



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 233 OF 2017

ALI HAMISI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence by Hon. B. Koech delivered on 11th December, 2017

in Kwale Chief Magistrate's Court Criminal Case No. 993 of 2015)

JUDGMENT

1. The appellant herein was convicted for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on the 13th day of September, 2015 at around 12.00 noon at Makanyakulo area, in Waa location in Kwale County within Coast region, jointly with others not before the court robbed Robert Juma Kundu of Kshs. 20,000/= and at immediately before/immediately after the time of such robbery used, threatened to use actual violence on the said Robert Juma Kundu.

2. The appellant had been charged with the 1st accused, Juma Suleiman Shibe who was acquitted for lack of evidence. The appellant herein was found guilty and sentenced to suffer death as by law prescribed.

3. He was dissatisfied with the decision of the lower court and filed a petition of appeal on 29th December, 2017. On 14th March, 2019, he filed amended grounds of appeal, with leave of the court. He raised the following issues: -

(i) That the Learned Trial Magistrate erred in law and fact in convicting and sentencing him to suffer death without a proper finding that the death sentence was declared unconstitutional and that this was a proper case suitable for a lesser charge of simple robbery;

(ii) That the Learned Trial Magistrate erred in law and fact by failing to warn herself of the dangers of convicting him on the evidence of a single identifying witness;

(iii) That the Learned Trial Magistrate erred in law and fact in convicting and sentencing him when basing the conviction on identification by recognition without a proper finding that there was no suggestion that the complainant had given his name or even his description to the person who received his initial report, thus leaving claims of recognition unsupported;

(iv) That the Learned Trial Magistrate erred in law and fact in convicting him on the uncorroborated testimony of the complainant;

(v) That the Learned Trial Magistrate erred in law and fact by merely dismissing his defence as out of hand which amounts to a serious error on the part of the Trial court.

4. In his written submissions, the appellant disputed the prosecution's evidence that he was in the company of others when the offence was committed as the complainant (PW1) stated that the appellant's accomplices were standing at the scene watching. He also stated that there was no evidence that he was armed with a dangerous or offensive weapon. He therefore submitted that the offence disclosed was simple robbery contrary to Section 296(1) of the Penal Code. He referred to the case of **Thomas Odhiambo Agao vs Republic, Mombasa Court of Appeal Case No. 46 of 2015**, where the court substituted the offence of robbery with violence contrary to Section 296(2) of the Penal Code with simple robbery under Section 296(1) of the Penal Code.

5. The appellant took issue with the fact that PW1 referred to him by the name of Aliji Pile whereas his name is Ali Hamisi. He denied that he was Aliji Pile and urged this court to acquit him as the Trial Magistrate did not warn herself of the dangers of convicting on the evidence

of one identifying witness. He referred to the case of **George Odoyo Omolo & Another vs Republic, Mombasa High Court Criminal Appeal No. 228 of 2008**, to buttress his submission.

6. The appellant submitted that there were inconsistencies in the prosecution's case as PW1 testified that the appellant was in the company of 5 other men but in cross-examination and on being shown the first report, he indicated that he was attacked by 2 people. The appellant thus stated that PW1's evidence was not reliable. There was a submission made to the effect that material witnesses were not called, and in particular one Asman, who led 2 Administration Police Officers to the appellant. The appellant claimed that it was Asman who led to his arrest. He cited the case of **John Kenga vs Republic, Criminal Appeal No. 118 of 1984**, where the appellant was set free because of failure by the prosecution to call some witnesses to clear doubts especially about his arrest.

7. The appellant challenged the failure by the prosecution to call witnesses who were present at the scene at the time of the alleged offence as PW1 said in his evidence that there were many people who witnessed the incident. He prayed for his appeal to be allowed.

8. The respondent through Ms Ogweni, Principal Prosecution Counsel, filed its written submissions on 2nd April, 2019. She conceded to the appeal on the grounds that it was not clear how PW1 identified the appellant since his first report to Kombani AP Camp indicated that he was robbed by Aliji Pile. She stated that PW1 did not offer a plausible explanation to satisfy the court that Aliji Pile is one and the same person as Ali Hamisi. She also submitted that the court relied on the evidence of a single identifying witness without warning itself of the dangers it poses. She also argued that one Asman who was mentioned as an eyewitness should have been called as a witness to fortify the prosecution's case. She pointed out that personal violence was not used against PW1 who failed to adduce cogent evidence as to the existence of the sum of Kshs. 20,000/= he alleges to have been robbed of.

9. The Prosecution Counsel concluded her submissions by stating that if the Hon. Magistrate had considered the appellant's defence, she would have found that it confirmed that he was Ali Hamisi and not Aliji Pile and that he was arrested while drunk. Ms Ogweni was of the view that both the conviction and sentence were unsafe. She therefore urged the court to allow the appeal.

10. PW1, Robert Juma Kundu was the complainant herein. His evidence was that on 13th September, 2015 at around noon as he was heading to a hotel at Maganyakulo, he was hit on the head by one Aliji Pile. He stated that the said person hit him with his head. PW1 testified that he knew him before and that he was in the company of 5 other men, whom he used to see in Maganya. He further testified that on being hit, he fell down and Aliji Pile pulled his trouser pocket and it got torn. PW1's evidence was that Aliji Pile took Kshs. 20,000/= which was inside his trouser pocket.

The evidence tendered in the lower court

11. PW1 stated that his accomplices were standing as they watched and that they followed the appellant as they ran away. It was his evidence that he reported the incident at Kombani AP Camp and Police Officers accompanied him to Maganya market where they met one Asman who had witnessed the incident. PW1 further testified that the said Asman narrated to Police Officers what had happened. They then managed to arrest Aliji Pile and one of his accomplices, at Maganya.

