



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 261 OF 2017

WAMBUA MASAIAPPELLANT

-VERSUS-

REPUBLICRESPONDENT

AS CONSOLIDATED WITH HCCRA 260 OF 2016

SHADRACK KAVIU NGNZI VS R.

JUDGMENT

INTRODUCTION

1. The Appellants were charged with offence of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE.**
2. Particulars being that on the 25th day of February, 2016 at Kisekini Sub-Location, Kikoko Location in Kilungu Sub-County within Makueni County, jointly robbed Mutunga of his shirt, trouser, motorbike, radio, scarf all valued at Kshs.4,600/= and before the time of such robbery used actual violence to the said Mutunga.
3. The accused pleaded not guilty and matter went into full trial.
4. They were convicted and sentenced to suffer death. Being aggrieved by the decision above, they lodged appeals which has been supplemented by grounds which they replicated one another canvassed via a replicated submissions .
5. The common grounds of appeal were ,namely: -

1. THAT the trial court erred in law and facts by failing to re-evaluate, analyse and cautions itself of the alleged identification evidence by a single identifying witness whose character, conduct and behaviour is contrary to Section 163(c) of the evidence Act Cap 80. Hence, PW2 is thus unreliable and incredible witness.

2. THAT the mode of arrest is suspect as the information leading to Appellant arrest was involuntarily obtained as PW2 mentioned him after being threatened to be lynched by members of public. Nevertheless, PW2 evidence not admissible against him unless it is proved to have been voluntary. The prosecution has to tender evidence to show that all the legal requirements in taking down information of this nature have been satisfied.

3. THAT trial court erred in law and facts by failing to find the alleged circumstantial regarding the radio and scarf allegedly found in his house as per investigating officer does not add up to. There were no special features showing that the radio and scarf belonged to the complainant and nothing else personal incriminating availed to prove indeed the said recovery was made in his house. For example, accused 2 identity card, his clothing, pictures of the accused, or the property owner if any.

4. THAT trial court erred in law and facts by failing to observe that the alleged recovery of the alleged stolen items was contradictory and inconsistent as it did not specify as whether they were recovered from accused 1 or 2.

5. THAT essential prosecution witnesses, especially those alleged to have initiated PW2 arrest but later made prosecution witness (members of public) were not availed in court to ascertain the circumstances that led them to torture PW2 to name his accomplices.

Worse still, upon his arrest he was sick and thus not capable to commit the alleged offence.

6. The parties agreed to canvass appeal via submissions but only Appellants complied. The prosecution relied on the evidence on record.

DUTY OF THE FIRST APPELLATE COURT

7. 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.**

EVIDENCE ADDUCED

8. PW1 Patrick Mutunga Joseph testified that he is from Kithangathini and a boda boda rider at Nunguni. On 25/10/2016 at 9:30 pm he was at Nunguni stage.

9. He was loading foodstuffs to take home. Both accused came and asked him to take them home. He told them that he had closed business of the day. They abused him and went away to pick another motorcycle. He then headed home.

10. On reaching Kisiani towards Kithangathini at a sharp corner, he found a log laid across his path. He slowed to go and remove the log, he was hit on the head with a stone/brick. He fell down. He saw Muuo.

11. They attacked him. He was struggling and was able to identify Muuo a boda boda driver. Muuo was the one who lifted his motorcycle when he fell. He is the person he knew.

12. His motorcycle was also at the scene. He did not identify the others.

13. He screamed as they beat him and undressed him. He screamed until he lost his voice. They even placed their fingers in his eyes and blinded him. He didn't know where Muuo went after that. They beat him and he lost consciousness.

14. The next day he found himself at Kilome Sub-District Hospital. He didn't know who took him there. He was referred to Machakos Sub-District Hospital and on return he was told by boda boda colleagues that they knew his attackers and they had been arrested.

15. Items stolen were found at the station. **Motorcycle was picked form the scene and taken to the station, Radio and neck scarf were recovered from the 2nd accused's house.** The radio and scarf are before court. Nothing else was recovered. He lost: **ID card National for (grandmother) Rose Ndulu, His driving license, Money Kshs. 25,000/= he had been sent to collect and take to his boss, Clothes –trouser (2), Shirt, Leather jackets (3)**

16. He was admitted in Hospital for one week at Kilungu Sub-District Hospital. He went for a scan at Machakos. He was injured on the head.

