



REPUBLIC OF KENYA
AT THE HIGH COURT IN NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 30 OF 2019

BETWEEN

JAMES MBARIA WANJIKU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Chief Magistrate's Court at Makadara Cr. case No. 49 of 2016 delivered by Hon. M.A. Opondo, SRM on 8th February 2019).

JUDGMENT

Background

1. The Appellant 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 12th of November, 2015 at Lunga Lunga Slums, Industrial Area within Nairobi County robbed Benjamin Onyancha of his mobile phone make Tecno valued at Kshs 8099/- and at the time of such robbery used actual violence to the said Benjamin Onyancha. At the conclusion of the trial, he was found guilty and sentenced to serve ten years imprisonment.

2. He was aggrieved by the decision and preferred the instant appeal, both against the conviction and sentence. A Petition of Appeal was filed by learned counsel, Gikenye Mugo & Rienye Advocates on 21st February, 2019. Nine grounds of appeal were raised which I have condensed into five as under:

- a. That the elements of the offence of robbery with violence were not proved;*
- b. That the identification of the Appellant was not established.*
- c. That there was non-compliance with Section 106B(4) of the Evidence Act in relation to production of electronic Evidence;*
- d. There were contradictions in the prosecution's case; and*
- e. That the sentence was harsh in the circumstances.*

Summary of evidence

3. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own independent conclusion. In so doing, the court must bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See **Okeno V Republic [1972] eKLR**.

4. **PW1, Benjamin Onyancha** was the complainant. He worked as an Assistant Administrator at Medical Link Integrated Health Program located along Lunda Lunga Road in Industrial Area. On 12th November, 2015 at 7.00 pm, he left the work premises and was walking on the road to go and buy an electric coil. He came across three (3) boys standing by the road. As he approached them one of the boys feigned that he had slipped on something and hit PW1 on the chest. The boy then confronted PW1 insisting that he had caused the him to slip. He removed his phone to call his brother and in the process the Appellant came and hit him on the mouth.

5. At this point **PW5, Benson Kimani Maina** was working at about 7.00 pm when he heard a scuffle outside his business premises. He saw

two young men holding a man. This was from a distance of about five metres in a well-lit section of the street. One of the young men then hit the man and the other frisked the man's pockets. PW5 identified the attacker as the Appellant who went by the name Jemo. This was because he had seen the Appellant frequently in the locality. On noticing that a crowd was gathering, the young men took off.

6. PW1 became unconscious after the attack. When he came to he found himself bleeding from the mouth. His incisor teeth had also become loose. He also had injuries on the face. He was treated and referred to a dentist. He identified treatment notes from the hospital dated 13th November, 2015. PW1 lost his mobile phone, Tecno in make worth Ksh. 4500/-. Police issued him with a P3 Form dated 24th November, 2015. The same was filled by a police doctor.

7. According to PW1 the place where the robbery took place was well lit and therefore he could clearly see the attackers. He testified that the boy who confronted him and stole his phone was not the Appellant. Rather, it is PW5 who clearly saw the Appellant attack him. PW5 had his photograph in his whatsapp application in the phone, which was used to track him by the police. PW1 added that he identified the Appellant as one of the attackers having taken sufficient time with him during the confrontation.

8. **PW2, Geoffery Momanyi** worked with PW1 at Meli Hope Hospital as an Administrator. He was aware that at around 7.00 pm, PW1 had stepped out of office. He shortly afterwards returned to the Hospital screaming and bleeding from the mouth. He (PW1) then narrated to him what had happened. PW1 was accordingly treated. His mouth was stitched and referred to a dentist. PW2 later learnt that one of the attackers was a boy known by the name Jemo. He also called police from Lunga Lunga and informed them about the incident.

9. **PW3, Dr. Joseph Maundu** of police surgery examined PW1 on 24th November, 2015. He said he had a cut on the upper lip, a broken canine and incisor tooth on the upper gum. He opined that the injuries were inflicted by a blunt object. He adduced the P3 Form as exhibit 3.

