



REPUBLIC OF KENYA

IN THE HIGH COURT AT MILIMANI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 31 OF 2018

DAVID TSISICHA AKHONYA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera*

*Cr. Case No. 249 of 2013 delivered by Hon. B. Ojoo (PM) on 13<sup>th</sup> February 2018).*

**JUDGMENT**

1. The Appellant herein was charged with the offence of robbery with violence contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code**. The particulars were that on the 8<sup>th</sup> of August 2008 at House 3 along Laikipia Road in Kileleshwa within Nairobi County, being armed with a dangerous weapon namely a panga, robbed **Deng Chang Wu** Kshs. 120,000/=, two Cheque books, two cheque leaves, Chinese identity card, Kenyan driving license and a bag all valued at Kshs. 160,000/= and immediately after the time of such robbery wounded the said **Deng Chang Wu**. He pleaded not guilty to the charge. Upon trial, he was convicted and sentenced to suffer death. Dissatisfied with the conviction and sentence, he preferred the instant appeal.

**Grounds of Appeal**

2. The Appellant raised six (6) grounds of Appeal in his Memorandum of Appeal filed on 27<sup>th</sup> February 2018. He also raised additional grounds of appeal in his written submissions filed on 4<sup>th</sup> March 2019. In summary: he was aggrieved that **Section 200 (3) of the Criminal Procedure Code** was not adhered to when Hon. B. Ojoo (PM) took over the proceedings from Hon. B. Ochoi (SPM); he complained that the learned trial magistrate relied on a defective charge sheet as the particulars of the charge were at variance with the evidence adduced; he faulted the learned trial magistrate for failing to find that the investigating officer had contrary to the law given the victim herein a P3 form to take to hospital and back; he was aggrieved that the learned magistrate relied on hearsay evidence and drew inferences from evidence which did not flow logically and reasonably; he complained that there was no positive identification and finally that the learned magistrate failed to find that the prosecution's case was not proved beyond reasonable doubt.

**Summary of Evidence.**

3. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses. (See **Okeno v Republic (1972) EA 32**).

4. The Prosecution's case can be summarized as follows: **PW1, Deng Changwu** was at his home in Kileleshwa on 8<sup>th</sup> August 2008 with his wife **PW2**, their daughter and their watchman of two years who is the Appellant herein. At about 7.00pm, they decided to go for dinner at a Chinese restaurant. **PW1, PW2** and their daughter boarded the vehicle then the Appellant went and told him that a door to the house had not been locked properly. **PW1** alighted from the vehicle and begun walking towards the Appellant. The Appellant drew a panga from his back and cut him on his left arm near the shoulder joint. He started bleeding. He then saw the Appellant run to his vehicle where he picked a bag and ran away with it. The bag had between Kshs. 100,000/= to 150,000/=, a Chinese national card, bank cards, two banker's cheque books and a driving license.

5. His wife **PW2** and his daughter came. He told them to go inside the vehicle. **PW1** then requested some workers from his company to go to his residence. They arrived about thirty (30) minutes later. One of the workers accompanied him to Kileleshwa Police Station where he reported the incident and was advised to seek treatment. As such, he went to Nairobi Hospital where he was treated. He then recorded a statement at the police station on the following day.

6. On her part, **PW2, Felin Quian** stated that PW1 had left her inside the house to lock the doors while he waited outside. At some point, she looked outside from the kitchen and saw PW1 holding his left hand then the shoulder. PW1 told her that he had been cut by the Appellant who was their watchman. He warned her not to go close to him because the Appellant was armed and could injure her. On cross examination, she stated that she saw the Appellant committing the offence as the vehicle was parked about five meters away from the kitchen and there was nothing in between that could hinder her view.

7. About five years later on 21<sup>st</sup> January, 2013 at about 10.30 am, PW3 Dennis Wasike, an employee of PW1 who knew the Appellant and had also been told about the incident, spotted the Appellant guarding a gate at some houses in Kileleshwa. He contacted PW1 and informed him about the same. PW1 told him to go and make a report at Kileleshwa Police Station which he did.