12. PW1 identified Aliji Pile as the 2nd accused person (appellant herein), whom he knew. He indicated that he had given a description of the appellant to Police Officers. PW1's evidence was that he went to Kwale District Hospital after 3 days of the incident.

13. PW2 was No. 67723, Police Corporal Kahindi Marsden who was attached to Kwale Police Station. He took over investigations from No. 61455 Cpl. Daniel Chepkok who was on operation duties at Boni Forest in Lamu County. PW2 testified that he went through the Police file which revealed that PW1 went to a food kiosk at Makanyakulo where he met 6 boys outside. He recognized 2 as Juma Ali Hamisi (appellant) and Juma Suleiman Shibe. According to the contents of the Police file, the appellant head butted PW1, who fell down. He stated that PW1 reported that the other boys started ransacking him and the appellant removed Kshs. 20,000/= from his right trouser pocket.

14. PW2 further testified that after PW1 reported the incident to Kombani Administration Police Camp, he was given 2 Administration Police Officers who accompanied him to the scene but they did not find the attackers. He stated that one Asman led them to where the attackers were. The Police managed to arrest 2 of them, who were charged. PW1 was issued with a P3 form which was filled by a Clinical Officer.

15. PW3 was Machagi Cornelius, a Clinical Officer working at Kwale Hospital. He produced a P3 form for PW1 who said at the time of examination that he had been assaulted on 13th September, 2015 and his money stolen. He stated that the appellant had pain when chewing but had no bruises. The P3 form which was filled on 5th October, 2015 was produced as P. exhibit 1.

16. PW4 was No. 236347 APC Abdalla Farhan, who was stationed at an Administration Police (AP) Camp at Kilifi County. On 13th September, 2015 at noon, he received a report from the Officer who was on duty that PW1 had been robbed. In the company of another Officer, they went to the scene at Makanyakulo centre where they arrested the appellant and Juma Suleiman, with the help of members of the public who did not want to be mentioned because of their security. They then took them to Kwale Police Station. He identified the persons they arrested as the appellant and his co-accused.

17. No. 243695 APC Onduso testified that on 13th September, 2015 in the company of PW4, they arrested the appellant and his co-accused.

18. In his defence, the appellant stated that on 13th September, 2015 at 9.00 a.m., he went to a club to drink. At noon Police Officers went to the club and arrested him and took him to Kwale Police Station. He further stated that on 15th September, 2015 he was charged in Kwale Court with the 1st accused whom he did not know. He denied having robbed PW1.

19. He referred to the evidence of PW1 who testified that he was attacked by 6 people but when he asked him to state the appellant's name, he said that he was Ali Chatire (sic). The appellant asserted that his name was Ali Hamisi. He further stated that PW1 had said in cross-examination that he was attacked by 2 people but had when giving evidence, he said he was attacked by 6 people.

ANALYSIS AND DETERMINATION

20. The duty of the first appellate court is to analyze and re-evaluate the evidence adduced by the witnesses in the court below and come to its own independent decision. In **Okeno vs Republic** [1972] EA, the Court of Appeal held as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

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

21. I have considered the evidence on record very carefully. I have no difficulties in arriving at the decision that the appellant herein, Ali Hamisi, was also commonly known as Aliji Pile by PW1, who maintained in his examination-in-chief that he knew the appellant by the said name. On cross-examination, PW1 stated that he knew him as Ali, a resident of Makanyakulo. He had given his description to the Police.

22. After analyzing the other evidence on record, this court finds that there are two reasons why this appeal must succeed. The first one is that one Asman, was said to have been present at the scene of the alleged robbery and he witnessed the incident. It is alleged that he narrated to Police Officers what had happened and that he led to the arrest of the appellant. He was however not called as a witness in court.

23. 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.”

24. As per PW2's evidence, Asman was the Village Elder who witnessed the incident but did not record a statement. It is this court's finding that as an eye witness to such a serious offence of robbery with violence, Asman should have been called to give a first-hand account of how the offence in this case was committed. If at all he witnessed the commission of the offence, he would have given corroboration to the evidence of PW1. Since he was not called to testify, I safely arrive at the presumption that had Asman been called as a witness, he would have given evidence that would have been adverse to the prosecution.

25. The 2nd reason as to why this appeal must succeed is that the Prosecutor in the lower court on 28th March, 2017 relinquished his right to have the Investigating Officer, PC Chepkok testify, yet he was present in court on the said date. The said Prosecutor fell right into the trap of the appellant and his co-accused, who informed the Trial court that since they had heard the evidence of PW2, they were not interested in the evidence of the initial Investigating Officer.

26. Having submitted to the whims of the appellant and his co-accused, the prosecution failed in its duty to shed light on the grey areas in the prosecution's evidence, such as whether in his first report, PW1 stated that he was robbed by 2 or 6 people. The initial Investigating Officer would also have shed light on why he did not consider it important to record a statement from Asman who was said to be an eyewitness to the offence the appellant was charged with.

27. Due to the said weaknesses occasioned by the initial Investigating Officer and the prosecutor, it is my finding that it would be unsafe to uphold the conviction and sentence of the appellant.

28. I therefore quash the conviction against the appellant and set aside the death sentence imposed against him. He shall be set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of September, 2019.

NJOKI MWANGI

JUDGE

In the presence of: -

Appellant present in person

Mr. Muthomi, Prosecution Counsel - for the DPP

Peris Maina – Court Assistant