



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPELLATE DIVISION
CRIMINAL APPEAL NUMBERS 127 AND 128 OF 2014

(CONSOLIDATED)

BETWEEN

CALISTUS MUSANYI MAKOTSI1ST APPELLANT

ALEXANDER ANDOLA MUSOTSI.....2ND APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal arising from the decision and judgment delivered on 28th August, 2014 by Hon. Pamela Achieng SRM, in Kakamega CMCCR Case No. 2430 of 2012)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. By the orders dated 3rd March, 2016 and 29th June, 2017 respectively the two appeals herein were consolidated, with the file in Criminal Appeal number 127 of 2014 being the lead file. This judgment therefore relates to the consolidated appeals.

2. The two appellants were the 2nd and 1st accused respectively in Kakamega CMCR Case number 2430 of 2012. The two of them were charged with ***robbery with violence contrary to section 296(2) of the Penal Code***. The particulars thereof being that on the 19th day of October 2012 at Museno Sub-Location, Khaega Location in Kakamega East District within Western Province jointly while armed with dangerous weapons namely pangas and runkus, robbed Calistus Mukunzi Kalilomba of cash kshs.4,000/- and immediately before the time of such robbery wounded the said Calistus Mukunzi Kalilomba. The appellants appeared for plea before Hon. Susan M. Shitubi, Chief Magistrate on 26th November 2016 and denied the charge. As a result of that plea, the prosecution called 5 witnesses.

3. At the close of the prosecution case, the appellants were found to have a case to answer and accordingly put on their defence. They each gave sworn evidence. They did not call any witnesses.

Judgment of the Learned Trial Court

4. After carefully considering the evidence adduced by both the prosecution and the defence the learned trial magistrate was satisfied that the prosecution had proved its case against each of the appellants beyond reasonable doubt. They were each found guilty as charged and accordingly convicted. They were each sentenced to suffer death as by law prescribed.

The Appeal

5. The appellants were aggrieved by the judgment of the learned trial court and consequently filed their separate appeals on 12th September, 2014. As the two appeals are premised on similar grounds, I do hereby set out the same:-

i. THAT the learned trial magistrate erred in fact and law in convicting the appellant against the weight of evidence so far

adduced.

ii. THAT the learned Trial Magistrate erred in fact and law in convicting the appellant when the prosecution had not proved its case on the required standard.

iii. THAT the learned trial magistrate erred in fact and law in failing to properly analyze the evidence adduced in court when arriving at her decision.

iv. THAT the learned trial magistrate erred in fact and law in rejecting the defence advanced by the appellant.

v. THAT the learned trial magistrate erred in fact and law in relying on extraneous matters/issues in arriving at her decision to convict the appellant

REASONS WHEREFORE, the appellant prays that the appeal be allowed, conviction quashed and sentence set aside.

6. This is a first appeal, and that being the case, this court has the onerous task of reconsidering and evaluating the evidence afresh with a view to reaching its own conclusions in the matter. As was held in *Pandya – versus R [1957]EA 336, this court is obligated to treat the evidence as a whole to that fresh and exhaustive scrutiny which the appellant is entitled to expectand affirm a conviction on evidence that has been reviewed.*” In *Mark Oururi versus Republic [2013] eKLR*, it was held that: “**The court is under a duty to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter, but always bearing in mind [the fact] that the trial court had the advantage of observing the demeanor of the witnesses and [of] hearing them give evidence and give allowance for that.**”

7. With the above principles in mind I now proceed to set out the evidence that was adduced before the trial court.

The Prosecution Case

8. From the record, appellants, the complainant as well as PW2, PW3 and PW4 are residents of Irobo Village. On 19th October, 2012, all the witnesses, with the exception of PW3, Eugene Mukanzi Kalilomba (Eugene) and number 832113 – Police Constable Abdidek Shariff, PW5, attended a funeral in the village. They were all at that funeral up to sometime between 4.00pm and 5.00pm. From the funeral, the complainant Calistus Mukanzi Kalilomba, PW1 (Calistus) went home and entered the bedroom of his two-roomed house. The door to the house was open, as was the window inside the bedroom. Calistus was in the company of his son, Eugene. Just then Calistus heard noise from the door which was hit by a panga. The two appellants entered the house and went straight to where he was in the bedroom and stood beside the bed. The second appellant (Andolo) was armed with a panga while the first appellant (Makotsi) was armed with a stick. Makotsi hit Calistus on the back using the stick while Andolo took out Kshs.4,000/- from the pocket of Calistus. The evidence does not indicate whether the money was in the shirt or trouser pocket. Calistus had got the money from selling trees.

9. After taking the money, the appellants pushed Calistus out of the house and into the nearby sugarcane plantation where they continued assaulting him. Just then, John Kamaya, PW2 (John) appeared at the scene and on seeing John, the two appellants took to their heels and fled. Calistus was assisted by John and he went for treatment at Iguhu Dispensary from where he was referred to Kakamega County Referral Hospital (previously known as Kakamega Provincial General Hospital.) After getting treatment at Iguhu dispensary Calistus went and reported the matter at Khayega Police Station. He was issued with a P3 form which he took to Kakamega PGH on 26th November, 2013. The P3 form was filled and signed by Dr. Akenga.

