REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 41 OF 2016

MUTUNGA MUMO GEDION.........APPELLANT

VERSUS

REPUBLIC……………………...…….RESPONDENT

(Being an Appeal from the Original conviction and sentence in ***Mutomo Principal Magistrate's Court Criminal Case No. 08 of 2016*** *of by* ***Z. J. Nyakundi P M*** *on* ***05/07/16****)*

J U D G M E N T

1. Mutunga Mumo Gedion, 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.** Particulars of the offence were that on the **4th** day of **December, 2015** at **9.00 p.m.** at **Ekani Trading Centre, Simisi Location** in **Ikutha Sub-County** within **Kitui County** jointly with another not before Court while armed with a knife robbed **Wambua Kyusya Kshs. 2,700/=** and at the time of such robbery used actual violence to the said **Wambua Kyusya.**

2. Facts of the case were that PW1 **Wambua Kyusya,** the Complainant herein went to **Ikanga Market** on the evening of the **4th** day of **December, 2015** where he stayed until **8.00 p.m.** When he left the club, the Appellant and another, persons known to him followed him. The Appellant stopped him and asked him to surrender whatever he carried. He hit him on the mouth and cut him on the finger with a knife. Then he attempted to cut him with a knife on the mouth and knee. They struggled and he lost the **Kshs. 2,700/=.** The Complainant sought treatment and reported the matter to the police. The Appellant was arrested and charged.

3. When put on his defence the Appellant denied having committed the offence. In an unsworn testimony he stated that he left home in **February, 2015** for **Kitui** where he was employed as a tout. On a date that he could not remember, while at **Ikutha** he was summoned to the Administration Police Camp and informed that he had robbed a person he did not know.

4. The learned trial Magistrate considered evidence adduced and found that the Appellant was positively identified as the individual who robbed the Complainant. He convicted the Appellant and sentenced him to death.

5. Aggrieved by the conviction and sentence he appealed on grounds that:

- The charge was duplex as it incorporated both **Section 295** and **296(2)** of the **Criminal Procedure Code.**
- The identification in the circumstances was not interrogated.

- The trial was not fair.
- It was erroneous to reject the alibi defence.

6. The Appellant canvassed the Appeal by way of written submissions. He relied on the case of **Mwaura Peter Njoroge & Another vs. Republic Criminal Appeal No. 5 of 2008** and three other cases where it was stated that charging an Accused person under **Section 295** and **296(2)** rendered the charge duplex.

7. That at the time the Complainant alleges he was attacked he was drunk having been drinking and having not told the Court the type of beer he was drinking, being in the rural area, he must have been drinking chang'aa. That he did not state the intensity of the light from the moon that could have favoured correct identification. That PW4 whose evidence corroborated that if the Complainant was stood down for being drunk therefore he did not conclude his testimony.

8. The State through learned Counsel **Mr. Mamba** opposed the Appeal. He reiterated facts of the case as presented in the Lower Court and concluded by stating that the Appellant was positively identified and he had an offensive weapon.

9. This being a first Appellate Court, I am duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. **(See Okeno vs. Republic (1973) EA 32).**

10. Whether a charge is duplex the primary consideration would be whether the Appellant was prejudiced. **Section 295** of the **Penal Code** provides thus:

> **"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."**

The marginal note of the Section is in respect of the definition of robbery but the Section also creates the offence of robbery. The elements/ingredients of the offence are stipulated in **Section 296(2)** of the **Penal Code** provides thus:

> **"(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."**

The marginal note is in regard to the Penal Section but the ingredients of the aggravated robbery is also provided.

11. In the case of **Cherere s/o Gakuli vs. Republic (1955) 622 EACA** the Court of Appeal stated this in regard to the issue of duplicity:

> **"The test still remains as to whether or not a failure of justice has occurred in our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity."**

12. The Appellant herein was informed of the charge he was facing. Ingredients of robbery with violence were stated. Right at the outset he understood the charge that he faced, therefore the charge cannot be dismissed because of duplicity.

13. The offence was committed at night, at 9.00 p.m. or thereabout. It was a case of identification by recognition per the evidence of the Complainant. In the case of **Anjononi & Others vs. Republic (1976 – 80) I KLR 1566** it was stated that:

> **"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case where no stolen property is found in the possession of the accused..... Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or other."**

14. Ideally this was a case of a single identifying witness. In the case of **Abdullah Bin Wendo & Another vs. Republic (1953) 20 EACA 166** it was held that:

> ***"Su*bject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known the conditions favouring correct identification were difficult."**

15. In his testimony PW1 stated that he went to the club at **6.00 p.m.** and he stayed there until **8.00 p.m.** The club was stated to be at an individual's home. When he left and was by the Appellant and Mukula followed him from behind. These two (2) people were also at the club. He went to the centre and left at **9.00 p.m.** The Appellant was a person well known to the Complainant. Prior to attacking him, the Appellant stopped him and asked for what he was carrying. When he responded by stating that he did not have anything, he was hit on the mouth and cut on the finger with a knife. He lost the **Kshs. 2,700/=** that he had. His accomplice ran away on seeing a person emerge.

