



IN THE HIGH COURT OF KENYA AT KAKAMEGA

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 144 OF 2012

BETWEEN

JACOB PRINCE MWANIKI..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. S. M. Shitubi delivered on 9th May 2012 at the Kakamega Magistrate's Court in Criminal Case No. 2489 of 2011)

JUDGMENT

1. The appellant, **JACOB PRINCE MWANIKI**, was charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the charge were that on 29th October 2011 at Emulundu Village, Emukaya Sub-Location of Kakamega Central District, jointly with others not before the court while armed with crude weapons namely rungas, he robbed **SAMWEL SHITOTE** of a motorcycle make Boxer registration no. KMCN 300S black in colour valued at Kshs. 80,000/- and immediately before the time of such robbery threatened to use actual violence to the said **SAMUEL SHITOTE**.

2. The appellant was tried, convicted and sentenced to death. He now appeals against conviction and sentence based on the grounds set out in his petition of appeal and written submissions. He contends that the trial magistrate erred by convicting him on a defective charge and that the prosecution failed to prove the case against him. He condemns the evidence against him as malicious, uncorroborated, speculative and insufficient to sustain a conviction. The appellant submits that he was not identified as the person who committed the offence and that he was also a victim of the robbery on the material day. He complains that the trial magistrate erred by convicting him on the basis of the testimony of a single eye witness.

3. The State counters that the prosecution through the witnesses proved all the elements of the offence of robbery with violence against the appellant and that he was identified as the assailant directly.

4. As this is a first appeal, I must recall the duty of the first appellate court. It is appraise the entire evidence on record and reach an independent decision as to whether to uphold the conviction always bearing in mind that it neither heard or saw the witnesses testify so as to make an evaluation of their demeanour.

5. The complainant, Samuel Shitote (PW 1), testified that on the night of 29th October 2011, he was at Beer Spot in Bukura having parked motorcycle no. KMCA 300S outside. The motorcycle belonged to his employer, Jeniffer M'Mbone (PW 2), who confirmed that PW 1 was her contracted rider. A person approached him and asked him to take him to Emulundu to assist a person whose motorcycle had stalled. He went with the person and when they arrived at Emulundu, they found another person with a motorcycle. PW 1 recalled that the person with motorcycle registration no. KMCN 259S at Emulundu was the appellant. The appellant had removed the spark plug and asked if PW 1 had a spark plug spanner. Suddenly another person came screaming, "kill him, kill him" with four other people emerging from the bush carrying rungas. PW 1 abandoned his motorcycle and ran off.

6. PW 1 went to seek help from his fellow rider, Jacob Imbundu (PW 3). PW 1 and PW 3 then proceeded together towards Shibuli. PW 3 testified that PW 1 told him that he could identify the person he had met earlier with motor cycle registration no. KMCN 259S. As Shibuli, they met the appellant with motor cycle registration no. KMCN 259S parked outside Lucky Bar. PW 1 recalled that the spark plug had been removed and when PW 1 and PW 3 demanded to be told where PW 1's motor cycle was; the appellant ran away leaving his motor cycle. PW 1 and PW 3 towed the motorcycle to the police station.

7. The investigating officer, Corporal Julius Odera (PW 6) recalled that on the morning of 30th October 2011, he found a robbery had been minuted in the Occurrence Book by PW 1 who stated that he had been robbed by a person known to him physically. He took the statements of PW 1 and PW 3 and noted that they had brought the assailant's motorcycle to the police station. After a few days, PW 6 received information from the Commanding Officer, Kakamega Police Station that they had found the owner of motor cycle KMCN 259S who was

one Hezekiah Asega Mugavale (PW 4).

8. PW 4 testified that motor cycle KMCN 259S belonged to him and that the appellant was his rider. He recalled that on 28th October 2011 at about 5.00pm, the appellant dropped him at the school where he was working. He expected him to come to work on the next Monday but he did not. He did not find him and after looking for him, he reported the matter to Kakamega Police Station. He later learnt that his motorcycle was at Bukura Police Station. When he went to the police station, he was told to look for the appellant. He managed to find the appellant on 24th November 2011. He informed police officers at Lurambi AP Camp who arrested the appellant. APC Willy Chesonik Gibelio (PW 5) of Lurambi AP Camp confirmed that he arrested the appellant on information from PW 4.

9. After the appellant was arrested, PW 6 organised an identification parade which was conducted by Inspector Kasiula (PW 7) on 25th November 2011. PW 1 identified the appellant by touching him on his shoulder. PW 7 produced the identification parade forms signed by the appellant.

10. The appellant denied the offence in his sworn testimony. He testified that he was a motor cycle rider for hire. He recalled that on Friday, 28th October 2011, he went to collect his employer from home in the evening. On Saturday morning, he the employer came to collect the motor cycle for service but did not return it to him on Monday. When he asked him why he had not returned the motorcycle, the employer told him that it was yet to be serviced. He thereafter decided to look for other casual work.

