



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 31 OF 2017

FRANCIS MAINA KAGWE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from conviction and sentence in Mukurueini Chief Magistrate's Court Criminal Case No.196 of 2016 delivered by V.O. Chianda Senior Resident magistrate on 7th June 2017.

JUDGEMENT

1 **Francis Maina Kagwe** the Appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars being that the Appellant with two others on 15th May 2016 jointly robbed Simon Gachanja Kimotho of various items valued at Kshs 10,400/-. That at the time of such robbery they wounded the said Simon Gachanja Kimotho who later died on 13th June 2016.

2 After a full hearing the Appellant was convicted and sentenced to death while his co-accused were acquitted under section 215 Criminal Procedure Code.

3 The Appellant being aggrieved with the judgment filed this appeal citing the following grounds:

(i) That the pundit magistrate erred in law in affirming conviction and sentence by failing to hold that the production of the complainant's statement was contrary to section 35 of Evidence Act, Cap 80(preliminary)

(ii) That the learned magistrate erred in law in failing to find that the prosecution witnesses PW2, PW3 and PW4 evidence was hearsay contrary to section 63 of the Evidence Act and further the implication of co-accused was contrary to section 25A(1) and (2) of the Evidence Act (Cap 80 Laws of Kenya).

(iii) That the learned magistrate erred in law and facts in failing to observe that the alleged exhibit was not found in his possession.

(iv) That the trial magistrate fell into error in failing to consider his believable defence that displaced the liability of the prosecution's case.

4 A summary of the prosecution case is that on 15th May 2016 10 p.m. PW2 **Peter Muguna Mugwe** was leaving Gakindu shopping centre for home when he met Martin Gitonga (2nd accused). They then found the deceased lying by the roadside while only wearing under pants. He complained of having been attacked by Maina Kagwe (Appellant) with two (2) others. He had been robbed of his suit, shoes and phone. He requested and they carried him to his house.

5 PW1 **Virginia Gathoni Gachanja** the wife of the deceased testified that on 13th May 2016 12.00 p.m she was at home when one Njuguna Gitonga brought the deceased home. The deceased was wearing a shirt and underpants. He told her he had been assaulted and he went to bed. He also told her he had been robbed by Maina and others of his torch, shoes and Kshs 200/- cash.

6 The next day he sent her to buy him pain killers because of the pain in the chest. He was taken to hospital on 17th May 2016 and was treated and even he seemed to have recovered. However two weeks later he was admitted to hospital and he died on 13th June 2016. She identified the Appellant as the Maina the deceased had mentioned as one of those who had robbed him. She confirmed recording her statement on 17th June 2017.

7 PW4 **Moses Wahome** of community policing stated that on 17th May 2016 while at Gakindu trading centre the deceased had reported to him that he had been assaulted the previous night. He gave him the Appellant's name as one of the attackers. The Appellant was arrested by a mob and almost lynched following the deceased's death. The Appellant then mentioned his accomplices. PW5 **David Mwangi Kiu**, PW6

Michael Muchiri Kairu, PW7 **Anthony Maina Githaiga**, PW8 **Patrick Githinji** and PW9 **David Mwanga Mugambi** all testified on how the Appellant had been arrested by members of the public who had wanted to lynch him.

8 PW10 **Paul Kamathi** produced a P3 form (EXB1) and treatment notes (EXB2) showing the injuries suffered by the deceased. He further produced the post mortem report (EXB 3) which confirmed the cause of death as blunt trauma to the head.

9 PW11 **No 72342 PC Gasambe Hamisi** the investigating officer confirmed receiving a robbery report from the deceased who had mentioned the Appellant as one of the attackers. Upon the arrest of the Appellant and others a search was done but nothing was recovered. He recorded a statement from the deceased under section 33 of the Evidence Act before he died. He produced the said statement as an exhibit. PW5 and PW11 testified that the deceased's clothes were recovered near the Appellant's place of work near the slaughter house.

10 In his sworn defence the Appellant denied the charges. He said he was arrested by a mob who accused him for assaulting and robbing the deceased. The mob had wanted to lynch him together with his co accused.

11 When the appeal came for hearing Mr. Gori who had filed written submissions on behalf of the Appellant submitted on several issues. He raised issue with the identification. He submitted that the conditions were not favourable for a positive identification. That the complainant is deceased and he did not explain how he identified the Appellant.

12 Further he contended that none of the ingredients of robbery with violence had been proved and nothing had been recovered from him. He referred to the last page of the judgment where the court said "**stolen clothes were recovered at his work place.**" It was his submission that there was no evidence to support that statement. He relied on the cases of **Wanjihia Mwai v R [2016]eKLR, Titus Wambua v R [2016] eKLR and David Mugo v Kimunge v R[2015] eKLR.**

13 He argued that PW1-PW4 had all given different dates of the occurrence of the robbery. He wondered whether the deceased's statement amounted to a dying declaration. He was quick to add that the complainant died 30 days after the incident.