8. **PW4, Chief Inspector Stephen Mwanzia** was the investigating officer. He was on duty at Kileleshwa police station on 21<sup>st</sup> January, 2013 when PW3 went and informed him that he had seen a suspect who had earlier stolen from his employer (PW1) and escaped. PW4, his colleague **Corporal Fredrick Muyodi** and PW3 went to Eli Centre where they found the Appellant. They arrested him and took him to the police station. Upon investigating, PW4 discovered that the robbery incident which occurred on 8<sup>th</sup> August, 2008 had been reported by PW1 on 9<sup>th</sup> August, 2008. He therefore, called PW1 to go and record a statement.

9. PW4 wrote a letter to Nairobi Hospital to confirm whether PW1 had been treated at the facility on 8<sup>th</sup> August, 2008 as claimed. He produced the letter dated 23<sup>rd</sup> January, 2013 as Exhibit 2. The facility confirmed the same vide a letter dated 6<sup>th</sup> February, 2013 produced as Exhibit 1. They also forwarded copies of PW1's treatment notes in which they confirmed that he was treated of a 2-cm cut wound on the left upper arm above the elbow. The notes were produced as Exhibit 3. Thereafter, PW4 referred PW1 to a police doctor for filling of the P3 form.

10. **PW5, Dr. Joseph Maundu** of Nairobi police surgery examined PW1 on 20<sup>th</sup> February, 2013. He had a healed scar on the left upper hand above the elbow joint. PW5 formed the opinion that the injury had been caused by something sharp. He classified the injury as harm and produced the P3 Form as exhibit 4.

11. Upon being placed on his defence, the Appellant chose to remain silent and await the court's verdict.

#### **Analysis and determination**

12. The Appellant appeared in person and tendered both written and oral submissions. His written submissions were filed on 4<sup>th</sup> March, 2019. On the other hand, learned State Counsel, Mr. Momanyi for the Respondent made oral submissions.

13. Upon a careful reevaluation of the evidence on record and consideration of the parties respective submissions, I find that the only two issues arising for determination are whether Section 200(3) of the Criminal Procedure Code was complied with and whether the case was proved beyond a reasonable doubt.

14. With respect to proof of the case, the Appellant submitted that the key prosecution witnesses, PW1 and PW2 gave two different accounts of what took place at the scene thus creating a doubt of his participation in the robbery.

15. The learned State Counsel Mr. Momanyi conceded to the appeal under this head on the basis of the alleged contradictory evidence tendered by PW1 and PW2. Counsel urged the court to allow this appeal on that basis.

16. I entirely concur with the learned State Counsel that the contradictions in the evidence of the key witnesses rendered a blow to the prosecution case. The complainant, PW1, testified that he was heading out for dinner in the company of **PW2**, his wife, and daughter. It was his testimony that his wife and daughter were in the vehicle with him when the incident occurred. However, his wife contradicted this by testifying that she was in the kitchen when the incident happened and observed that she only saw PW1 holding his left arm and shoulder. In cross-examination **PW2** varied her testimony now adding that she saw the both her husband and the Appellant. She added that she did see the Appellant committing the offence. She also testified that her view of the vehicle from the kitchen is unobstructed.

17. I find the testimonies of **PW1** and **PW2** at odds. While **PW1's** testimony appears to incriminate the Appellant the same is not corroborated. **PW1's** testimony that **PW2** was in the vehicle at the time of the incident must imply that she was able to witness the ordeal without obstruction. Her testimony unfortunately brings into question the material fact of her ability to observe the ordeal. She testified that she was in the kitchen and not in the car and that she only saw her husband holding his arm and shoulder. In a bid to, in the court's opinion to salvage the situation, she varied the testimony stating that she saw the offender committing the offence. She also added that the view from her kitchen to the vehicle is unobstructed. She curiously failed to confirm seeing the Appellant stealing the bag from the car. In sum, I find that the testimony of the **PW1** and **PW2** is not free from error. The failure to corroborate the stealing of the bag and attack on PW1 causes the failure of the element of robbery.