16. The issue of the Complainant having been drinking at the club did not arise in the Lower Court. And, the allegation that he must have been drinking chang'aa was mere speculation.

17. The intensity of moonlight has been questioned. The Complainant told the Court that the illumination from the moonlight enabled him to see his attackers. The intensity of moonlight varies greatly depending on its phase. The Complainant stated that when he left the club the Appellant followed him. He knew the Appellant as a person who used to sell 'Mogoka'. Therefore he was familiar to him.

18. The offence was committed on **4th** of **December.** It is argued by the Appellant that the report to the Administration Police was made on **Monday** which was on **7th December, 2015.** That having failed to report the matter immediately meant that it was an afterthought.

19. The Complainant was an employee of PW2 **David Mwange.** He saw the Complainant the following morning with a swollen left side of the face, his index finger, upper lip had cuts. He enquired what happened. The Complainant told him that he was attacked by **Kalulundu** and **Mukula.** These were his neighbours. He had paid him **Kshs. 3,700/=** in wages. He went with the Complainant to where he was attacked and he found some blood stains. At the outset they reported the matter to the area Chief and he advised the Complainant to go to hospital. On cross examination, PW2 stated that the Appellant was well known for selling 'mogoka'.

20. PW3 **No. 75433 P C Japheth Kidiavai** stated that the Appellant was known as **Mutunga Mumo Gideon *alias* Kilulunda** and after the incident he went into hiding and was arrested a month later.

21. There was a witness PW4 who was alleged to have gone to the scene on hearing screams and the attackers ran away on seeing him. However, as correctly submitted by the Appellant the witness turned up drunk such that he was stepped down. He was not recalled to testify therefore what he told the Court was not tested through cross examination. His evidence should have been disregarded.

22. In his Judgment the trial Magistrate treated evidence adduced cautiously and took into consideration the issue of conditions that existed at the time of the act.

23. Having re-analyzed evidence adduced and circumstances in which the Appellant was recognized, I find that the recognition was satisfactory and reliable as it depended on personal knowledge of the Appellant.

24. It was the Prosecution's case that after the act the Appellant absconded from the area. He was seen a month later. It has been stated that the conduct of the Appellant absconding, fleeing is indicative of guilt. **(See Kennedy Wesonga Kwoba vs. Republic (2013) eKLR; Alberty vs. US 162 US 499 (1986); Section 8(2) of the Evidence Act, (K)).**

25. To counter the argument that the Appellant escaped he put up an alibi defence. The Appellant stated in his unsworn defence that he could not have been at the scene of crime because he left home in **February, 2015** and got employment as a tout within Kitui Town. He faulted the trial Magistrate for not applying relevant principles in the assessment of his defence.

26. In **Karanja vs. Republic (1983) KLR 501** it was held that, it is trite that the burden of proving the falsity of the Accused's alibi defence lies on the prosecution. Further, it was also stated that in a proper case, a trial Court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the Accused's guilt is established beyond all reasonable doubt take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

27. Throughout the case the Appellant had the opportunity of cross examining witnesses. At no point in time did he suggest that he could not have committed the offence because he was not within **Ekaini, Ikanga area.** Therefore the kind of defence put up must be disregarded as an afterthought.

28. This is a case where the Prosecution was required to prove the existence of ingredients for the offence of **Robbery with Violence.** The case of **Johanna Ndung'u vs. Republic – Criminal Appeal No. 116 of 2005** set out the ingredients of the offence as provided in **Section 296(2)** of the **Penal Code** thus:

> **"a) If the offender is armed with any dangerous or offensive weapon or instrument, or,**
>
> **b) If he is in the company with one or more other person or persons; or**
>
> **c) If at or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other violence to any person."**

All the Prosecution was required to do was to prove any one of the ingredients.

29. The Appellant was in company of another person. The Complainant was examined by PW8 a Clinical Officer at **Mutomo Health Centre** after he was treated at **Kanziko.** He had sustained a wound on the upper lip of the mouth, left ear and the neck region was tender. He had a deep cut wound on the left thumb. The probable type of weapon used was stated to be blunt and sharp. The Complainant said that the Appellant was armed with a knife, which he used to cut him. He was robbed of the **Kshs. 2,700/=** amidst use of actual violence upon his person. That was robbery with violence.

30. The upshot of the above is that this Appeal fails in its entirety and is hereby dismissed.

I31. t is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **20th** day of **February,** 20**18.**

L. N. MUTENDE

JUDGE