



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MARSABIT
CRIMINAL APPEAL NO.10 OF 2017

WAKO OKOTUAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgement of Principal Magistrate Hon. B.M. Ombewa delivered on 29.8.2017 in Marsabit Court Criminal Case No.230 of 2017).

JUDGEMENT

The appellant was charged with the offence of robbery with violence Contrary to section 296(2) of the Penal Code. The particulars of the offence are that the appellant, on the 18th day of April, 2017 at about 1900hrs at Manyatta Jillo Scheme in Marsabit Central Sub-County within Marsabit County, Jointly with another NOT before court robbed JOHN MALICHA of Ksh.6000/=, TECHO Mobile phone, One(1) packet of milk (500ml), ½ Kg sugar all valued at Ksh,7340/= and immediately before the time of such robbery used actual violence to JOHN MALICHA.

The trial Court convicted the appellant and sentenced him to suffer death. The appellant's grounds of appeal are that:-

- 1. The provisions of Section 207 and 211 of the Criminal Procedure Code were not complied with.***
- 2. The trial Court did not promptly inform the appellant of the maximum sentence and the likelihood or possibility of substantial injustice being occasioned.***
- 3. The appellant was not informed of his right to be represented by an advocate and allowed the proceedings to be conducted while the appellant was unrepresented.***
- 4. The appellant was not accorded the right to call his witnesses contrary to the provisions of Article 50 of the Constitution.***
- 5. The conviction is not supported by the evidence on record.***
- 6. The trial Court made the wrong conclusion and failed to evaluate the evidence.***
- 7. The prosecution failed to summon vital witnesses and that no eye witness testified.***

8. The trial Court relied on the complainant's evidence which is fabricated.

9. No weapon was recovered and no exhibits were found with the appellant during his arrest.

10. The complainant did not mention the kind of light used to identify the appellant.

Mr. Biwott appeared for the appellant. Counsel submit that no identification parade was conducted to identify the appellant. The incident occurred at around 7.00pm. There was no explanation whether there was enough light to sufficiently identify the appellant. This makes the conviction not to be safe. The robbery involved Ksh.6000 and goods worth Ksh.1,040. The person who sold the goods to the complainant at the shop was not called to testify. Receipts of the stolen techno phone were not produced. It is the appellant's word against that of the complainant. There was no corroboration of the complainant's evidence. Counsel further submit that the appellant informed the trial court that he was with someone at a mosque at the time of the incident and wanted to call witnesses. The court ought to have issued summons to those witnesses. There was no evidence as to whether the appellant's witnesses were notified as the appellant was in custody.

Mr. Mwangangi, prosecution counsel, opposed the appeal. Counsel submit that there is no legal requirement as to the number of witnesses to be summoned by the prosecution to testify. In this case the main witness was the victim. There was no other witness at the scene. PW1 had known the appellant for about one month. There was moonlight. In his defence, the appellant admitted that he knew the complainant. It is not a case of mistaken identity. The alibi defence was not raised at the earliest possible opportunity. It was an afterthought. The appellant was allowed to call his witnesses and the case was adjourned. PW1's evidence was corroborated. A P3 form was produced. It was not a framed up case as the two had no differences.

This is a first appeal and the court has to evaluate the evidence afresh and make its own conclusion. PW1 JOHN MALICHA OBA was the complainant. On 18.4.2017 at about 7.00pm he went to the shop at Manyatta Jillo scheme where he was residing. He saw two people following him from behind. He identified one of them as the appellant and his accomplice one Ndolo Wako Kubi. He had known the appellant for about one month and knew him by appearance. He knew the appellant as a herdsman and was residing at the home of one Hussein Dida.

It is PW1's evidence that he bought ½ kg of sugar and a 500ml packet of milk. On his way back two people emerged from a shade. The appellant held his mouth and nose. He was pushed down. They took the sugar, milk, Ksh.6000 and his techno phone. The robbers said "uwa yeye, akitujua atatushitaki" kill him, if he identifies us he was caused to be charged. PW1 lost consciousness. He was hit on the nose. The robbers escaped. He regained consciousness, went home and informed his family members. On 19.4.2017, he reported the case at the police station. He went to hospital where he was treated and a P3 form was filled. It is part of his evidence that there was moonlight at the time of the robbery and that it was not dark.

PW2 PC GUYO GALGALO was stationed at the Marsabit Police Station. He investigated the case. The case was reported on 19.4.2017 by PW1. The complainant told him that he had been attacked by two men namely Dolo Wako Kubi and the appellant whom he knew physically and the place where he was residing and working as a herdsman. PW2 visited the scene. On 8.5.2017 PW1 saw the appellant in town and had him arrested by members of the public. Nothing was recovered from the appellant.

PW3 Dr. STEVE MAKORI SERETI is a medical officer who was based at the Marsabit county referral hospital. He saw the complainant on 19.4.2017 and filled a P3 form. PW1 had lacerations on the left side of the nose about 4cm long. The left hand and shoulder had tenderness.

