



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 80 OF 2017

DICKSON OMONDI.....1ST APPELLANT

DENNIS ONYANGO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by Hon. Kagoni, SRM, delivered

on 22nd March, 2017 in Mombasa Chief Magistrate's Court Criminal Case No. 2023 of 2016)

JUDGMENT

1. The appellants herein were jointly charged with the offence of robbery with violence contrary to Sections 295 as read with 296(2) of the Penal Code. The particulars of the charge were that on the 17th day of October, 2016 at Mombasa County Court cell in Mombasa Town, they jointly robbed one Samson Odhiambo Ochieng of his mobile phone make ITEL smart phone worth Kshs. 10,000/= and cash Kshs. 400/= all valued at Kshs. 10,400/= and at immediately before or immediately after the time of such robbery, used actual violence on the said Samson Odhiambo Ochieng. They were sentenced to death. They appealed against the conviction and sentence.
2. Each filed separate grounds of appeal challenging the decision of the Trial Court. The 2nd appellant filed his written submissions on 4th December, 2018. The 1st appellant filed his on 10th December, 2018. Some of their submissions are similar. They argued that identification of PW1's assailants was not free from the possibility of error hence mistaken identity could not be ruled out. They submitted that PW1 was attacked from behind thus it was difficult for him to identify his attackers.
3. The appellants further submitted that PW1 was a stranger to his assailants and he failed to disclose the source of light in the cells. They stated that since cells hold many people, identification parades should have been held to clear any doubts about the identity of the assailants.
4. It was further submitted that none of the inmates were called to give any evidence as to the offence of robbery with violence. It was suggested that the Hon. Magistrate should have warned himself of the danger of relying on a single witness in so far as identification was concerned.
5. The appellants challenged the evidence of PW1 that he was attacked in the cells, yet a few minutes after the robbery, the cell phone he said he was robbed of and the cash 400/= could not be traced even after a search was done on the appellants.
6. They also submitted that the evidence adduced did not meet the threshold of robbery with violence to warrant the death sentence. They urged the court to substitute the death sentence with a custodial sentence, if the court was of the view that they committed the offence they were charged with. They cited the case of **Philip Imana and Another vs Republic**, High Court Criminal Appeal No. 234 and 327 of 2008 (Mombasa) where the death sentence was substituted with the 7 years imprisonment.
7. Ms Ogwen, Principal Prosecution Counsel filed submissions on 10th December, 2018. She opposed the appeal. She submitted that on 17th October, 2016 at 1:00 p.m., PW1 and the appellants were in the Mombasa County Court cells. She stated that PW1's evidence was that the 1st appellant grabbed his neck and the 2nd appellant emptied his pockets. It was further submitted that PW1 gave a description of his assailants to PW2 and PW3 which led to the arrest of the appellants on the same day. The phone and cash were not recovered.
8. She further submitted that PW1 saw the appellants well since the cells were well lit and the incident took place during day time. She explained that PW1 gave a description of the 1st appellant as tall and dark. She emphasized that they were positively identified and that PW3

upon opening the door to the cells found PW1 holding his neck. This was after he was called by one of the inmates.

ANALYSIS AND DETERMINATION

9. The duty of the first appellate court is to analyze and re-evaluate the evidence that was tendered before the court below and come to its own conclusion. It must however bear in mind that it has neither seen nor heard witnesses testify and make an allowance for that fact. In **David Njuguna Wairimu vs. Republic** [2010] eKLR, the Court of Appeal reiterated this duty as follows:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

The issue for determination is if the prosecution proved its case beyond reasonable doubt

10. According to PW1, on 17th October, 2016 he was arrested for parking his Tuktuk on a yellow line. He was taken to the Municipal Court where he was charged and convicted. He asked for a cell phone from a fellow inmate and called his father. He asked him to take to him his cell to the Municipal Court cells. He stated that he was making the calls in a less crowded cell when the incident happened.

11. He testified that when in the said cell, he was grabbed by the neck to the extent of almost choking. The man who grabbed him emptied his pockets, as he did so, another man took his phone. PW1 stated that the rest of the inmates just watched but one of them rushed and called the County askaris who went to his rescue.

12. He indicated that when they were taken out of the cells, he saw the man who had grabbed him as dark and tall. He was searched but the cell phone was not recovered. PW1 stated the offence occurred at 1:00 p.m.

13. The evidence is clear that PW1 was attacked from the back by someone who got hold of his neck. He therefore had no opportunity to see the said person at that instant. After he was robbed of his phone and cash, his assailants stopped gripping him on his neck. According to him, that is when he was able to identify the 1st appellant, whom he described as tall and dark. The description of the said appellant is not of any probative value since PW1 said the 1st appellant was arrested at the scene and he only saw him after he turned. At one time he said that the 1st appellant emptied his pockets and another man went and took his phone. He later on said that the 2nd appellant is the one who took his cash as the 1st appellant grabbed him by the neck. From his evidence, PW1 was unsure of the roles played by his assailants.

14. PW3 gave evidence that the cells were well lit. It is therefore clear that from the light that was in the cells, the circumstances were ideal for positive identification. When PW3 went to the cell and PW1 showed him the 2 men who had robbed him, PW3 separated PW1 and the two appellants from the other inmates but he did not recover the cell phone or cash from any of them.

15. The offence in this case occurred in a confined environment. PW1 was accosted from the back and did not get an opportunity to see who his assailants were until after he turned around. He did not state if the said assailants spoke with him or how he ended up identifying the 1st appellant as the one who grabbed his neck. Since the offence occurred in a cell that was occupied by other inmates, it cannot be safely said that the 1st appellant was positively identified.

16. As concerns the 2nd appellant, PW1 did not give a good explanation as to why he picked him as one of his assailants from the cell that was occupied by other inmates.

17. The person who called PW3 to the cells after the alleged incident took place was not called as a witness. In the absence of his evidence, it cannot be said that the evidence of PW1 was sufficient to convict for the serious offence of robbery with violence. In **Donald Majiwa Achilwa & 2 Others vs Republic, Cr. App. No 34 of 2006**, the Court of Appeal explained the position of failure by the prosecution to call relevant witnesses thus:-

“The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses’ evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case.”

18. In the circumstances of this case, I hold that the issue of mistaken identity cannot be ruled out. I therefore quash the conviction and set aside the death sentence imposed against the appellants. They shall be set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 30TH DAY OF SEPTEMBER, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellants present in person

Ms Mwangeka, Prosecution Counsel for the DPP

Ms Peris Maina – Court Assistant