17. He reported at Kilome Police Station after being discharged from the hospital. He recorded his statement. He marked his discharge summary Kilungu Sub-District Hospital PMFI – 3.

18. He was issued with a P3 form at the police station. It was filled PMFI – 4.

19. He knew both accused persons. In the market, he didn't know his name but he knew his nick name as "Kisu". He said that he has always known the 2nd accused as Wambua.

20. This happened at night. But his head lamps were alight. He stated that he had no grudge with 1st and 2nd accused but he knows their place. **Cross examination by 1st accused that** He knew "Kisu". He was told about him by people from his area. Kisu is his name for working. He carries items at Numguni market. He states the truth the same way he said at Kilome. Stones and bricks are all blunt objects.

21. The area is populated. He screamed till he could no more. He lost consciousness. he stayed two days in dizziness. He said that he did not see the 1st accused attack him. The complainant also said that he did not send any police to arrest him (1st accused).

22. He also told the court that the 1st accused abused him as Kino at the stage. Muuo lifted his bicycle on **Cross examination by 2nd accused in person he stated that,** People who picked items were boda boda riders, **Mwendwa, Muuo, Harrison and Felix.**

23. The did not take photographs of what they recovered. The 2nd accused was arrested at a place he did not know. He submitted to this court that he could take the second accused to his house and determine it.

24. PW2 Dickson Muuo Mutua stated that he used to live at Katulia. He is a boda boda rider at Nunguni. On 25th February, 2016, at 9:00 pm., he was at Nunguni market. He saw Kaviu 1st accused and Wambua. They told him to take them to their home on his motor bike. Kaviu told him to go towards Kisekini.

25. On reaching the slope, they stopped him there, he wanted to be paid. He saw Mutunga arrive and passed him and stopped just ahead about five metres. He didn't see why.

26. He saw them the two head towards the complainant. Then Kaviu assaulted Mutunga on the head using his hand.
27. He ran away and left them there. It is Kaviu who assaulted him. 2nd accused was just there holding Mutunga's motorcycle.
28. PW2 then ran home. He didn't help as he thought they were together and he could intervene and be beaten up. He disappeared immediately. Mutunga was alone with the motorbike. He had not seen Mutunga before carrying. They didn't even pay him.
29. PW2 knew Wambua himself by face only in the market but he didn't know his name. He knew Kaviu as he is his neighbour. They are the people he carried that night.
30. They told him to stop at a place he didn't know there was a house uphill. He knows Kaviu's place. They told him to take them to Kisekini.
31. He learnt about what happened the next day when the motorbike riders came to his home and asked whom he had carried the previous night.
32. He informed them he carried Kaviu and Wambua. He went to Kilome Police Station and recorded his statement. He did not know how they were arrested on **CROSS EXAMINATION BY ACCUSED 1 he stated that**. He was a boda boda operator. A boda boda operator carries two people. He carried the two of them which is unlawful because he (accused 1) forced him the PW2. He was taking them to Katulye.
33. He was instructed to go to Kisekini road. Before Nunguni he sent him to Katulye. He charged him Kshs.50/=. He didn't even pay PW2 any money. He is telling the truth.
34. The complainant could be confused because accused 1 assaulted him to unconsciousness. He could have helped him and accused 1 pointed at him and he found that a threat of beating him.
35. He feared if he went back to Nunguni they would way lay him. He informed his mother. she told him to go report in the morning. PW2 said that accused 1 was lying because he carried him and saw him attack the complainant on **CROSS EXAMINATION BY 2ND ACCUSED PERSON he stated that**. He never knew him before. The 1st accused told him his name that night. On **RE-EXAMINATION he stated that**, that day he carried Kaviu and Wambua at once. Kaviu instructed him to take him home and said he carry 2nd accused his cousin.
36. Kaviu told him to pass through Kisekini, he touched Mutunga's bike and made it stand. He didn't know what was happening.
37. When he tried to help, 1st accused pointed at him menacingly and he ran away. He had nothing against Mutunga. He said that he was telling the truth and he knew accused by face. He knew accused by that name on that day.
38. PW3 Godfrey Musyoki Muindi stays in Katulia and was a boda boda rider. On 25/02/2016, he remembers at 8:30 to 9:00 pm, he was with Josphat Mutunga the complainant.
39. He left him and went home. The next morning on 26/02/2016, he left home at 6:00 am and went to Kisiani area stage. Godfrey saw many people on the road. They told him a boda boda rider had been attacked.
40. He heard the motorcycle "**please call me**" he knew obviously it was Mutunga's. He rushed at Nunguni to enquire whether people knew. He found that people knew and was told he was in hospital.
41. He went to hospital and in the ward he could speak but coulnt see. He had a badge on the face but could recognize him (Godfrey Musyoki Muindi).
42. Godfrey was called at Nunguni stage and was told on phone the people who had carried the assailants were known. He was told Muuo carried the assailants Kaviu and Wambua.
43. He went to the stage and they decided to go to Muuo's residence. They found Muuo at the shamba. Muuo was almost beaten and lynched by people but he stopped them.
44. Muuo came and he asked him what happened. He asked him to tell people not to beat him and he would disclose who he carried. He said he carried Kaviu and Wambua.
45. They then headed to Kaviu's place and found him at the shamba. All boda boda riders. They arrested Kaviu and asked him why he beat Mutunga. He denied, they took Kaviu up to Kisiani. Kaviu was asked to tell them why they beat Mutunga.
- He then said they were two and took them to the place they beat Mutunga. He said that they were with Wambua. A group took Kabviu to the Police station. Other went to Kaviu's place. They found Kaviu's place scarf. **Scarf – was at the drying line and the Radio was under bed.**
46. PW3 was an eye witness and said that the complainant was confused. The items were found at accused 1 and not accused 2's house. They took them to Kilome Police Station.