In his sworn defence, the appellant denied committing the offence. The appellant testified that on the day of the alleged incident he was at a mosque. He came from herding livestock and went to the mosque. The complainant was his neighbour. He had not differed with PW1. He is a herdsman for one Hussein Dida. He went to the mosque at about 7.00pm

The issues for determination are:-

1. Whether PW1 was violently robbed on 18.4.2017.

2. Whether it was the appellant who committed the robbery.

According to PW1, he went to the shop on 18.4.2017. Two people were following him from behind. After purchasing the two items, he was on his way home while two people attacked and robbed him. He was injured and lost consciousness. He later regained consciousness. He reported the case at the Marsabit Police station the following day. PW2 received the report. PW3 attended to PW1 and filled his P3 form. During the robbery, PW1 sustained injuries. His blood stained shirt was produced in Court. The prosecution evidence does show that indeed PW1 was attacked and robbed of his property on 18.4.2017.

The appellant contends that sections 207 and 211 of the Criminal Procedure Code were not complied with. The record shows that the plea was taken on 10.5.2017. The charge was read over to the appellant in Borana language which is understood by the appellant. The appellant pleaded not guilty to the charge. That process satisfied the requirements of Section 207. There was no need to inform the appellant about the severity of the sentence since the appellant pleaded not guilty. Similarly, there is no legal requirement that all accused persons facing capital offences must be accorded an advocate at the state's expense. With regard to Section 211, the prosecution closed its case on 2.8.2017. A ruling was made on 3.8.2017 and the appellant was put on his defence. Section 211 of the Criminal Procedure Code was explained to the appellant. He opted to give sworn evidence and call two witnesses. The appellant testified on 3.8.2017. The trial Court then adjourned the case to 17.8.2017. On that day the appellant told the Court that he was closing his case. The trial Court had issued witness summons. Counsel for the appellant contends that there was no evidence that the two witnesses were served. It was the duty of the appellant to inform the Court where those witnesses were to be found. The record does not show that the appellant sought a second adjournment or was coerced to close his case. I do find that Section 211 was complied with.

The evidence on record shows that there was no any other person who witnessed the robbery. According to the complainant, he saw the two people who were following him as he went to the shop. It was his evidence that on his way home two people emerged from a shade. The appellant held his mouth and nose and he could not scream. PW1 knew the appellant. He gave the same information at the Police station that he was robbed by the appellant and one Dolo Wako Kubi. PW1 knew the appellant as a herdsman for one Hussein Dida. There is no evidence that between 19.4.2017 to 8.5.2017 when the appellant was arrested the Police were looking for him. However, the evidence establishes that immediately PW1 saw the appellant in town on 8.5.2017, he caused him to be arrested. This confirms that PW1 knew the person who had robbed him. The evidence of PW1 is believable. He did not give the description of any other person other than that of the appellant. The appellant confirmed that he used to be a herdsman for Hussein Dida. He had no differences with PW1. The evidence shows that the incident occurred within Manyatta Jillo Scheme.

The appellant's defence is that he was at a mosque does not raise doubt on the prosecution case. It is possible that the appellant left the mosque and went to commit the offence or that after committing the robbery he went to the mosque. There is no evidence that the mosque is located quite far from the scene. The appellant was positively identified by PW1 to have been at the scene. The incident occurred at about 7.00pm and according to pW1, it was not very dark. From the evidence on record, I do find that the identification of the appellant by PW1 is satisfactory. There was no need for an identification parade as it was PW1 who caused the appellant to be arrested. PW1 knew the appellant. I am satisfied that the conviction is both safe and proper.

The trial Court sentenced the appellant to suffer death. In Constitutional Petition number 15 and 16 of 2015 (*consolidated*) **FRANCIS KARIOKO MURIUATETU & ANOTHER V REPUBLIC**, the Supreme Court of Kenya partly held as follows:

(a) The mandatory nature of the death sentence as provided under section 204 of the Penal Code

is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.

(b) This matter is hereby remitted to the High Court for re-hearing on Sentence only, on priority basis and in conformity with this judgment.

Section 296(1) of the Penal Code makes the death sentence to be a mandatory sentence for the offence of robbery with violence. The decision of the Supreme Court

should not be limited to murder cases only which falls within the provisions of Section 204 of the Penal Code. The Supreme Court decision applies to any Section of the law which makes the death sentence as the only mandatory sentence for a given offence.

In the current case, the complainant suffered lacerations on the nose. What was stolen was valued at Ksh.7,340. The appellant told the trial court that he is an orphan. The appellant is a young man who should be accorded a second chance in life. There is no evidence that the appellant is incapable of being reformed and re-integrated back to the society. I do find that the death sentence is not appropriate given the circumstances of the case.

In the end, the appeal on conviction is disallowed. The death sentence imposed by the trial court is set aside and replaced with five (5) years imprisonment.

Dated, Signed and Delivered at Marsabit this 18th day of January 2018

S. CHITEMBWE

JUDGE