



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 11 OF 2017

CHRIS ZIRO MATHIUS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 185 of 2017

of the Chief Magistrate's Court at Malindi – Hon. J. Oseko, CM)

JUDGEMENT

1. The Appellant, Chris Ziro Mathius was convicted and sentenced to suffer death for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence being that on 12th March, 2017 at Mjanaheri Village, Magarini Sub-County within Kilifi County the Appellant, jointly with others not before the court while armed with dangerous weapons namely iron bars robbed Margaret Munala Andayi Kshs. 5,000 and immediately before or at the time of the act threatened to use violence against the said Margaret Munala Andayi.
2. The Appellant being aggrieved by both the conviction and sentence has appealed to this court. Through amended grounds of appeal filed on 30th July, 2018, the Appellant challenges his conviction and sentence on grounds of unconstitutionality of the sentence, failure by the prosecution to prove its case beyond reasonable doubt and failure by the trial court to consider his defence.
3. This being a first appeal, the Appellant is entitled to a fresh analysis of the evidence adduced at the trial and an independent finding by this court on the same.
4. The evidence adduced by the prosecution at the trial was to the effect that on 12th March, 2017 PW1 Margaret Andayi Munala was at her place of work at Enzine Pub in Mjanaheri where she worked as a waitress. It was then that the Appellant arrived on a motorcycle with two other persons. The Appellant walked towards the counter where she was and pointed a knife at her. One of the two other persons walked towards a gaming machine within the premises and broke the padlock and took away the money in the machine. She estimated that not less than Kshs. 5,000 was in the machine. The money was then divided between the Appellant and the person who broke the gaming machine using an iron bar. All along, the motorcycle rider was standing by the door.
5. After the people left, she telephoned her boss PW3 Kahindi Ngombo Kithi and informed him about the incident. Her boss told her he was far. She then telephoned PW2 Benard Amani the son of her employer who immediately went to the pub.
6. PW2's evidence was that upon receiving the report from PW1 he rode straight to the pub. On the way he met the Appellant whose nickname is Makoroma, one Kahindi and a motorcycle rider.
7. Upon arrival at the pub, PW2 confirmed that the gaming machine had indeed been broken and there was no money in the drawer. PW1 informed him that the Appellant was armed with a knife and the other person used an iron bar to break into the machine. As they were still there, PW3 arrived and confirmed the incident for himself. PW3 then went and reported the matter at Marereni Police Station.
8. PW3 supported the evidence adduced by PW1 and PW2.
9. PW4 Sergeant Samuel Ngere testified that a robbery report was made at Marereni Police Station on 12th March, 2017. He recorded statements from the witnesses and visited the scene the following day. At the scene he found a broken gaming machine and took it as an exhibit.

10. PW4 further testified that on 18th March, 2017 his colleagues who were on patrol were alerted of the Appellant's location. They arrested him and took him to the police station and he charged him. The complainant also identified him.

11. In his defence, the Appellant denied committing the offence stating that the evidence against him had been fabricated.

12. The Appellant's testimony was that on the date of the alleged robbery he attended a funeral between 12.15 p.m. and 5.00 p.m. He was with a friend called Antony Masha.

13. The Appellant stated that PW2 was doing his father's bidding and that is why he told lies against him.

14. The Appellant told the trial court that he had an affair with PW1 and PW3 was not happy about it. PW3 even threatened to harm him as a result of the affair.

15. The Appellant also talked of some election in which PW3 lost his position as a vice-chairman.

16. I have perused the proceedings before the trial court, the judgement of the trial court, the submissions by the Appellant in support of his appeal and the submissions by the Respondent in opposition to the appeal and I have identified the issues for the determination of this court as:

a) Whether the prosecution proved its case against the Appellant beyond reasonable doubt; and

b) What is the appropriate sentence for the Appellant in light of the decision of the Supreme Court in **Francis Karioko Muruatetu and another v Republic, Petitions No. 15 and 16 of 2015?**

17. In her judgement delivered on 30th June, 2017, the trial magistrate considered at length the evidence adduced by the prosecution, the defence raised by the Appellant and the ingredients of the offence of robbery with violence and concluded that the prosecution had proved its case beyond reasonable doubt. She convicted the Appellant and gave him the death sentence, which was at that time, the only available sentence for the offence of robbery with violence.

18. I have perused the evidence that was adduced and find consistency in the prosecution case. PW1 clearly identified the Appellant at the scene of crime. He was a person known to her prior to the robbery. PW2 rushed to the scene immediately after the crime was committed. As he was rushing to the scene he met the Appellant and two others riding a motorbike. His evidence therefore corroborated that of PW1 who had informed him that she had been robbed by three people who came on a motorbike.

19. All the prosecution witnesses confirmed that the gaming machine was damaged. The machine was produced as an exhibit in court.

20. The trial court carefully considered the defence raised by the Appellant and found it untenable. On my part, I note that the Appellant raised an alibi defence. Looking at the record it is clear that the same was raised at the defence stage thus denying the prosecution an opportunity to rebut it. It is also noted that although the Appellant named the person he was with at the time of the alleged offence, he never called him as a witness even though the trial court afforded him an opportunity to do so. I am therefore in agreement with the trial magistrate that the Appellant's alibi defence was an afterthought and did not in any way upset the prosecution evidence.

21. The Appellant's allegation of a web of conspiracy involving the prosecution witnesses and the police find no traction in light of the evidence adduced in support of the prosecution case.

22. In the circumstances of this case I therefore find the conviction sound.

23. The remaining question is the appropriate sentence to impose in this case. In light of the Supreme Court decision in **Francis Karioko Muruatetu** (supra) that the death sentence is not mandatory in capital offences and in view of the Court of Appeal decisions in **Mulamba Ali Mabanda v Republic, Criminal Appeal No. 12 of 2013 (Mombasa)** and **Sammy Konde Tuva v Republic, Criminal Appeal No. 25 of 2016 (Mombasa)**, I find that the Appellant is entitled to a sentence re-hearing in this appeal. Fortunately, the Appellant, made a detailed mitigation at the trial. He stated that he was 23 years and asked for leniency. The prosecutor indicated that the Appellant had no records and could be treated as a first offender.

24. Taking into consideration the age of the Appellant and the fact that nobody was injured during the robbery and looking at the amount of the money stolen, I am of the view that the Appellant should be given a chance to mend his ways. However, the offence of robbery with violence remains a grave offence which, may, depending on the circumstances attract the ultimate penalty of death. In the circumstances, in order to be in a position to mete an appropriate sentence, I direct the Probation Service to prepare and file a probation report on the Appellant within two weeks of the delivery of this judgement.

25. In summary, the appeal on conviction fails but that on sentence succeeds on the terms already stated.

Dated, signed and delivered at Malindi this 27th day of Sept., 2018.

W. KORIR,

JUDGE OF THE HIGH COURT