



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 239 OF 2017

JONATHAN MUSAU MUTUNGIAPPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Applicant was charged with the offence of **ROBBERY CONTRARY TO SECTION 296(2) OF THE LPENAL CODE.**

2. Particulars being that on the 12th day of November 2016 at Kyandubi village, Kivani location in Makueni County robbed Imoran Musyoka Mwenga one bar soap valued at Ksh.60/= one kilogram of sugar valued at Kshs.140, one kilogram of beans valued at Kshs.100/=, three kilograms of fertilizer valued at Kshs.210, a mobile phone make *Itel* valued at Kshs.400/= cash 300/= all valued at Kshs.2,210/= the property of Imoran Musyoka Mwenga and immediately before the time of such robbery used actual violence to the said Imoran Musyoka Mwenga.

3. He pleaded not guilty and after trial he was found guilty and convicted and sentenced to suffer death.

4. He lodged instant appeal and set out 7 grounds in his petition of appeal namely: -

1) **THAT** he pleaded not guilty to the charges.

2) **THAT** the trial court faulted the points of law when appreciating the evidence of identification by recognition while failing to note that the circumstance that prevailed at the scene was not conducive for any positive identification.

3) **THAT** the trial court gravely faulted the point of law and fact when getting impressed by the mode his arrest while failing to observe that there was no exhibit in his possession that could have linked him with the commission of the offence.

4) **THAT** the trial court grossly erred in points of law and fact when not finding that the prosecution did not prove their case to the required standard as provided by the rule of law.

5) **THAT** the investigations into this matter were shoddy hence could not have been relied upon by the trial court to base the conviction.

6) **THAT** the trial court further faulted the points of law when rejecting his defense of alibi without giving any cogent reason for so doing as is stipulated under Section 169(1) of the CPC.

7) **THAT** since he cannot recall all that transpired at the trial court, he prays to this Honorable court to furnish him with the trial records so as to enable him prepare some more tangible grounds upon the hearing of this appeal of which he would also wish to be present.

5. During hearing, the state relied on record but Appellant filed submissions.

APPELLANT'S SUBMISSIONS

6. The appellant submits that the prosecution did not prove that the ingredients of Robbery with Violence within the meaning of Section 296(2) of the Penal Code existed herein. In the circumstances, the charge sheet as it is, is fatally defective and cannot sustain a conviction.

7. It is further argued that the circumstances obtaining were not conducive for a positive identification
8. The events to which PW1 testified all took place in darkness. He said, however, that there was moonlight, and that he knew the Appellant before that day as he was a neighbor.
9. The evidence of identification/recognition did not rule out possibility of mistaken identity, or even of frame-up as suggested by the defense at the trial, and that the Appellants' defense had not been sufficiently proved to be negative.
10. He submits to this court that although there was evidence of moonlight, there were circumstances which did not favor correct identification/recognition.
11. The circumstances surrounding his effort to identify the appellant were such that no one would conclude that he had a clear view of his attacker. Moonlight where there is immediate attack is not such circumstances as would have led anyone to conclude that PW1 had identified/recognized his attacker beyond reasonable doubt.
12. He relied on cases of (**RAMAXANI BIN MIRANDU (1934), 1 E.A.C.A. 107**); **R. V. MUYOVYA BINMSUMA (5), MATIANYI VS- REPUBLIC (1986) KLR 198**, **WAMUNGA -VS- R. (1989) KLR 424**, **PAUL KIMATHIS SUNGU VS REPUBLIC (2005) KLR, ANJONI -VS- REPUBLIC (1980) KLR 50**

THE DUTY OF THE APPELLANT COURT

13. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **SELLE & ANOR -VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123**.

