



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL CASE NO. 10 OF 2017

JAMES WAMBUA.....APPELLANTS

LUCY KAGENDO

VS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellants James Wambua and Lucy Kagendo appealed against judgment in Maua CMC CR.C No. 1924 of 2014 where they were convicted for the offence of robbery with violence contrary to section 296(2) of the penal code and sentenced to suffer death on 13th January 2017.

James Wambua's ground were that the trial Magistrate

- did not consider his defence
- did not observe that the appellant was not recognised during the commission of the offence.
- That the trial magistrate faulted in matters of law and fact by not observing that the evidence adduced by PW2 was hearsay
- That the trial magistrate faulted not observing the evidence tendered by prosecution was inconsistent and in corroborative.
- That the court should assign him legal representation as provided under Article 50(h) of the constitution of Kenya.
- That he should be issued with proceedings and judgments of the trial court
- He urged that appeal be allowed and sentence set aside and conviction quashed.

The second appellant Lucy Kagendo on the other hand relied on amended grounds of appeal and submissions attached thereto. She said that her participation in commission of offence was doubtful.

- That the trial magistrate failed to note that evidence tendered by the witnesses was hearsay.
- That the trial magistrate erred in law and fact by failing to observe the circumstances behind the alleged ordeal were not favourable for a positive identification.
- That the trial magistrate failed to consider that the exhibits produced didn't link the appellant with the alleged offence.
- That the investigation was poorly conducted.
- That the trial magistrate erred in fact and law by rejecting the appellants defence.
- That the prosecution's case was not proved beyond reasonable doubt.

Taking into account that this court has the duty of re-visiting the evidence adduced in the trial court and coming up with an independent conclusion taking into account that the trial court had the opportunity to observe the demeanour of witnesses. I wish to say that the deceased herein allegedly reported that the appellants and others at large attacked and robbed him as stated in the charge sheet.

The complainant who died 15 days later after being attacked informed PW1 that he had been attacked by appellants together with 2 others who are at large. He reported to police and recorded a statement after his report was booked in the OB.

One of the cows was positively identified at PW2's butchery/slaughter house and he gave the name of the person who sold to him and it was neither 1st nor 2nd appellant.

PW3 claimed he conducted investigation together with the Investigating Officers who could not be found to come and testify in court having

gone on transfer. He produced photographs of exhibits recovered as well as P3 form and post-mortem report as prosecution exhibits.

The prosecution opposed appeal saying the deceased left death declaration and gave names of appellants as having been part of the robbers. The deceased person was able to record a statement and only died 15 days after alleged attack. When he reported the robbery both to PW1 and to police was he of settled hopeless expectation of death so that we can say that his statement to PW1 and to police was a dying declaration?

S.33 of the Evidence Act provides for production of statements made by persons who cannot be called as witnesses. This is an exception to the hearsay rule. However in this instance the statement of the deceased was not produced for the court to confirm that indeed he recorded that he was able to identify and/or recognize the appellants herein attack and rob him. If the statement was availed, it could have been interrogated by the court to establish whether circumstances prevailing at the time of the offence were conducive to proper identification of assailants.

The appellants were arrested while the deceased was still alive but the Investigative Officer didn't testify and arresting officers didn't also testify. The court is left to speculate whether it is the deceased who led to their arrest.

PW3 said a different person sold to him the cow that was found having been slaughtered for sale by him. So a part from failure to produce the deceased person's statement which would have acted as dying declaration, there is no other evidence. Corroborating the alleged dying declaration that the deceased was attacked by the appellants among other 2 robbers.

I consequently find that evidence adduced at the trial court didn't meet the threshold of beyond all reasonable doubt. I do find the conviction was erroneous and same is quashed and sentence set aside. The appellants shall be set at liberty forthwith unless lawfully detained. Orders accordingly.

HON. A.ONG'INJO

JUDGE

JUDGMENT DELIVERED, SIGNED AND DATED THIS 27th DAY OF SEPTEMBER 2018.

In the presence of

Appellants: 1- PIP

2- PIP

HON. A.ONG'INJO

JUDGE