47. He was later called to record a statement with the police. The 2nd accused was arrested at Kisiani later by them at a shamba by boda boda riders.

48. They found him at Kisiani and he said “*Muuo wacheni kunipiga mimi sikupiga Mutunga hata*”. Later he said he was using drugs and they took him to hospital. Kaviu went to the same school. PW3 said that he also knew 2nd accused and even knows his home.

49. on **Cross examination by accused 1 in person he stated that**,they arrested him (accused 1) because Muuo said he attacked Mutunga. Muuo is the one who carried him (accused 1) that night. He (PW3) went to Mutunga at hospital and he was awake and they talked. He is not lying.

50. They entered his house through the door it is a mob of people who entered. He is sure those items were found at accused 1's and not accused 2's house.

51. He further said that at Kilome he didn't say that the items were found at Wambua's. They didn't have a search warrant. There was no government representative.

52. On **RE-EXAMINATION he stated that** Nyaundi a police officer is the one who recorded his(PW3) statement the way he told him. But he couldn't explain how it came to be that the items were recovered from the accused 2. They were recovered at accused 1's place.

53. PW4 No. 73650, Corporal Reuben Nyaundi work at Kilome Police Station Crime Branch.

54. He is the investigating officer in this case. The 1st accused Shadrack and the 2nd accused Wambua.

55. On 25/02/2016, at around 11:55 pm, he was the duty officer. The area chief Mukoma brought this report of a person injured. He was injured and found lying on the ground.

56. They found at the Kisiani junction and found a man who was injured lying to the junction half naked. He was unconscious. They saw the motor bike and a tree that had been fallen across the road. Also there were bricks on the road across.

57. They carried the motorcycle and the complainant and took him to Kilungu Sub-District Hospital. KMDR 852U Sky Go. The next day at 12:00 noon the 2 accused were arrested at Kisiani area by the public.

58. The public claimed they were the ones who attacked the victim. They were booked. Some items recovered. On investigation they were told radio was stolen.

59. At recovery the motorcycle had no radio. The accused were brought to the station with a radio and scarf. They recovered scarf and radio from the accused. It is the public that did so. He produced Pexh – 1 scarf, Pexh – 2 radio.

60. The items were recovered from accused No.2. The 1st accused was named by accused 2. Also PW2 also mentioned accused 1. The scarf and radio were for the complainant. He recorded statements of all witnesses.

61. He visited the scene the same night. P3 form was issued by chief inspector Kariuki OC crime. Accused 2 was found with the items under the bed.

62. The complainant said that the two accused approached him at the stage posing as customers. He had Kshs.25,000/= and was to take to an M-pesa shop. He declined and then they took another motorbike.

63. He met the accused. The PW2 also told them he dropped them at the place the complainant was attacked. He also witnessed the complainant having been knocked and feared for his life and ran away. PW2 is the one who led the public to the accused persons. PW2 is actually the one who had carried the two accused that night.

64. On **Cross Examination by Accused 1 In Person stated that**,there was a report by area chief Kisiani Sub-location. The chief is Mukoma. Himself he received a report from the public, the people who called the area chief called him. The public do not have the call number even for the chief.

