



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 5 OF 2017

BETWEEN

SAMSON MWORIA KINYUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence of the Learned Hon. SRM Joan Irura

delivered on 10.01.2018 in Nkubu SRM Court Criminal Case No. 664 of 2015)

J U D G M E N T

Background

1. From the record, the appellant herein was charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**, the particulars of which were that on the 6th day of April, 2013 at NITINE Village, Ukuu Location in Imenti South District within Meru County, with others not before court robbed Purity Kagwira of Cash Kshs.600/= and immediately after the time of such robbery used actual physical violence against the said PURITY KAGWIRA. The appellant denied committing the offence when he appeared for plea and thereby set the stage for full hearing.

2. At the conclusion of the hearing the appellant was found guilty as charged convicted and sentenced to suffer death as by law provided.

The Appeal

3. The appellant, being dissatisfied with both conviction and sentence filed his home grown petition of appeal on 17th January, 2018. However, on acquiring the services of counsel, M/S Muia Mwanzia & CO. Advocates filed a supplementary Petition of Appeal on 2nd March, 2018. The same is dated 14th March, 2018. It is the Supplementary Petition of Appeal that formed the basis of counsel's submissions during the hearing of the appeal. The petition raises three grounds of appeal;-

1) THAT the ingredients of the offence of robbery with violence were not proved beyond reasonable doubt by the prosecution and therefore the conviction by the trial Magistrate was unsafe.

2) THAT the trial Magistrate erred in law and fact in the manner she analysed the evidence on record and thus arrived at a wrong finding

3) The conviction was against the weight of evidence tendered and therefore erroneous.

4. It is the appellant's prayer that the appeal be allowed, conviction quashed and sentence set aside.

Submissions

5. Both counsel made oral submissions. Counsel for the appellant submitted that the learned trial Magistrate failed to properly analyse the

evidence before her and thus erroneously concluded that the ingredients of the offence of robbery with violence had been proved beyond any reasonable doubt. Counsel submitted that the evidence adduced by the prosecution was contradictory in that PW2, Haron Mugambi who was in the company of the complainant told the court he never saw the appellant attacking the complainant.

6. Secondly, Counsel submitted that the complainant was not keen on proceedings with her case against the appellant who is her cousin, for the reason that the incident that gave rise to the appellant being arrested was a simple domestic misunderstanding that escalated into a mere assault. Reliance was placed on the ***Court of Appeal decision at Nyeri (sitting in Meru), Criminal Appeal No. 57 of 2013 – Harun Mwambia Ndereba & Another – vs – Republic***. It was counsel's contention that the facts of this case do not point to a robbery with violence case, but to a lesser but cognate offence such as assault causing actual bodily harm or grievous harm.

7. Counsel for the respondent partially conceded the appeal, on the ground that during the trial, the complainant wanted to withdraw the charge against the appellant, Secondly, counsel submitted that the ingredients of the charge of robbery with violence were not proved by the prosecution.

Duty of this Court

8. As this is a first appeal, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. The court will however do well to remember, and appreciate the fact that it neither saw nor heard the witnesses who gave evidence during the trial. This being the case, the court must act with great circumspection in determining whether or not to overturn the judgment of the learned trial court. Generally see ***Okeno – vs – Republic [1973] EA 32 and Pandya – vs – R [1957]332 EA*** for the above proposition.

The Prosecution Case

9. In keeping with the above principles I will summarize the prosecution's case which is as follows;- on 6th April, 2013 at about 9.30pm, the complainant, PURITY KAGWIRIA NJERU was at her Kibera stop Down Bar with one Isaiah Mwenda and Boniface Kiambi, taking keg beer. The appellant who is a son to the complainant's aunt went to where the complainant was seated. He was accompanied by two other people, one of them being Duncan Mwirigi. Tarascio Mbagaju was also with the appellant.

10. When the appellant and his companions entered the bar, they kept switching the corridor lights on and off. The appellant then went to where the complainant was seated and hit her in the right eye. Tarascio took a plastic seat and also hit the complainant with it. At that point the complainant ran out of the bar, with the appellant and his accomplices in hot pursuit. In the process the complainant lost a tooth.