10. According to PW3, Patrick Namiti, Senior Clinical Officer at Kakamega PGH Calistus who reported having been assaulted at about 5.00pm on 19th October, 2012, had injuries on the back, chest and hands. In particular, Calistus had a stitched cut wound on the left hand. The injury sustained by Calistus was classified as harm. The P3 form was produced in evidence as Pexhibit 1 while the treatment notes were produced as Pexhibit 2.

11. From the evidence of Calistus, he was hit on the left hand with a panga by Andola he visited Iguhu Health Centre on the very day of the attack which was 19th October, 2012. Eugene also testified of the attack on Calistus by the two appellants, both of whom were from the same village.

12. John also testified that as he was walking by the home of Calistus he heard Calistus crying for help and on rushing to the scene, he found the two appellants engaged in a fight with Calistus. The group of three was outside the house belonging to Calistus. It was also close to a sugarcane plantation. All the prosecution witnesses confirmed the incident took place at the home of Calistus, at about 5.00pm. Apart from PW5, PC Shariff, all the other witnesses said they knew both appellants because they all hail from the same area of Irobo.

13. PC Shariff testified that at about 3.00pm on 6th November 2012, while he was at Kakamega Police Station on general duties Calistus went there and reported that he had been assaulted and robbed of kshs.4,000/- by the two appellants at about 5.00pm on 19th October, 2012. That Calistus further reported that he had been assaulted before the robbery. After recording the statements from Calistus and his witnesses, PC Sharif arrested the appellants on 25th November, 2012 and caused them to be charged with the present offence.

The Defence Case

14. As indicated elsewhere in this judgment both appellants gave sworn evidence. While admitting that they were together with Calistus at a funeral on the material date, they were adamant they neither assaulted nor robbed Calistus. Andola stated that on the material day, he met Calistus at the funeral and reminded him (Calistus) of the debt of Kshs.15,000/- which Calistus owed him. Calistus told Andola that if he

wanted his money, then he (Andola) had to go for the same from Calistus home and that was when Andola asked Makotsi to accompany him so that Makotsi could be a witness when Calistus paid the money. Both appellants then left for Calistus home as demanded by Calistus.

15. Before they reached the home of Calistus they found Calistus on the road at a junction. Calistus had smeared himself with mud and when Andola told him he had come to collect his kshs.15,000/- debt Calistus removed a panga from his clothes while threatening to kill both appellants. Calistus cut Mokotsi on the face and also cut Andola on the wrist of the left hand. The two appellants sought treatment at Museno Private Dispensary. On the following day, they reported the incident to the area assistant chief and Khayega AP camp. According to both appellants the incident took place on 18th October, 2012, the very day they attended the funeral between 10.00am and 4.00pm.

16. Neither Andola nor Makotsi were able to produce any P3 forms to confirm that they were assaulted by Calistus, though according to Makotsi, Calistus cut each of the appellants on the forehead using the panga.

17. Each of the appellants stated that they were arrested while they were in the process of obtaining the P3 forms.

Submissions

18. The appellants filed their written submissions in support of their appeal. The respondent relied on the evidence on record in support of the judgment of the learned trial court.

19. In summary the appellants submitted that no evidence was placed before the trial court to prove, beyond any reasonable doubt, that the complainant Calistus, was robbed of kshs.4,000/- as alleged. That there was no corroboration of the testimony given by Calistus of this allegation of theft. That even Eugene who was together with Calistus during the incident, did not make any mention of this robbery of kshs.4,000/-.

20. Secondly, it was submitted on behalf of the appellants that there was no proof that Calistus was ever injured, and that there being no clarification about whether Calistus was hit or cut this honourable court should give the benefit of doubt to the appellants. Further, it was submitted that the witnesses gave contradictory evidence regarding the injuries sustained by Calistus, and that even with medical evidence by PW3, it is not clear whether Calistus was cut on the right or the left hand and whether indeed he had any injuries on the chest. Appellant's counsel also submitted that the evidence is not clear on whether Calistus was pushed out of the house and taken to the sugarcane plantation as alleged or whether John found him together with the appellant's just outside the house.

21. Thirdly, it was submitted that the Learned Trial Magistrate did not properly analyze the evidence on record and that he erroneously ignored the evidence given by the appellants. On the basis of the above, appellants pray that their respective appeals be allowed on both conviction and sentence. The respondent relied on the evidence on record in opposing the appeal.