14 Counsel submitted that the Appellant's defence of alibi had not been considered by the learned trial Magistrate. He contended that even though the alibi defence was raised for the first time in the defence, the court still had a duty to weigh it alongside the other evidence. For this he relied on the case of **David Kyalo Justice v R [2013]eKLR; Wangombe v R [1976-80] 12KLR 1683; and Victor Mwendwa Mulinge v R [2014] eKLR**

15 Mr Njue for the State conceded the Appeal for the following reasons.

- The Appellant was convicted on the basis of a dying declaration. Section 33 of the Evidence Act is clear.
- The recognition was at night and there was no evidence on the lighting conditions.
- Recovery of recently stolen property. There was no indication of actual or constructive possession of the items by the Appellant.
- No admission was taken in conformity with the Law on the taking of confessions.

16 This is being a first appeal, this court has a duty to reconsider and re evaluate the evidence on record and arrive at its own conclusion. The court has to bear in mind that it did not see or hear the witnesses and must give an allowance for that. The Court of Appeal in the case of **Mwangi v R [2004] 2KLR 28** stated this in respect of this duty:

“ An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate courts' own decision on the evidence.

The first appellate court must itself weight the conflicting evidence and draw its own conclusions.

It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witness.”

17 I have considered the evidence by the witnesses the grounds of appeal; the submissions by both counsel and the cited authorities. I proceed to analyse the evidence. The charge sheet in the particulars shows that the incident occurred on 15th May 2016. The dates given by the witnesses are as follows:

PW1-13th May 2016

PW2-15th May 2016

PW4-16th May 2016

PW10-15th May 2016

18 There is therefore a disparity in the dates.

It is clear from the evidence on record that there was no eye witness to this incident. It is therefore the evidence of the complainant that was relied on by the Court to form the basis of the conviction. Each of the witnesses PW1, PW2, PW4, PW11 referred the court to what the complainant told them. It is not in dispute that the complainant died on 13th June 2016 a month after the alleged incident.

19 The incident occurred at night as the complainant left Gakindu shopping centre. It is not known how the complainant was able to identify and recognize the Appellant let alone anybody else. When identification is said to have been at night the court is called upon to carefully examine the evidence before wholly relying on it to convict an accused person. See **Wamunga v Republic 1989 KLR 424; Osiwa v R 1989 KLR 469**. PW2 who found the complainant lying by the road side did not explain how the environment at the scene was. There is no indication of there being any form of light anywhere at or near the scene.

20 PW5 the community policing man and PW11 the investigating officer seemed to suggest that there was evidence of recovery of the complainant's suit. First of all the alleged suit was never availed to court for identification and so was never produced as an exhibit. Secondly, even if it had been produced there was no evidence to show that the Appellant was in exclusive control of the place where it was allegedly recovered from.

21 A mysterious person had allegedly seen the Appellant hiding it there. I call the person mysterious because he/she was never called to testify. In brief the considerations to be met when proving a case of recent possession as set out in the case of **Arum v R [2006] 1KLR 233** were not established.

22 The witnesses in particular PW4-PW8 testified how the Appellant had admitted having committed the offence and even named his accomplices. There was no formal confession recorded from the Appellant in conformity with the procedure under the Evidence Act.

23 Their evidence on this "admission" could not therefore be used against the Appellant. PW2 said he was the one who found the complainant and even took him home. PW1 testified that the person who took the complainant home was one Njuguna Gitonga. PW2 gave his names as Peter Muguna Mugure. So who exactly found the complaint on the road side and took him to his home?

24 I finally wish to deal with the statement of the complainant produced by the investigating officer (PW11). The incident the subject of this case allegedly occurred on 15th May 2016 and the complainant died on 13th June 2016. The statement produced herein was recorded on 17th May 2016. PW11 produced the said statement under section 33 of the Evidence Act. The said section provides:

"Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

(a) relating to cause of death

when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made,

under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;"

25 There is however nothing on record showing that the prosecution made any application to have the statement of the complainant produced as exhibit. It is therefore not clear under what circumstances PW11 was producing the statement without any application being made by the prosecution

26 The circumstances under which a statement is produced under section 33 of the Evidence Act are clearly set out under that section. That is why it was important for the prosecution to apply and state what it wanted the statement to prove. If it was to prove death, the Appellant had not been charged with murder.

27 As stated above no such application had been made. The learned trial magistrate wholly relied on what the witnesses had been allegedly told by the complainant a month before he died. PW11 simply relied on that to have the Appellant charged. He never carried out any investigations to support what the deceased allegedly said.

28 He never visited the scene to satisfy himself of the conditions for a positive identification. He did not recover the suit and have it identified and even link it to the Appellant.

29 All in all I am satisfied that the trial court erred on wholly relying on the unsupported evidence of PW1, PW3 and PW4. If indeed the Appellant had admitted the offence and even named others PW11 should have taken him to a qualified officer for the purpose of recording a confession. He never did so!

30 The State has considered all these shortfalls and conceded the Appeal.

31 In conclusion I find that the Appeal has merit and I allow it. The conviction is quashed and sentence set aside.

Orders accordingly.

Dated, signed and delivered this 27th day of November 2018 in open court at Nyeri.

HEDWIG I. ONG'UDI

JUDGE