11. As the complainant escaped, she also screamed, especially when she got near to Harun Kirema's house. Harun Kirema and his wife intervened by asking the appellant to leave the complainant alone the appellant and his accomplices heeded the plea by the Kirema by going back to the bar, but not before the complainant had lost a tooth and kshs.600/=.

12. On the following day, the complainant went to Kariene Police Station and reported the incident. She was referred to Kanyakine Hospital for treatment. The complainant was later issued with a P3 form which was later filled at Meru County Referral Hospital.

13. Harun Mugambi who testified as PW2 was asleep in his house when he was woken up by the complainant's screams asking for help. On going out of his house, he saw two young men namely Mwirigi and Kanyeri attacking the complainant with sticks. According to PW2 (Harun) the appellant was not at the scene. Harun rescued the complainant and escorted her home. He also advised the complainant to report the matter to the police. On the following day, Harun went and reported the incident to Kariene Police Station. He told the court he had no grudge with the appellant.

14. Boniface Kiambi testified as PW3 and recalled that at about 9.30pm on 6th April, 2013, he was in the company of the complainant at Kibera area at shop down club enjoying some drinks when the appellant, and his two friends arrived at the club and started attacking the complainant. Mworio hit the complainant, by hitting her with a plastic seat on the mouth and on the eye. Kamunde one of the appellant's friends hit the complainant with his palm. He also hit her on the face as a result of which the complainant ran off as she feared for her life. Boniface too ran away for his life. When the day broke, he met the complainant who informed him that she had lost her kshs.600/= . He also noticed that the complainant was injured on the eye and the mouth. During cross examination, Boniface admitted he had taken some alcohol at the material time, though he claimed he was not drunk.

15. Number 52190 Police Constable Richard Shikami of Kariene Police Station received the report of the incident on 7th April, 2012. According to PC Shikami who testified as PW4, the complainant informed him she had been attacked by Duncan Mwirigi, Samson Mworio and one Kamunde. By the time of the report, the complainant had already been treated at Consolata Mission Hospital Nkubu. PC. Shikami recorded statements, took possession of exhibits and on 26th June, 2015, the appellant was arrested and charged. PC Shikami also issued a P3 form to the complainant. The form was filled at Meru Level Five Hospital.

16. Dr. Maria Mwangi of Meru Level Five Hospital testified as PW5. She produced the P3 form on behalf of Dr. Njuguna. From the P3 form the complainant had lost one of her lower incisor teeth and had a bruised and swollen right eye lid and eye. The injuries observed by Dr. Njuguna were classified as grievous harm. The P3 form was produced as PExhibit 1.

The Defence Case

17. At the close of the prosecution case, the appellant was put on his defence. He gave sworn evidence. He raised defence of alibi, saying that at the material time he was in Nyeri where he was working at Gathithi tea Factory as a driver. He also testified that when he was arrested in 2015, he was informed it was due to drunkenness. He was therefore shocked when the charge of robbery with violence was read to him.

18. During cross examination, the appellant confirmed the complainant was his aunt. He also could not produce any documents to support his claim that he was an employee of Gathithi Tea Factory in Nyeri at the time of the alleged incident.

Judgment of the learned trial court

19. After carefully analyzing the evidence on record, the learned trial magistrate reached the conclusion that the complainant had been clearly and positively identified at the scene of crime. The learned trial magistrate also made a finding that the ingredients of robbery with violence had been proved beyond any reasonable doubt and in particular that the appellant was in the company of two other people during the attack and secondly that the complainant was injured during the attack.