Issues for Determination

22. From an analysis of the evidence in this case, the judgment of the learned trial court together with the grounds of appeal and the law, the following issues arise for determination:

i. Whether the prosecution's case was proved beyond reasonable doubt;

ii. Whether the learned trial court properly analyzed the evidence placed before it before making its decision.

iii. Whether the learned trial court erred in rejecting the appellant's defence

Analysis and Determination

a. Whether the prosecution's case was proved beyond reasonable doubt

23. The appellant's case is that the learned trial magistrate took into account extraneous matter in reaching its conclusions and therefore that the case against the appellants was not proved to the required standards. The appellants also alleged that the case was so poorly investigated that the investigations yielded no evidence to support the prosecution case.

24. As regards the issue of investigation, it was PW5, who received the report of the incident from the complainant who also gave him the names of the appellants as the robbers. PW5 observed that the complainant had a deep cut on the left hand as well as injuries on the back. Though PW5 did not visit the scene because the report was made to him a considerable time after the alleged robbery, he nonetheless took the complainant's statement and that of his witnesses. PW5 also stated that he interrogated John who confirmed to him that he (John) had witnessed the incident. PW5 relied on John's testimony as well as the complainant's in preferring the charge against the appellants.

25. On the basis of the above, I do not agree with appellant's contention that this case was not investigated properly. According to the testimonies of both John and Calistus, the incident took place at 5.00pm on 19th October, 2012. It was daytime and what could be seen was seen. The two appellants were well known to both Calistus and John, and even to Eugene, and the events leading to the commission of the alleged offence did not need any more detailed investigation than what PW5 did. I therefore dismiss the appellant's complaint that the case was not properly investigated, nor do I agree that the appellants were not properly identified as perpetrators of the offence. The appellants did not deny being with the complainant at the material time, but told the court that it was the complainant who attacked them. I have considered the appellants' versions of the events vis-à-vis the version given by the complainant and John and in my humble view, the story as given by the appellants sounds most unlikely. I am satisfied that the attack took place at the complainant's house and not on the road as

the appellants wanted the trial court to believe. The complainant stated clearly the appellants entered his house. The two were armed with a panga and a stick. The first appellant hit him on the back using the stick while the second appellant took the money from the complainant's pocket. The complainant had sold trees. Eugene saw the appellants as they assaulted the complainant. John also found them in the act of assaulting the complainant. Medical evidence produced by PW4 confirmed the complainant was injured.

26. It is clear from all the above that the case against the appellants was proved beyond reasonable doubt. First the appellants were two when they committed the offence. They were also armed with dangerous weapons namely a panga and a stick and they injured the complainant before they stole from him. All that the prosecution needed to do was to prove one of the three ingredients under the **section 296(2) of the Penal Code** for the offence therein to be established. The prosecution in this case proved all the ingredients.

b. Whether the learned trial court properly analyzed the evidence placed before it before making its decision

27. Section 169 of the Criminal Procedure Code requires that every "**judgment shall, except as otherwise expressly provided by this code, be written by or under the direction of the presiding officer of the court in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.**" What the appellants are saying is that the trial court did not comply with the above provisions.

28. I have myself carefully gone through the judgment of the learned trial court and I note with satisfaction that the learned trial magistrate fully complied with the provisions of **section 169 of the Criminal Procedure Code**. The judgment contains the details of the offence and its particulars, the evidence adduced by both the prosecution and the defence, the analysis of the said evidence and the trial court's finding in the following words: - "**I find that there is overwhelming evidence pointing to the accused persons as being the ones who attacked, robbed and injured the complainant. I find that the prosecution has proved its case against the accused persons beyond reasonable doubt. They are guilty of the offence and are accordingly convicted.**" In my considered view, what the learned trial court stated above amounted to sufficient analysis. I accordingly dismiss the appellant's complaint that the learned trial court did not properly analyze the evidence.

c. Whether the learned trial court erred in rejecting the appellant's defence

29. In rejecting the defence offered by the appellants, the learned trial court, after settling out the respective defences, stated that the appellants had failed to produce any medical evidence to prove that they were injured, and that she did not agree with them regarding the allegation that they had been injured. The trial court expressed its satisfaction with the evidence given by the complainant as opposed to the evidence given by the appellants. After reconsidering the evidence given by the appellants, I am equally satisfied that the defence did not in any way shake the evidence given by the prosecution against them. The learned trial court was therefore right in rejecting the defence case, except to mention that the appellants did not have to exonerate themselves by giving any form of evidence as the trial court seemed to imply.

Conclusion

30. In light of all the foregoing I find and hold that the appellant's entire appeal has no merit and I accordingly dismiss it.

31. As to sentence, recent pronouncements by the Supreme Court have declared the death sentence prescribed by **section 204 of the Penal Code** unconstitutional and in this regard, it is imperative that the death penalty meted out against the appellants be reviewed. In this regard, I set aside the sentence of death against each of the appellants and direct the appellants to offer mitigation if any for consideration by the court before sentencing them afresh.

It is so ordered.

Judgment written and signed at Kapenguria

R. N. SITATI

JUDGE

Judgment delivered, dated and countersigned at Kakamega on this 30th day of July, 2018.

WILLIAM M. MUSYOKA

JUDGE