65. Corporal Reuben Nyaundi didn't see the chief that night. He didn't get back to him. Corporal Reuben saw accused 1 after he was brought to the station. The accused person appeared fit to Corporal Reuben Nyaundi. Corporal did not know whether accused 1 was injured.

66. The person who received accused 1 recorded that he was not injured. They found the motorbike and an injured person. There was a tree across the road.

67. The bike's head lamp was still lighted and shining. They couldn't take a photo as it was at night.

68. The pieces of bricks are not before court, and he told the court what he saw. Accused number 2 led people to accused no. 1.

69. PW1 Dickson Mutua. He says they took the victim to the hospital and left him. He was unconscious. Every time a person goes to hospital a card is issued.

70. It is supposed to be in the patient's name. the doctor knows what he wrote in this case. PW1 says that accused 1 was involved in this case. Accused no.1 was mentioned by both PW2 and accused no.2. there was no need of an identification parade. Accused 1 was known and recognised even by his names as Ngonzi. On **Cross Examination by Accused 2 In Person** He stated that the public found him at the shamba.

71. PW5 Jackson Mwendwa is a boda boda rider at Nunguni market. He has done so for seven years. He is a discipline master in the boda boda Sacco. He says he knew the accused 1 as Kaviu, accused 2 as Wambua.

72. PW5 says that he knew Mutunga Joseph. On 26/02/2016 at 9:00 am. He found people in groups. They told him that Mutunga Joseph was attacked at night on 25/02/2016. He was at Kilungu sub county Hospital.

73. He visited him and found that he was seriously injured. He went back to the stage and found that the public suspected the two accused.

74. They went to Muuo PW2's place. Muuo told them that he carried them to Kisekini and they came from Katulye. He left them at Kisiani area at a hill and left them there.

75. Muuo named Kaviu and they went to Kaviu's place and arrested him at Kisiani. They interrogated him and he agreed that he was the one who attacked "kata" Mutunga.

76. They took him to Kilome police station. He also told them that they were with Wambua. They went seeking for Wambua accused 2 at a shamba and they arrested him. They took him to the police station direct.

77. At Wambua's house they found the radio and scarf by the public. Further he said: **-Mutunga was attacked, Muuo said he carried the two, Kaviu admitted he attacked Mutunga and they were with Wambua and Wambua was found with the items.**

78. On CROSS EXAMINATION BY 1ST ACCUSED PERSON He stated that, Muuo is the one who carried the 1st accused in his boda boda. The other people were boda boda riders.

79. They arrested him and took him to the police station. He learnt of the attack and they mobilized, visited the hospital and proceeded to look for him. Further he says that he would report if he found no evidence.

80. On **Cross Examination by Accused 2 In Person** He stated that, Jackson Mwendwa come from Kauti. He is a boda boda rider. He knows Katulye. He didn't know accused 2's place of residence.

81. PW6 Erick Kasyamani testified that He had a discharge summary for Mutunga Joseph. Date of admission on 26/02/2016. which showed he was injured on the head. He was treated and discharged. Also a P3 form for Mutunga Joseph. He had blood oozing from the nose. The head was also swollen and had a blood clot. He had a head CT scan and showed there was a clot at the brain.

82. He was put in a ward and treated. The weapon used to injure him was a blunt object. The degree of injury was "main". The injury age was 3 months.

83. He lost consciousness and also could not perform his normal functions. He (the clinical officer) signed the document on 15/06/2016) the discharge summary – Pexh.3 and P3 form – Pexh.4.

84. The prosecution closed case and appellant was put in his defence where via unsworn statement stated he was from Katulye, near Katulye Primary School. He was employed at the compound where he was arrested.

85. On 25/12/2017, he was employed by Nzioka. On 26/12/2017, he was arrested and told that a radio was found in his house and he would answer questions later. He was arrested by three people and they beat him and was taken to Kilome Police Station.

86. He saw the radio in court. He only heard the radio was picked from his house. He didn't know which house. He didn't see it being picked. Further he says that he knew nothing about that issue. He had been sick and he was injured on that day.

87. ISSUES

88. After going through evidence on record and the submissions tendered, I find are : ***whether prosecution case was proved beyond reasonable doubt?***

ANALYSIS AND DETERMINATION

89. Prosecution availed six distinct witnesses in support of their case. PW1 evidence is to the effect that he did not identify the two accused persons at the scene of crime. Further, he stated scarf and the radio had no specific mark nor were receipts availed to prove ownership by PW1.