Analysis and Determination

20. I have now carefully reconsidered and evaluated the evidence afresh. I have also carefully considered the three grounds of appeal, the contending submissions by counsel and the applicable law. From all the above, the following issues fall for determination.

a) *Whether the appellant was properly and positively identified at the scene, or whether it is true as claimed by himself, that he was on duty in Nyeri.*

b) *Whether the ingredients of the offence of robbery with violence contrary to Section 296(2) of the Penal Code were proved?*

Whether the appellant was properly and positively identified

21. The principles on identification of assailants are now well settled. Cases such as **Wamunga- vs – Republic [1989] KLR 424 and Nzaro – vs – Republic [1991] KLR 70** are relevant in this regard. From a reading of the evidence on record, I am satisfied that the appellant was at Stop Down Bar when the incident occurred. Both the complainant and Boniface testified that there were lights at the bar when the appellant entered the bar, although the appellant and the people accompanying him kept switching the lights in the corridor on and off. Boniface Kiambi saw what the appellant and his companions did. The appellant was well known to both the complainant and Boniface and the question of mistaken identity in my considered view did not arise.

22. As to the alibi defence which placed the appellant in Nyeri, I refer to the cases of **Karanja – vs – republic [1983] KLR 501 and Wangombe – vs – Republic [1980] KLR 149**. In the **Wangombe case** (above) it was held that when an accused raised an alibi as an answer to a charge made against him, whether the alibi is raised during the prosecution case or during his unsworn statement in defence, he assumes no burden of proof and the burden of proving his guilt still remains on the prosecution, and that it is the duty of the prosecution to test the alibi wherever possible but different considerations may then arise as regards checking and testing it. All that a trial court is expected to do is to weigh the alibi against the evidence of the prosecution.

23. In this instant case, the appellant did not raise the issue of alibi until he was put on his defence, but from the Court of Appeal decision in the Wangombe case (above) the appellant was not barred from raising the alibi at the time that he did so. I am satisfied though that from the evidence on record, the appellant was at the scene when an altercation between himself and the complainant arose.

24. The major issue for determination is whether the ingredients of robbery under **Section 296(2) of the Penal Code** was proved beyond reasonable doubt. It is well to remember that the burden of proof in criminal cases never shifts to an accused, and that is why under **Section 306(1) of the CPC**, an accused is not under a duty to say anything in response to the allegations against him. If an accused feels like not saying anything at the close of the prosecution case, he can maintain his silence and leave the matter to the court for a decision based on the evidence before it.

25. What does the prosecution need to prove in this case? That the appellant was in the company of two or more persons, or that he was armed with dangerous weapons or that during the robbery he struck or threatened to strike the complainant or some other person. Speaking of the incident, the complainant testified in part: *“Samson came to where I was sitting and hit me in the eye. When he came, he hit me on the right eye. The others started assaulting other people in that bar.”* The complainant also alleged that she lost Ks.600/= and a tooth during the attack. During cross examination the complainant stated in part:- *“.....you were arrested for another theft case, and I was called. When you attacked me, you went away.”*

26. The complainant further testified that when she escaped from the bar, she ran towards the home of Harun, and that the appellant and his accomplices followed her and continued attacking her. During his testimony Harun stated that he did not see the appellant at the scene, but that two young men, Mwirigi and Kanyeri were the ones assaulting the complainant.

27. On his part, Boniface testified that after the attack he ran away as he feared for his life. It was only on the following day when he met the complainant that he learnt the complainant had lost Kshs.600/=.

28. Can one conclude from the evidence above that the appellant committed a violent robbery against the complainant? I do not think so. From the record, the complainant is a son to the complainant’s sister and though it is not explicitly stated, there seems to have been some unexplained family misunderstanding between the two. It is on record that he complainant it did not even want to proceed with the case against the appellant. I therefore find that if the trial court had holistically considered the evidence on record, she would have found the appellant guilty of the lesser but cognate offence of grievous harm or perhaps assault instead of the offence of violent robbery. The record shows that the incident was quite protracted and it involved other people who assaulted the complainant.

29. In my considered view therefore, the charge of robbery contrary to **Section 296(2)** of the Penal Code cannot stand. I therefore quash the conviction for robbery with violence and set aside the sentence of death. In their place, and because the complainant lost a tooth, I substitute

a conviction for grievous harm contrary to **Section 234 of the Penal Code**.

30. The appellant is accordingly sentenced to seven (7) years imprisonment with effect from 10th January, 2018. Right of appeal within 14 days.

It is so ordered.

Judgment written and signed at Kakamega

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned at Meru this 25th day of September, 2018

ALFRED MABEYA

JUDGE