10. **PW4, Moses Kamau Waweru** was an Administration Police officer from Lunga Lunga AP Post. He stated that PW1 reported the incident on 15th November, 2015 whilst in the company of his brothers. He reported that he had identified two of the attackers and was told to keep an eye in case he later spotted them. On 5th January, 2016, PW1 called him and informed him that he had spotted one of the assailants outside their clinic. PW4 was accompanied by a colleague to the scene where they arrested the Appellant and took him to Industrial Area Police Station

11. **PW6, Patrick Musyoka** (retired) was the investigating officer. He summed up the prosecution case. He added that the Appellant was arrested by the AP officers pursuant to a photograph submitted to them by PW5. He produced in court the dental treatment notes as well as a photograph belonging to the Appellant.

12. After the close of the prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He gave an unsworn defence. It was his testimony that he was arrested under the mistaken belief that he was James Mbaria, yet he insisted that he was Kuria.

Determination

13. The appeal was canvassed by both oral and written submissions. Those of the Appellant were filed by his counsel, Mr. Mugo on 13th June, 2019 and later highlighted orally in court. The Respondent through learned State Counsel, Miss Nyauncho made oral submissions and opposed the appeal. I have considered the respective rival submissions and arrived at a conclusion that the following issues arise for determination, namely whether the Appellant was properly identified as having participated in the robbery, whether the photographic evidence was properly adduced in court and whether the case was proved beyond reasonable doubt.

Whether the appellant was properly identified

14. The question of identification is critical because it informs the court of the culpability of an accused person. According to the Appellant his identification was questionable given that at the time of the robbery two acts were committed against the complainant, namely stealing of the phone and hitting him. It was submitted that two different assailants played different roles with one stealing the phone and another injuring him. It was submitted that the eye witness, PW5, described the Appellant as the person who hit PW1 and since the offence of robbery with violence cannot be complete without proof of theft, the Appellant could not be deemed to have participated in the robbery.

15. It was further the counsel's submission that criminal liability is personal as opposed to collective responsibility. As such, the Appellant could not be made to pay for the sins of another if he did not commit the offence charged. His view is that if the Appellant only hit PW1, he ought to have been charged with the offence of assault.

16. Miss Nyauncho on the hand submitted that the Appellant was properly identified. Her case is that the PW1 testified that he took adequate time with the Appellant during the robbery which enabled him to identify him. Furthermore, the scene of the robbery was well lit which aided both PW1 and PW5 to identify the assailants.

17. Miss Nyauncho added that the mere fact the Appellant only played a specific role during the robbery did not absolve him. This is in view of the description of the offence of robbery with violence under the Penal Code, more so that whilst committing the offence, the offender may be in the company of one or more persons or must use actual violence against the complainant.

18. According to both PW1 and PW5 the scene of the crime was well lit reasons wherefore they were able to identify the Appellant. PW1 indeed reported that he was able to identify two of the assailants. In his own evidence though he stated that he was able to identify the robber who confronted him with whom he spent a considerable amount of time during the confrontation. He was categorical that this person was not the Appellant. He testified as follows;

“The place where the three boys hit me was lit. I was able to identify the one who confronted me is not the accused in court. I had spent time with him during the confrontation and I am able to identify him. Benson saw the accused beat me. He is a witness in court. The police are the ones who arrested the accused and the case took off.”

19. What is clear from the above excerpt is that at the time of the robbery, the Appellant apparently only clearly identified the assailant who confronted him. And this was not the Appellant. The identification of the Appellant was brought to the fore by PW5 who said he witnessed the robbery taking place. In so doing, he had this to say:

“I met many people among them two young men holding a certain man. One of them, (the young men) hit the man they were holding on the mouth. The other one entered the pocket. Other persons noticed what was going on. The 2 young men on noticing this took off. I sought to know what was happening. On drawing closer I noticed it was my neighbor and he had been injured on the mouth badly.

Since we all lived in the same locality I was able to identify one of the assailants as I would see him frequently though his name was not known to me. The name that he was commonly referred to as was Jemo. I don't know what his name stand for his full name. I had seen Jemo hit Benjamin on his mouth.

...Jemo is the accused in court”

20. What is intriguing is the circumstances of the arrest of the Appellant. He was arrested under fairly unclear circumstances. In cross examination, PW5 stated that he suggested to PW1 to check on the face book if he could see his (Appellant's) picture. That PW1 searched for the picture and identified it. PW5 then downloaded it and sent it to PW1.