90. PW1, stressed that "he saw PW2 who lifted his (pw1) motorcycle when pw1 fell".

91. PW2 testified that while under threat of being lynched by the members of public implicated the accused persons with the crime.

92. Hence, his implication of the appellants was involuntary and was intended to save his skin. PW2 being placed at the scene, he however implicated the accused persons. He was seen by PW1 holding his motorcycle.
93. The trial court believed him, without enquiring why PW2 was (threatened to be lynched) if he was really credible and lucid witness. The trial court did not consider that important issue.
94. PW2 wanted the court to believe that he ferried the accused herein and witnessed the alleged heinous crime. The question is; What made him not report to the police as soonest as possible or inform any of his boda boda colleagues through the phone about the incident?
95. PW2 claim to have informed her mother. His mother advised him to report in the morning to the police. He did not report until boda boda riders after doing their own investigation came to arrest him as a suspect. He was arrested while at the shamba. He claims not to have received his payment.
96. As a reasonable person, it was expected of him to seek assistance from police and report the entire incident to police to assist the police in conducting their investigation.
97. PW2 statement remains inconsistent and contradictory hence not a truthful witness. Therefore, the trial court ought to have disregarded his evidence in its totality. As it is suspicious and amounted into an after thought which was not a reliable evidence. This was because it was an information not voluntarily received but emanating from threat of killing by the members of public.
98. On circumstantial evidence, the trial court found that the Appellants were in recent possession of the alleged stolen radio and scarf shortly and stated thus: - **“Besides the direct identification evidence, we find that the circumstantial evidence available pointed more to the guilt of the Accused 2 than to his innocence. This evidence revolved around the recovery of the radio and scarf. We are convinced by the evidence on record that the trail of evidence on the movement of the radio and scarf after the robbery was traced to the Accused 2.”**
99. That leaves the circumstantial evidence connecting the Appellants to the offence. It is important to underscore that the radio and scarf were not found in possession of the Accused 2.
100. On the evidence, there exists material contradiction as regard the place the exhibits were recovered. PW3 stated as follows. **“We found at Kaviu’s place this scarf. It was at drying line. Radio was under the bed”**. The alleged recovery is suspect.
101. Apart from mere allegation, nothing produced to prove the ownership of the alleged house i.e identity card, a picture or any clothing believed to be his. PW3 evidence is contradicted by PW4 evidence that, the items were recovered from accused No. 2.
102. In any case the said items were not positively identified as belonging to PW1.
103. No receipts availed before court or any special marks shown to reflect its ownership. Overall, PW2 was placed at the scene of crime.
104. Unfolding of event on that fateful night clearly reveals demonstrate his character and behaviour that he was not desirous to tell the truth.
105. The entire circumstantial evidence thus became accomplice evidence, which though admissible, requires corroboration in practice. The court in **KINYUA –VS- R (2002) IKLR** held as follows: -
- “The firm rule of practice is that the evidence of an accomplice witness requires corroboration. It is however, a rule of practice only and in appropriate circumstances, the court may convict without corroboration if it is satisfied that the accomplice witness is telling the truth upon the court duly warning itself ... on the dangers of doing so”.**
106. Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of the witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail.
107. If the court decides that the witness though an accomplice witness, is credible then the court goes further to decide whether it is prepared to base a conviction on his evidence with corroboration. The court must direct its mind and warn itself accordingly.
108. If the court decides that the accomplice witness’ evidence, though credible, requires corroboration, the court must look for, find and identify the corroborative evidence.”
109. In this case, the trial court did not warn itself about the credibility and the need for corroboration of the evidence of PW2.
110. PW3 had the following to say **“Muuo (PW2) came and he asked him what had happened. He asked him to tell people not to beat him and he would disclose who he carried. He said he carried Kaviu and Wambua.**
111. The totality of the prosecution case was full of doubts, and contradictions on material particulars and incredible pieces of evidence, which left yawning gaps.
112. Thus the court finds that the appeals have merit and makes the following orders ;

i. -Appeals are allowed, convictions are quashed and sentences set aside.

ii. -The appellant shall be set at liberty unless otherwise lawfully held.

SIGNED, DATED AND DELIVERED THIS 31ST DAY OF MAY, 2019, IN OPEN COURT.

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C. KARIUKI

JUDGE