14. EVIDENCE TENDERED

15. PW1 Imoran Musyoka Menga testified that he knew the appellant person as Musau. He stated that he was his classmate in Kyadume Primary School from standard 5 to 8. PW1 testified that on 12/11/2016, at about 9:00 pm he had left Kivaani market on foot for home. On the way someone followed him.
16. The said person spoke to him and told him they walk together. He indicated that he turned and saw it was Musau. Shortly after he hit him at the back of his head with something that he did not know and he fell.
17. The complainant testified that he was carrying a bag on his back. When he fell the appellant started to strangle him and hit him. He indicated that he was lying on his back.
18. The complainant stated that appellant person was using one hand to strangle him and the other to hit him. He thus lost consciousness for a while.
19. He regained consciousness at the road and realized that he did not have his bag. He was also bleeding on the head. He informed the court that he returned to Kivaani market and reported the incident at the police post.
20. He was referred to Kola Police Station and went there on 14th. The complainant stated that after reporting at Kivaani Police post he went home where he lives with his mother namely Alice Mwenga Mutheu.
21. He told her what had happened. His mother gave him first aid that night and on the next day. When he went to Kola Police Station, he was given a note to go to hospital and went to Machakos Level 5 hospital.
22. He was also issued with a P3 form that was duly filled at Machakos Level 5 Hospital.
23. The complainant averred that on the 12th there was a full moon and that is how he was able to recognize the appellant person and he also recognized his voice.
24. He informed the court that he was certain it was the appellant person who attacked him and no one else. He indicated that the bag he had carried was his and it had items therein which were; one bar of soap worth Kshs.60/= sugar one kilogram worth Kshs.140/=, one kilogram of beans worth Kshs.100/= fertilizer 3 kilograms worth Kshs.210/=, I tele phone Kshs. 1,400.
25. He indicated that when he regained consciousness Musau was not there. He stated that he also had Kshs.3,000/= in his trouser pocket. None of the items were recovered.
26. The complainant asserted before he lost consciousness the last person he saw was Musau beating him. He denied falling as a result of being drunk. He averred that he was sober.
27. In cross examination by the appellant person, PW1 stated that the road is a main road and there are homes near the road about 200 metres away.

28. He stated that when the appellant person hit him, he did not manage to scream. He indicated that he does not see the appellant person often and that they do not have any relation or do not engage in any way.

29. The complainant stated that the appellant person spoke to him and asked him to wait for him so that they could walk together and he (the complainant) slowed down. He reiterated that he saw the appellant person and he knows him well.

30. PW1 stated that he was alone and did not see three people behind him. It was the complainant's testimony that the appellant person escaped when the police went to arrest him. The appellant person was later arrested by community policing officers.

31. PW2 Alice Mutheu Mwenga informed the court that he knew the appellant person before court as Musau Mutungi who is a neighbor. She testified that on 13/11/2016 at 5:00 am she was at home sleeping and heard her door being knocked.

32. She opened and saw it was her son. He was bleeding on the head and the left eye was swollen. He told her that Musau had attacked him on the road and his bag was stolen. The bag contained 3kg fertilizer, 2kg sugar, 1kg, beans and Kshs.3000/= and a phone.

33. PW2 informed the court that she boiled water and put salt and washed him. She prepared food but he did not eat. On 14/11/2016 they woke up and she told him to go and make a report at Kola Police Station but he did not accompany him.

34. He returned with a note to proceed to hospital and he went to Machakos Level 5 Hospital and was treated. She averred that her son does not take alcohol or smoke cigarettes. She stated that she lives with her son in one homestead.

35. In cross examination by the appellant, PW2 stated that she was not present when her son was attacked, however his son told him that it was the appellant person who attacked him.

36. PW2 stated that the appellant person's wife has never assaulted her and the appellant person had cut down her trees but she forgave them both and did not pursue the matters. She stated that her son had left home on 12/11/2016. She denied that her son had been arrested for creating disturbance.

37. PW3 PC Ndirangu githua of Kola Police Station testified that 14/11/2016 at 10:50 am he was at the station when he received a complaint from Imoran Musyoka who complained that on 12/11/2016 at 9:00 pm when headed home from Kivani market, he saw somebody whom he knew called Musau Mutungi following him. Musau spoke to Imoran and told him to wait for him they walk together.

38. Without any warning, the appellant hit the complainant with a blunt object which the complainant did not know what it was. The complainant on being hit fell on the ground and the appellant continued to hit him with the object.

39. The appellant then stole the complainant's bag and inside the bag was a panga soap 3kg fertilizer, 2kg sugar, 1kg, beans and Kshs.3000/= and a phone

40. The I.O stated that while the complainant was making the report, he noted that he was weak and had injuries on the head with blood clots and a swollen left eye. He thus gave him a note to go for treatment and issued him with a P3 form. The complainant returned on 19/11/2016 and he told him to take him to the scene.

41. The I.O stated that at the scene he noted that it was on the road and there was nothing that could have prevented the complainant from identifying the appellant person. The said scene is about 3kms to Kivaani market and 2kms to the complainant's home. The homes near the scene are far and scattered.

