



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 21 OF 2017

MELVIN MUENDO MUEMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Machakos Chief Magistrate's

Court Criminal Case No. 995 of 2016, Hon. Lorot, SPM

dated 8th February, 2017)

REPUBLIC.....PROSECUTOR

VERSUS

MELVIN MUENDO MUEMA.....ACCUSED

JUDGEMENT

1. This appeal arises from the conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 995 of 2016, dated 8th February, 2017. The appellant was charged with three counts. The appellant was charged with the offence Robbery with violence contrary to section 295 as read with 296(2) of the *Penal Code*. Alternatively, he was charged with handling stolen goods contrary to section 322(1)(2) of the *Penal Code*.

2. The evidence for the prosecution was that on 24th June, 2015, PW1 who used to do *bodaboda* work with the appellant gave the appellant his *bodaboda* to carry him at 10.00 pm. Along the way the appellant told him to wait for him and when the appellant came back, the appellant attacked him with a knife. Grabbed his Kshs 800/= and his phone and then went towards their place. Due to the injuries sustained by PW1 he was unable to move far and crawled into a bush where he stayed till the following day when he was found by his relatives. After reporting the matter, the appellant was arrested by members of the community led by PW2. According to PW3, the police retrieved Kshs 745/= from the appellant which was bloody. Upon taking the appellant to his home, they recovered a blood stained knife under some stones and a phone inside his gumboots.

3. According to PW4 after the appellant was arrested, he upon interrogation removed Kshs 745/= from his private parts and disclosed that the knife was under a stone where he was bathing while the phone was at home in the gumboots. They therefore went for the knife with the police officers and retrieved the knife. According to him the money was bloodstained.

4. PW5 the investigating officer received a report on 25th June, 2015 at 6,30 am of the incident. After recording the statements, the appellant took them to his house where he showed them the place where he had hidden the complainant's phone inside the gumboots. He then took them to his bathing place where they recovered a Somali sword under a stone while the 800/= was also next to the knife under the stone. He then produced the said items as exhibits.

5. PW6 examined the complainant and file the P3 form which he produced in evidence.

6. In his evidence the appellant testified that he could not recall 24th June 2015. He was however arrested on 25th June, 2015 from his bathroom, taken to Konza Police Station and charged with the offence. According to him, he could not understand why he was linked to the offence.

7. This appeal was conceded on the ground that from the circumstances of the offence there was no evidence of positive identification of the appellant since the complainant was seized from the back. There was also contradiction as to the sum of money that was recovered. Further there was also contradiction as to the place where the money was recovered. Accordingly, it was not clear whether the money that was produced was the money that was recovered from the appellant. It was further noted that the complainant never identified the phone that was produced as the one that was recovered for the appellant.

8. Based on the foregoing, it was submitted that there was doubt in the prosecution's case.

9. I have considered the material on record as well as the submissions made. I agree that there were material contradictions and discrepancies in the prosecution's case that were irreconcilable. Not only was there an inconsistency as to the amount that was recovered, but also where it was recovered. I also agree with the Respondent that the issue of identification was not free from error. **Viscount Sankey L.C** in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

10. In **Sekitoliko vs. Uganga (1967) EA 53** it was held that:

“The prosecution has a duty to prove all the elements of the offence beyond reasonable doubt and that the conviction of he accused is depended upon the strength of the prosecution case and not the weakness of the defence case.”

11. **Brennan, J** in the United States Supreme Court decision in **Re Winship 397 US 358 {1970}, at pages 361-64** stated:-

“The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction... Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”

12. In 1997, the Supreme Court of Canada in **R vs. Lifchus [1997] 3 SCR 320** suggested the following explanation:-

“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond reasonable doubt.”

13. In **JOO vs. Republic [2015] eKLR, Mrima, J** held that:

“It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person.”

14. As was held by the Court of Appeal with respect to heavy minimum sentences in the case of **Hamisi Bakari & Another vs. Republic [1987] eKLR:**

“We would note that where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved.”

15. In the premises I agree with the learned prosecution counsel that the appellant's conviction was unsafe. I therefore allow the appeal, set aside the conviction and quash the sentence. I direct that the appellant be at liberty forthwith unless otherwise lawfully held.

16. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 25th day of July, 2019.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey