



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 6 OF 2017

MUTUA MUSYOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Kitui Senior Principal Magistrate's Court

Criminal Case No. 423 of 2014 by Hon. E. Boke (PM) on 02/02/17)

J U D G M E N T

1. **Mutua Musyoki**, the Appellant, was arraigned in court and charged as follows:

Count 1 – Robbery with Violence contrary to **Section 296(2)** of the **Penal Code**. Particulars of the offence were that on the **22nd** day of **April, 2014** at around **10.30 p.m.** at **Oil Libya Petrol Station** area in **Kalundu Sub-Location** within **Kitui County** while armed with offensive weapon namely **rungu** robbed **Samuel Kilonzo Mulei** of his cash **Kshs. 3,200/=** and one **Nokia Mobile Phone** valued at **Kshs. 3,000/=** all amounting to **Kshs. 6,200/=** and at or immediately before or immediately after the time of such robbery used actual violence to the said **Samuel Kilonzo Mulei**.

Count 2 – Wearing Uniform without Authority contrary to **Section 184(1)** of the **Penal Code**. Particulars of the offence were that on the **2nd** day of **May, 2014** at around **12.10 a.m.** at **Stadium Estate, Township Location** in **Kitui County**, not being a person serving in the Kenya Police Service, without the permission of the Minister for Interior Services, wore one smock combat jacket, jungle trouser and black military boots for Kenya Police Service.

2. He was taken through full trial, found guilty on both counts and sentenced thus,

Count 1 – Sentenced to death.

Count 2 – Sentenced to serve one (1) month imprisonment.

Sentence in Count 2 held in abeyance because of the death sentence.

3. Aggrieved, he appeals on grounds that; identification was not positive; The defense of alibi put up was not considered; The case was not proved to the required standard of proof beyond reasonable doubt.

4. Facts of the case are that on the **22nd April, 2014**, PW1, **Samuel Kilonzo Mulei**, the Complainant was on his way home at about **10.30 p.m.** when he was stopped by an individual wearing Administrative Police uniform. The person hit him with a 'rungu' on the left eye. The assailant demanded to know where he was coming from and where he was going to. He made him walk for **1½ kilometers** until Kitui Stadium where he ordered him to give everything that he had. He took from him **Kshs. 3,200/=** and a cellphone, **Nokia Phone 3310**, slapped him and ordered him to go back home. He went back to his house and made a report to the police the following day. A week later he was summoned to the police station where an identification parade was held and he identified the Appellant who was ultimately charged.

5. Upon being put on his defence the Appellant denied having committed the offence in issue. He stated that on the **2nd May, 2014** he was on the farm cultivating. At **1.00 p.m.** he went to buy pesticides for vegetables as he waited for the sun to set. As he ate maize the police went and arrested him for allegedly roasting maize without a licence. He was in custody for 5 days prior to the parade being conducted and he was arraigned in Court 12 days later.

6. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. (See **Okeno vs. Republic (1972) EA 32**).

7. It is urged by the Appellant that he was not properly identified and at the point of making the report to the police the Complainant did not state any features which would enable him to identify the assailant.

8. This was a case of visual identification. In the case of **Wamunga vs. Republic (1989) KLR 424**, the Court of Appeal stated that:

“... Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of identification...”

9. I therefore caution myself of the importance of ensuring that identification in the circumstances that prevailed was positive. PW1 was a single witness to the incident. He testified that the person he encountered wore the Administration Police uniform. When he looked at his face he hit him with a ‘rungu’ on the left eye. He made him walk for 1½ kilometres but there were security lights at the gate where he found him which enabled him to identify the person.

10. The Complainant’s attacker was a stranger to him. The person was behind him. When ordered to stop he complied and looked behind only to see a person dressed in police uniform. Upon looking at his face, he was assaulted and was not able to use the eye properly. He spent 1½ hours with the person but where there was no light. The person kept on interrogating him. At the point of identifying the individual, he touched him. It was not a case of voice identification therefore he did not seek to hear his voice. The Complainant made a report to the police the following morning. PW4 **No. 64880 Corporal Stephen Kosgei** arrested the Appellant on **2nd May, 2014** and on finding a report having been made by the Complainant on **22nd April, 2014** he summoned him to identify the suspect. Although the Investigation Officer stated that the Complainant had given the description of the person who robbed him, as a dark and not tall man, the Complainant’s testimony was silent on that particular allegation.

11. If the Complainant was hit on the eye as soon as he tried to look at the individual, it is unlikely that he may have been positive as to his physical features. What he may have been certain about was the mode of dressing. And any person may have dressed in the Administration Police uniform. In the circumstances the identification may have not been cogent.

12. With regard to the 2nd Count the Appellant was stated to have been found wearing one smoke combat jacket, jungle trouser and black military boots for Kenya Police Services without permission of the Minister or any other lawful authority. PW2 **Joseph Ndolo**, a village elder and PW3 **Benson Samburu Muli**, a Member of Community Policing Agency encountered the Appellant while on patrol on the **2nd May, 2014** at midnight. He was dressed up as a police officer. They notified PW4 who ultimately joined them. They went to a structure where they found the Appellant and arrested him. The items were adduced in evidence.

13. It was proved that he had no authority to have the attire. In his defence he came up with a different tale and therefore failed to explain how he had the attire. In that regard the learned Magistrate did not fall into error in reaching the finding of guilty on his part. Regarding the sentence imposed it was within the law.

14. From the foregoing, I find that it was not safe for the learned Magistrate to conclude that the Appellant having been found with clothes with the appearance of police uniform must have been his attacker. Therefore, I quash the conviction on the 1st Count and set aside the sentence imposed.

15. On the second Count, I affirm the conviction and sentence imposed which was held in abeyance. Therefore, it shall be effective from the date of this Judgment.

16. It is so ordered.

Dated, Signed and Delivered at Kitui this 23rd day of April, 2019.

L. N. MUTENDE

JUDGE