



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO.18 OF 2017

ANTONY KINYUA KIVUTI APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal case no.7 of 2017 of the Chief Magistrate's Court at Embu)

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 were that the appellant on the 30th day of December, 2016 at Kithimu village, Kithimu Location within Embu County, jointly with others not before court robbed **JOSEPH MUREITHI NJUE** of one wallet valued at Ksh.500/=, and one Equity bank ATM card valued at Ksh.600/= all valued at Kshs.1,100/=.

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

- 1. The appellant pleaded not guilty.**
- 2. The Prosecution failed to prove its case beyond any shred of doubt.**
- 3. The evidence is insufficient to sustain the conviction.**
- 4. Crucial witnesses were not summoned.**
- 5. No document or exhibit was found with the appellant.**
- 6. The appellant's defence was rejected for weak reasons**
- 7. The trial process took less than one month yet the appellant was sentenced to suffer death.**

The appellant submits that the evidence of PW1 is contradictory. He testified that he had withdrawn money from M-Pesa but his other evidence is that he had no money and decided to spend only ksh.150/= to buy bear for some people. His wallet had no cash. PW1 is therefore not a credible witness. PW1 made reference to a boda boda operator by the name Nthiga as an eye witness. It is submitted that the said Nthiga testified as PW2 but alleged that he did not witness the incident. PW2's evidence does not support that of PW1.

The appellant further submits that PW1 alleged to have ran to another bar owned by one Makumi who gave him a T-shirt. The said Makumi was not called to testify. PW3 was not at the scene. The circumstances were not conducive for positive identification. The identification by PW3 who was not at the scene is not proper. PW1 did not tell the Court whether he knew the appellant before the incident. He testified that he did not go to the area Chief to report as he had not gotten the names of his attackers. PW1 made reference to Tony, Keny and Tamu. The charge sheet used an "alia" name yet PW1 did not make any reference to the alleged alias name.

The appellant also contends that the evidence on record shows that no violence was used. The ingredients of the offence were therefore not met. Crucial witnesses including customers who were inside the bar were not called to testify. The appellant's defence was simply rejected for no good reasons.

Miss Nandwa, prosecution Counsel, opposed the appeal. Counsel submit that the prosecution proved its case beyond reasonable doubt. The

ingredients of robbery with violence were proved. The appellant was in the company of more than one person. PW1 was pinned to the wall. PW1 and PW3 stated that they saw the appellant stealing PW1's wallet. The two witnesses positively identified the appellant. The incident occurred at 4.40pm in the afternoon. There was enough light and there was no mistaken identity. PW2 placed the appellant at the scene of crime. The appellant was seen inside Makuti bar before he left.

Counsel further submit that all crucial witnesses were summoned to testify. The prosecution evidence was sufficient enough to convict the appellant. The evidence is clear, consistent and well corroborated. PW1 reported the matter to the Police and gave out the appellant's name. The appellant's defence was considered and was found to be an afterthought. The prosecution was efficient and fulfilled its duty. That is why the case was finalized within one month.

This is a first appel. The evidence adduced before the trial court has to be evaluated afresh for this Court to make its own conclusion. Four witnesses testified for the Prosecution. **PW1 JOSEPH MURITHI NJUE** was the complainant. he informed the Court that he was working at Kathembe Hospital. On 30.12.2016 at 4.40p.m he was at Kathembe market. He went to a bar and met six boys including Tony, Keny and Tamu. One of the boys recognized him as a prosperous/aspiring member of parliament. He ordered that each be served a Ksh.30/= keg beer as he was in a hurry. He decided to spend Ksh.150/=. The boys then poured beer on him. He gave Nthiga (PW2) his cell phone so that it could not be spoilt by the beer. The boys followed him to the door. Pinned him to the wall and then requested if they could rob him. The appellant took his wallet which had no cash but ATM cards. The bar attendant tried to intervene but was threatened by the boys. PW1 escapade and entered Mukami's club. he briefed Mukami who gave him a T-shirt. On 31st December 2016 he was at a tournament and saw the appellant. He went to an AP camp and made a report. The appellant was arrested.