21. What I am unable to fathom is why, if PW1 and PW5 knew the Appellant before the incidence and in the case of PW5 was a person who lived in their locality, they needed his picture for identification. Be that as it may, according to PW6, the investigating officer, what led to the arrest of the Appellant was upon his identification using this downloaded photograph. PW6 said he gave the picture to the AP officers from Lunga Lunga AP Post after which they were able to track him.

22. A sharp contrast of this narration is evidenced in the testimony of PW4, one of the arresting officers. He said that after PW1 reported that he could be able to identify his assailants, he told him to report to him if he spotted them. That on 5th January, 2016, PW1 called him on phone and told him that he had spotted the Appellant outside his working premises. He went and effected the arrest.

23. From this chronology, it is pretty unclear whether the person who was arrested by use of the downloaded photograph was one and the same person that was arrested by PW4. I say so because PW4 was not at all aided by the photograph to arrest the Appellant. At the same time, according to PW1, the arrest of one of the assailants could only have been aided by his identification through the photograph.

24. Based on the conflicting evidence of how the Appellant was arrested, two issues arise: one is that if the arrest was by the physical identification by PW1, the court needed to go the drawing board and reevaluate the circumstances of identification at the scene of crime. Although both PW1 and PW5 said it was at a well-lit area, then PW1 would have been able to describe his assailants. Apart from stating that he identified two of the assailants, he did not give their description in whatever manner. He awaited PW5 to describe to him who the attackers were and more so, the Appellant whom he knew through the face book.

25. Amidst this unclear description, the investigators ought to have ordered that an identification parade be conducted more particularly having regard that the robbery occurred at night. The ordeal took place at 7.00 pm when it was dark thus rendering visual identification in difficult conditions. There was therefore need to tender evidence on what aided this identification. (**see Turnbull v R [1976] 3 All ER 549**). Unfortunately, the evidence adduced did not meet this threshold casting doubt as to a positive identification of the Appellant.

26. The second issue respects the angle taken by PW6; that the Appellant was arrested through the aid of an electronically generated photograph. Were this line of evidence consistent, then the investigators ought to have complied with the law relating to adduction of electronically generated evidence; specifically **Section 106B (4) of the Evidence Act**. The provision makes it mandatory that electronic evidence must be accompanied by a certificate confirming the electronic record containing the statement and describing the manner in which it was produced, the device from which it was made and the person who so recorded the evidence. In this case, PW6 adduced the downloaded photograph but failed to meet these mandatory requirements. It follows that any evidence purported to persuade the court of the identity of the Appellant by way of the photograph was inadmissible in court.

27. Flowing from this observation, it is clear that PW1 identified the Appellant to PW4 because he had been shown his photograph by PW5. Thus, it is safe to conclude that a case of mistaken identity may have occurred. With contradictory evidence of identification abound, it is my candid view that even though PW1 was robbed, the Appellant may not have been one of the robbers.

28. I agree with the learned State Counsel, Ms. Nyauncho that the elements of the offence of robbery with violence as set out under **Section 296(2) of the Penal Code** were established. I differ from the learned counsel for the Appellant that because the Appellant only allegedly assaulted PW1, he did not commit the offence of robbery with violence. Whatever role any of the robbers plays, so long as at the conclusion of the *actus reus*, the offence is completed, each of the actors must be deemed to have committed the offence. **Section 296(2)** does not provide that each robber (where more than one are involved) must commit a specific element of the offence singularly for him to be deemed culpable. Of importance is that the prosecution must prove that any of the offenders is armed with a dangerous or offensive weapon or is in the company with one or more persons, or, at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

29. No doubt in the instant case, the complainant lost a mobile phone, he sustained serious injuries and the robbers were more than one in

number. It is trite that a proof of any of the three elements is sufficient to found a conviction. The prosecution meticulously discharged this burden, of establishing the requisite elements of the offence.

30. The Appellant on the other hand was in the company of the other robbers. Whatever role he played aided in the completion of the offence. He was therefore a principal offender. Nevertheless, the prosecution failed to demonstrate that he was culpable. For this I shall accord him the benefit of doubt.

31. I accordingly find that the conviction was not safe. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi this 29th day October, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of:

1. *Mr. Mugo for the Appellant/Applicant.*
2. *Mr. Momanyi for the Respondent.*