11. The appellant submitted that the prosecution failed to prove the elements of the offence of robbery with violence. The offence of robbery with violence under **section 296(2)** of the **Penal Code** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see ***Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, *Oluoch v Republic* [1985] KLR 549 and *Ganzi & 2 Others v Republic* [2005] 1 KLR 52). **Section 296(2)** is an aggravated form of robbery which is defined in **section 295** of the **Penal Code** which provides that, “any person who steals anything, and at, or immediately before or immediately after the time of stealing, uses or threatens to use actual violence to any person or to any property in order to steal.”**

12. The prosecution case was that the assailant, who was identified as the appellant, was part of a gang that lured the appellant to come and rescue someone and in the course of stealing the motorbike threatened the PW 1 with violence. In this case the elements of robbery with violence were satisfied in several ways. First, the appellant was part of the gang. Second, PW 1 testified that members of the gang were armed with rufungu and threatened him with violence causing him to run away. Third, the motor cycle in his possession was stolen after he had run away. I am therefore find and hold that the prosecution proved the elements of the offence of robbery with violence under **section 296(2)** of the **Penal Code**.

13. The next question for determination is whether the appellant was identified as the person who robbed PW 1. The evidence on the record shows that the robbery was committed at night. The principles guiding the court’s approach to matters of identification in difficult circumstances are well settled. Our courts have emphasised that unless handled with care, evidence of visual identification can occasion a miscarriage of justice (see ***Karanja & Another v Republic*, [2004] 2 KLR 140 and *Wamunga v Republic*, [1989] KLR 424**). In ***Wamunga v Republic (supra)*** the Court of Appeal warned that;

[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.

Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see ***R v Turnbull* [1967] 3 ALL ER 549**).

14. Although it was at night PW 1 testified that the he was able to identify the appellant when the appellant stopped him for the first time at Emulundu. When cross-examined on this point, PW 1 stated as follows:

I flashed my headlights and saw you and even the motor cycle registration. I met you under the same circumstances ahead. I flashed the torch on you and saw you. I reported all in the first report. I gave a description [of] a brown young man on a motor cycle

15. I am satisfied that given the close proximity and short interaction between the appellant and PW 1 in the circumstances, where PW 1 had been lured to help the appellant posing as a distressed rider, were favourable for positive identification. Since the PW 1 had identified not only the appellant but also motor cycle registration number KMCN 295S which the appellant had earlier, he was able to identify him when he met him the second time with the motorcycle he had seen earlier.

16. The circle of evidence against the appellant was completed by the first report made by the PW 1 to the police. PW 7 confirmed that PW 1 reported that he could identify the person who robbed him physically and also took motorcycle registration no. KMCN 295S, which the appellant had left behind, to the police station. This evidence led to owner of that motorcycle, PW 4, who identified the appellant as his contracted rider. It is after the appellant was arrested that he was subjected to an identification parade where he was identified by PW 1.

17. I have considered the manner in which the identification parade was carried out by PW 7 and I find that he scrupulously adhered to the **Force Standing Orders** and the standards laid down in ***Rex v Mwangi s/o Manaa*[1936] 3 EACA 29** amongst other cases. Some of the relevant instructions contained in the **Force Standing Orders** are as follows;

1. The Accused person is always informed that he may have an Advocates or friend present when the parade takes place.

2. The officer in charge of the case, although he may be present, does not carry out the identification parade.
3. The witness does not see the accused before the parade.
4. The accused is placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.
5. The accused is allowed to take any position he chooses, and he is allowed to change his position after each identifying witness has left, if he so desires.
6.
7.
8.
9.
10. The witness is to touch the person he identifies.
11. At the termination of the parade or during the parade the accused is to be asked if he is satisfied that the parade is being conducted in a fair manner and a note is to be made of his reply.
12.

18. PW 7 testified that after being requested by PW 6 to conduct the parade, he picked 7 members of the parade randomly from the public. He informed the appellant of the rules and asked him whether he wanted his witness present. The appellant answered in the negative. The appellant accepted a position between number 5 and 6. PW 1 identified the appellant by touching him. The appellant signed the identification parade form after stating that he was satisfied with the manner in which it was carried out. PW 7 also confirmed that the PW 1 was outside and that there was no possibility of PW 1 seeing the appellant.

19. In his defence, the appellant admitted that he had been contracted to ride motorcycle registration number KMCN 295S but at the time of the robbery it was in the possession of PW 4 who had not returned it to him. His evidence on this issue was effectively demolished as he did not put this issue to PW 4 in cross-examination. Further, PW 4 was clear that the appellant had the motorcycle and had not returned it to him when the robbery took place. He even reported it stolen at Kakamega Police station before it was recovered. The appellant's defence was really an afterthought.

20. The totality of the evidence was the appellant was among the people who waylaid and stole the motorcycle in PW 1's possession. He was identified and his identity confirmed at the identification parade. The evidence against him was fortified by his association with the motorcycle registration KMCN 259S which he had both times when PW 1 met him and which PW 4, an independent witness, associated with the appellant. The evidence against the appellant was therefore watertight and as such I affirm the conviction.

21. The appellant was sentenced to death as required by **section 296(2)** of the *Penal Code*. However, the mandatory death penalty was declared unconstitutional (see *Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR* and *William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR*). Considering the facts of the case, I allow quash the sentence of death and substituted with a term of 15 years' imprisonment.

22. In conclusion, I affirm the appellant's conviction but quash the sentence and reduce it to 15 years' imprisonment. As the appellant were in pre-trial custody, the sentence shall run from the date of arraignment, that is, **28th November 2011**.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at KAKAMEGA this 26th day of September 2019.

W. MUSYOKA

JUDGE

Appellant in person.

Ms Ombega, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.