42. It was the I.O's testimony that on 26/11/2016 he got a police vehicle from Kilome Police Station and he went to the appellant person's home together with the colleague Cpl Nyaundi.

43. They found the appellant person in his shamba and when he saw them because his colleague was in uniform, the appellant person escaped and they ran after him up to Kaiti river.

44. He dived in the river and they were unable to pursue him further. They thus retreated. The I.O stated that he later spoke to the Chief Kivaani location called Joyce Kimana and urged her to liaise with nyumba kumi personnel to arrest the appellant person. On 10/1/2017, the appellant person was arrested and handed over to him. He thus charged him with the offence before court.

45. He produced the investigations diary as Exh. No. 2. The I.O stated that he did not know the complainant or the appellant person before.

46. In cross examination, by the appellant person, PW3 stated that he found the appellant person in the shamba below his homestead. He however stated that he did not know if it was the appellant person's home or his mother's home.

47. The I.O stated that he found no reason why the complainant could falsely accuse the appellant person. He opined that if the appellant person had not committed the offence, he had no reason to escape.

48. He stated that he learnt that the appellant person escaped for a week and thus sought the help of the chief. The I.O stated that the road where the incident occurred is interior and not busy.

49. PW4 Erick Kasiamani of Kilungu sub-county hospital produced the P3 form dated 24/11/2016 on behalf of Dr. Mutunga of Machakos

Level 5 Hospital upon the prosecution invoking the provisions of Section 77 of the Evidence Act.

50. The injuries stipulated in the P3 form were that the complainant had an injury on the right side of the head at right eye. The eye was swollen and had redness and there were scratch marks on the neck.

51. In cross examination by the appellant person, PW4 stated that he did not know who injured the complainant.

52. The prosecution closed its case and thereafter the appellant was found to have a case to answer. He opted to give an unsworn statement.

53. The appellant person stated that he was surprised to be arrested in 2017 because he was falsely appellant in this matter which had happened in 2016 and he did not know anything about it.

54. He indicated that he was surprised that during all that time since 2016, he was arrested in 2017. The appellant person stated that the complainant told the court that he knew him.

55. He asked the complainant if he stays with him and/or whether they spend days together and the complainant replied that they do not. He also asked the complainant if he had witnesses to the incident and he replied he did not have.

56. The appellant person contended that the appellant person had appellant him falsely because of a boundary dispute at home between their family and that of the complainant. The appellant reiterated that he does not spend time with the complainant.

57. They cannot relate because he has a family and the complainant does not. He indicated that he is normally struggling to provide for his family because he is the sole dependant.

58. ISSUES

After going through the evidence on record and the submissions tendered I find the issues are; ***whether prosecution proved its case beyond reasonable doubt? Was identification of the attacker positive?***

ANALYSIS AND DETERMINATION

59. The COURT OF APPEAL AT NAIROBI CRIMINAL APPEAL NO.140 OF 2000 PETER MWANGI MUNGAI V- REPUBLIC upheld the reasoning in the Court of Appeal in England in R.V Turnbull (1976) 3 ALL ER 549 as follows “ **The judge examines closely the circumstances in which the identification by each witness came to be made. How long did the witness have the appellant under observation? At what distance? In what light? Was the observation impeded in any way, e.g. by passing traffic or a press of people? Had the witness ever seen the appellant before? How often? If only occasionally, had he any special reason for remembering the appellant?**

How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the appellant given to the police by the witness when firsts seen by him and the appellant person's actual appearance?

60. In the case of **WAMUNGA –VS- R, (1989) KLR 424** this court while dealing with the complexities of an identification of an assailant stated as follows: -

“It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction.”

61. PW1 testified that on 12/11/2016 while headed home on foot at night around 9:00 pm he heard someone behind him. The said person spoke to him and asked him to wait for him so that they could walk together.

62. The complainant stated that he turned around and saw it was the appellant person herein whom he referred to as Musau. He informed the court that he knew it was Musau because they had been schoolmates in primary school and was thus able to recognize him. He further stated that there was a full moon that enabled him to see the appellant person and the fact that the appellant spoke to him, he was able to recognize his voice.

63. The appellant person in his defense contended that he was surprised how the complainant identified him yet they did not stay together or spend days together. However, it is notable that the appellant person informed the court that the complainant had accused him falsely because of land boundary dispute.