18. In these circumstances, it is my view that PW2 was not a credible witness. It is clear that she did not see the Appellant attack PW1. She only saw him with an injured hand. There is thus no corroborating evidence that incriminates the Appellant to the attack on PW1. For this crucial reason, the Appellant ought to be accorded the benefit of doubt.

19. **PW1's** testimony was further contradicted by **PW4**. It is his testimony that he made a report with Kileleshwa Police Station on the 8<sup>th</sup> of August, 2008, the date of the incident. However the investigating officer PW4 found that the report was made on the 9<sup>th</sup> August, 2008. This contradiction pokes further holes into the accuracy of the account.

20. **PW5, Dr Maundu** of Police Surgery produced the P3 form exhibit 4. The report prepared and dated 20<sup>th</sup> February, 2013 stated that the

injury that the complainant suffered was only twenty-two (22) days old. Dr Maundu confirmed the same when he gave his testimony. The incident complained of by Mr Deng was five old years old, unfortunately. As such, it was impossible that the injuries that were sustained an estimated week after the date of taking plea formed the basis of the complaint in this part. It is the court's view that the report failed to support the case of the prosecution.

21. He also argued that it was wrong for the investigating officer (PW4) to produce in evidence the treatment notes supplied to him by Nairobi Hospital. He was of the view that the maker should have been called to verify the contents and confirm that PW1 was indeed attended to at the facility. It was therefore his submission that the treatment notes remained to be hearsay evidence and therefore inadmissible.

22. From the proceedings though, there is no evidence that the defence objected to the production of the medical report by the investigating officer. Furthermore, Section 77 of the Evidence Act does not place a caveat that the report must be adduced by the maker. I only add a rider that it was important that a witness from the hospital testified in view of afore stated contradictory evidence of Dr. Maundu.

23. In addition to the foregoing, the Appellant contended that PW1 was given the P3 form after which he took it to the hospital and back to the police station. He submitted that doing so contravened the Police Force Standing Orders which prohibit a complainant from handling a P3 form.

24. I agree that the Police Standing Orders provide that only police officers should handle P3 Forms. However, the court must be alive to the logistical hurdles police undergo due to shortage of manpower against the large number of patients they deal with. This compels them to occasionally allow that patients to deliver the Forms for filling. It is not contested that the Form was filled by a duly qualified doctor, who in any case testified. I rule, in the circumstances that the fact that PW1 delivered the P3 Form to the doctor did not vitiate the trail.

25. Further, the Appellant submitted that the charge sheet was defective since the particulars of the charge were at variance with the evidence adduced. In this regard, he questioned why the charge sheet indicated that he robbed PW1 of Kshs. 120,000/= yet PW1 stated that he had between Kshs. 100,000 to 150,000/= inside the bag which the Appellant stole from the car. Further, he stated that PW1 testified that he reported the incident on the same day that it occurred whereas OB number 8 of 9<sup>th</sup> August, 2008 indicated otherwise. He also argued that PW2 stated that she witnessed the attack on PW1 but did not expressly state that she saw the Appellant take the said bag.

26. I do not wish to reevaluate this submission after having found that the Appellant was not properly identified as the perpetrator of the offence.

27. Further, the Appellant contended that Section 200(3) of the Criminal Procedure Act was not complied with since Hon. Ojoo failed to inform him that he had a right to recall any or all the witnesses who had testified. She had taken over the conduct of the proceedings from Hon. Ochoi. He submitted that this contravened the mandatory provisions of the said section and as such the proceedings were a nullity.

28. A scrutiny of the proceedings do however show that after Hon. Ojoo took over the conduct of the case, she duly explained to the Appellant the requirements of Section 200(3) after which the Appellant opted to have the case proceed from where it had reached. Accordingly, this ground of appeal is dismissed.

29. In the upshot, I find that this is a case in which the conviction was unsafe. The prosecution dismally failed to discharge its burden in proving the case beyond a reasonable doubt. I accordingly quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held.

**Dated and Delivered at Nairobi This 4<sup>th</sup> April, 2019.**

**G.W.NGENYE-MACHARIA**

**JUDGE.**

**In the presence of:**

1. *Appellant in Person*
2. *Momanyi for the Respondent.*