizabeth was to be a witness but she told him that he would never come to testify. He denied the charges.

Analysis and Determination

15. The court has perused the proceedings herein as well as the handwritten submissions by the appellant. The appellant has generally attacked the veracity of the prosecution case touching among others the question of identification and general contradictions of the evidence as presented. The State apparently did not file any written submissions as ordered.

16. The duty of this court nevertheless is to re-evaluate the evidence afresh with a rider and caution that it did not have the benefit of seeing and hearing the witnesses.

(See *Okeno Versus Republic (1972) E.A. 32.*)

17. The substantive issue to be considered is whether the prosecution was able to show that the complainants clearly identified the assailants. This is of course a key plank in the offence.

18. Having looked at the evidence as presented I find that this question was clearly on the affirmative despite the line of submissions taken by the appellant. PW1 explained that the person who approached him to take them to Kibomet was the appellant. He spoke with him and sat in front of the car. They also went to fuel the car at Kiboswa where there was electricity. Further as they left for Kibomet then Ambwere, he was ordered to stop and the lights inside the vehicle were on.

19. With this line of evidence one can doubt whether the witness would be unable to recognise his assailant. There was sufficient time and light for the witness to recognise them.

20. PW3 equally gave the same reason. She said that the assailants had not covered their faces as they talked to her. Infact it was the appellant who was armed with a pistol. Earlier on in the day she had seen him and even 4 days prior to this he came to her place of business and told her that he worked with Post office at Kesogon.

21. PW2 testified that he found the appellant in possession of his driving licence when he was arrested. Although the circumstances of his arrest by the public was not clearly explained the appellant was however when searched found in possession of assorted items which included PW2's driving licence.

22. The sub total of the evidence clearly points out to the fact that the key witness PW1 and PW3 identified the appellant. I find the two witnesses credible in their testimony.

23. For the foregoing reasons the appeal is dismissed. In line however with the Supreme Court decision in ***Francis Muruatetu & Another V Republic (2017) eKLR*** I shall set aside the death sentence imposed by the trial court and permit the appellant to mitigate afresh so as to consider an appropriate sentence.

Orders accordingly.

Delivered, signed and dated at Kitale this 25th day of March, 2019.

H.K. CHEMITEI

JUDGE

25/3/19

In the presence of:-

Mr Omoria for Respondent

Appellant – present

Kirong – Court Assistant

Judgment read in open.