64. Though this line of defense was never put to the complainant in cross examination and defense amounts to an admission by the appellant person that they were not strangers to each other and were persons who knew each other well.

65. The court takes caution on relying on the sole testimony of PW1 which links the appellant person to the offence. Nevertheless, the court finds that his testimony was clear and consistent and finds that there is evidence to demonstrate that the appellant person was positively identified by the complainant on the material date.

66. **IN THE HIGH COURT AT MOMBASA CRIMINAL APPEAL NO. 2 OF 2010 MOHAMED ALI V- REPUBLIC** held; citing the case of **AJONONI & OTHERS –VS- REPUBLIC (1980) KLR...** *“recognition evidence is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”*

67. Similarly, in the same case **THE HIGH COURT AT MOMBASA CRIMINAL APPEAL NO. 2 OF 2010 MOHAMED ALI VS- REPUBLIC** upheld the reasoning in the case of **MAITIANYI –VS- REPUBLIC (1986) KLR** the court of appeal held that *“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification*”

68. In addition, the court takes in to account the evidence of the I.O who informed the court that on 26/11/2016, which is about 14 days after the incident had occurred went to the appellant person’s home with his colleague who was in police uniform.

69. They found the appellant person in the shamba and when the appellant person saw them, he escaped. He went into hiding and his arrest took place in January 2017. The action by the appellant person of running away portrayed that of a person who knew that he had done something wrong.

70. Taking into account that the police went after him 14 days after the incident, this court draws an inference that the appellant person knew that he had committed an offence in the recent past. Consequently, the evidence of PW3 does corroborate the testimony of PW1 which links the appellant person to the offence taking into consideration the appellant person’s act of escaping arrest.

71. The complainant testified that upon the appellant person telling him to wait for him on the material date, he slowed down and shortly after he was hit on the back of his head with an object that he did not know what it was. He fell on to the ground and the appellant person continued to hit him while strangling him.

72. He as a result of the assault lost consciousness. It was his testimony that he had carried a bag on his back with items in it and had Kshs.3,000/= in his pocket.

73. When he regained consciousness while still on the road, he realized that the appellant person had gone and also his bag and money had been stolen. He indicated that their home is near the road where the incident took place but the same were far which evidence the I.O corroborated and stated that the road was not a busy road and the homes nearby were scattered.

74. The P3 form was produced as evidence which illustrated that the complainant had sustained injuries to the right side of the head to the right eye. The right eye was swollen and had redness and there were scratch marks on the neck. Taking the evidence of the complainant, the same does support issues number (i) and (iii) as outlined herein above.

75. The complainant has demonstrated that the appellant person was armed with an offensive weapon which he used to strike him on the back of his head although the complainant could not tell what the appellant person used, but averred that he was hit from behind as a result of which he fell on the ground.

76. By hitting the complainant with whatever instrument, disempowered the complainant and empowered the appellant person to attack. Upon attacking the complainant causing him to lose consciousness, the appellant person then proceeded to steal from him.

77. In light of the provisions of Section 296(2) and bearing in mind the use of the word “or” therein implies that any proof on the above three issues is sufficient to sustain the case brought under the said section.

78. Having considered the evidence by the prosecution in totality, the court forms the considered view that the prosecution established their case beyond reasonable doubt against the appellant person. Thus appeal on conviction is meritless.

79. However after mitigation, the trial court held that the sentence available is only the mandatory death sentence. This is no longer our law vide **SCOKE CASE PET NO. 15 OF 2015 MURUATETU AND ANOTHER VERSUS REPUBLIC AND OTHERS.**

80. The court declared mandatory aspect of the death sentence unconstitutional thus giving discretion powers to the Subordinate and Superior Courts to give the appropriate sentence depending with the circumstances of the case.

81. I have looked at the mitigation in which appellant stated that he was a bread winner to his children and his elderly mother and the fact that he had no previous record.

82. I have also considered the circumstances of offence, value of items robbed and the injuries inflicted which was classified as harm.

i. I therefore set aside the order on death sentence and substitute the same to a 10 years’ imprisonment from the date of arrest 10/1/2017.

SIGNED, DATED and DELIVERED this 31ST DAY of MAY, 2019, IN OPEN COURT

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C. KARIUKI

JUDGE