PW2 ANSENO NTHIGA NJERU is a boda boda operator. On 30.12.2016 at 4.30pm he was at Makuti bar drinking beer. PW1 ordered 3 keg cups for himself, PW2 and the appellant. The appellant took PW2's beer. PW2 left and went out. Later PW1 went outside and told him to take his phone as his T-shirt was wet. PW2 took a customer and went to Embu. He did not witness the incident.

PW3 EDITH NJERI MUTHURI was at Makuti bar on 30.12.2016. A customer purchased keg beer for ksh.150/=. Someone poured beer on the customer. She did not see who did that. The appellant and other people followed the customer. The customer was pushed to the wall. The appellant pulled a wallet and the customer was released. There were six people. The six people then went out with the customer. She did not follow then.

PW4 PC JOSEPH CHEKWONYI was stationed at Gatimu Police Post. On 30.12.2016 at 5.00pm his colleague received a call that someone had been robbed at Kaga bar. The went to the bar but did not see the complainant. On 31.12.2016 PW1 went to the Police post and reported that he had been robbed of his wallet which had his identity and ATM cards. He reported that there were six (6) people during the incident. He had bought beer for those who robbed him. The appellant was traced and charged with the offence.

In his unsworn defence, the appellant testified that he was framed because he was dating the lady who was selling them beer.

The issue for determination is whether the prosecution proved its case beyond reasonable doubt. The incident took place between 4.30 and 5.00pm when the Police were called and informed of the matter. It is the evidence of PW1 that he decided to buy beer for six people who seemed to have heard that PW1 was intending to contest for a parliamentary post. PW1 decided to buy keg beer for each of those six people. PW2 saw only three keg cups being purchased and left after the appellant took the cup meant for him. It is clear from the evidence that PW2 did not witness the incident.

According to PW1, the six boys poured beer on him. They thought he had money. They followed him and in the process the appellant removed the wallet from PW1's pocket. The evidence establishes that when PW1 gave out the phone to PW2, the wallet had already been taken. This position is in line with the evidence of PW2 and PW3. According to PW3, the customer went out and the six people followed him. PW2 was also outside when PW1 went there and gave him the phone as his T-shirt was wet.

The picture pointed of the scene does not clearly demonstrate a robbery with violence incident. It is clear that PW1 knew some of the six boys he met at the bar. That is why he decided to buy them bear. PW1 did so as the boys recognized him as a prospective parliamentary candidate. It appears that the boys thought that PW1 had money and followed him. In the process, the appellant had an opportunity to remove PW1's wallet. Although there were six people, I do not see any common intention to rob the complainant. the appellant seems to have acted on his own and removed the wallet. PW1 was not threatened or armed. There are people who were drinking together.

On his part, the appellant testified that he was framed because he was dating the lady who was selling them beer. Presumably, this was PW3. That evidence was not part of the cross-examination when PW3 testified. There was no indication that PW3 had any relationship with the appellant. The trial Court therefore correctly dismissed the appellant defence.

From the evidence on record, I do find that there was no robbery with violence. All what happened was that six people thought that the complainant was going to contest for a parliamentary post as per PW1's own evidence. After PW1 had bought beer for them, the six people clamored for money from PW1. In the process, the appellant robbed PW1 of his wallet. I do find that the appellant robbed PW1 of his wallet which had no money. The wallet had PW1's identity and ATM cars. These were PW1's documents. The appellant was at the scene as Pw2 saw him taking the beer that was meant for PW2. PW3 also saw the appellant at the club. the incident occurred during the day and it cannot be held to be a case of mistaken identity. The appellant took advantage of the situation and took the wallet.

I am satisfied that it is the appellant who robbed PW1 of his wallet on 30.12.2016. I do find that the prosecution did not prove a case of robbery with violence against the appellant. The appellant is acquitted of the charge of robbery with violence as charged. However, the appellant is hereby found guilty of the offence of robbery contrary to Section 296(1) of the Penal Code and is convicted accordingly.

In the end, the appeal partly succeeds. The death sentence imposed by the trial court on the charge of robbery with violence is hereby set aside. The appellant is found guilty of robber Contrary to Section 296(1) of the Penal Code, Chapter 63 laws of Kenya. The appellant shall

serve four (4) years imprisonment.

Dated and Signed at Marsabit this 11th day of April 2018

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Embu this 31st Day of May, 2018

F. MUCHEMI

JUDGE