



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO.74 OF 2017

(From CM's Bungoma Cr.No.505 of 2014 by: Hon. E.N. Mwenda (SRM))

FRED NYONGESA WEKESA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

Fred Nyongesa Wekesa, the appellant, was charged with the offence of Robbery with Violence Contrary to Section 296(2) of the Penal Code.

The particulars of the charge are that the appellant on 5/3/2014 at Lunau Area in Bumula District, Bungoma District, with others not before court while armed with dangerous weapons, i.e. pangas robbed Denis Wamalwa Mitabo of a television set Samsung, one laptop HP; 2 pairs of safari boots, one pair of open shoes, one flash disk Sony 16GB, two mobile phones make Nokia Lumia and Nokia 110, cash money Kshs.11,200/=, assorted clothes all worth Kshs.126,400/= and at the time of the said robbery, used actual violence on the said Dennis Wamalwa.

In the 2nd count, he faced a charge of attempted robbery with violence Contrary to Section 297(2) of the Penal Code.

The particulars of that charge are that on 5/3/2014 at Lunau Area of Bumula District, jointly with others not before the court, while armed with pangas and rungus attempted to rob Daniel Simiyu Wanyama of his motorcycle Reg.No.KMDD 460V make Bajaj Boxer worth Kshs.85,000/= and immediately before the time of the said attempt, wounded the said Daniel Simiyu.

In Count III the appellant also faced a Charge of robbery with violence Contrary to Section 295 as read with Section 296(2) of the PC. He is alleged to have robbed Martin Wabwile of several goods as per the Charge sheet.

The appellant was found guilty on both counts, and sentenced to death on the 1st count while sentence on 2 was held in abeyance.

I wish to point out that the trial court, omitted to Consider Count III and did not make my findings on it.

The appellant was aggrieved by both convictions and sentence and filed this appeal challenging them.

Were & Co. Advocates filed a memorandum of appeal citing 20 grounds of appeal. Mr. Were summed up the grounds as follows:

On ground 1:

Counsel submitted that the elements of the offence of robbery with violence were not proved; – that there was no theft, or that the appellant participated or that violence was meted on the complainant or that the appellant was armed.

He argued grounds 2, 3, 4 & 5 together:

Counsel submitted that the court erred in convicting the appellant based on the uncorroborated evidence of the complainant; that no evidence was adduced to prove that the complainant owned the properties listed in the charge sheet; that the court erred in making a finding that PW6 had gone to PW1's house and found it broken into because PW6 never said that he went to PW1's house.

Grounds 6, 7, 8, 9, 10, 11 & 18 were urged together:

They touch on the question of identification. Counsel submitted that the complainant could not have identified anybody due to the prevailing circumstances because PW1 did not allude to how much light the television was producing and there was probability of mistaken identity.

Ground 13:

Counsel submitted that though the court listed 3 issues, it dealt with only one.

As respects **ground 14**; counsel urged that though the P3 form was marked. It was never produced as an exhibit.

On **ground 15**; counsel urged that the Court erred when it cast aspersions on the evidence of DW2 because she was the wife of the appellant yet it believed the evidence of the PW3 wife to PW2.

It was also submitted that crucial witnesses who included the neighbours that intervened when PW2 was being robbed were never called.

Lastly, it was the counsel's contention that the offence was not proved to the required standard and urged this court to allow the appeal.

Ms. Njeru, counsel for the State opposed the appeal when she stated that PW1 was attacked by 3 men who were armed with pangas and rungus. He was injured on the head as they demanded money which PW1 gave them; that PW1 recognized the appellant whom he knew before.

As for PW3, the wife to PW2, she saw a spotlight outside the door. PW1 hid behind the door and hit one of the robbers as they entered but they overpowered him, and inflicted a deep cut on him; that PW3 corroborated PW2's evidence; that using the spotlight, she recognized the appellant as a person they grew up with; that PW4 too was attacked and lost money; that PW6 confirmed that there was a series of attacks within short intervals of the same night; that PW2 mentioned the name of the appellant to PW6 who tried to trace the appellant in the houses of his three wives but did not get him; that the defence was considered in detail but did not dislodge the prosecution case; that the defence of alibi was considered; that theft was proved and attackers were placed at the scene of crime.

In a rejoinder, Mr. Were submitted that PW2 was under attack, was hit with a stone on the head, used a table to protect himself and was armed with an iron bar and therefore could not be in a position to identify anybody. As for PW3, counsel submitted that she never said that she identified the attackers.

This being the first appeal, this court has the duty to re-examine all the evidence tendered before the trial court, analyze it and draw its own conclusions but bear in mind that it did not have the opportunity to see the witnesses to be able to assess their demeanor. See **Okeno v Republic (1972) EA 32.**

The prosecution called a total of six witnesses in support of their case.

Dennis Wamalwa Mitabo (PW1) is the complainant in Count 1. He testified that he was asleep in his house at Lunau village in Bungoma when about 1.45 a.m. he heard a bang on the door, got up and found 3 men in his house, which is behind a shop. The people were armed with pangas and rungus and they ordered him to lie down. He complied; they demanded to know where he keeps money and he gave them a wallet with Kshs.11,200/= cash; they ransacked the house and carried away the items named in the charge sheet. They left and warned him not to raise alarm. He got up after they left, went out and found his neighbor Martin (PW4) complaining that he too had been robbed.

Later, police came to the scene and he told them that he had identified Fred – the appellant and next morning he found police interrogating the appellant and identified him. He said that he knew the appellant because he used to graze donkey around their estate. PW1 said he used the TV light to identify the appellant.

PW2 Daniel Simiyu the complainant in count II; a motor cycle cyclist (boda boda operator) was asleep in his house about 11.00 p.m. with the wife, Emily Nasimiyu (PW3). She woke him up and informed him that there were people outside. He saw a flashlight. He grabbed a metal bar went to the sitting room and the door was forcefully opened and one person entered. PW1 hit the 2nd person on the head and he fell. The person got up and ran. The others ran off but the one inside the house hit him on the right shoulder with a metal; that the person called himself a police officer and called the others to come back, overpowered him, hit him on the head and he got confused as they tried to take away the motor cycle. He shielded himself using a table and it is just then that a neighbor came and he told him that he was able to identify Fred Nyongesa Wekesa.

Police were called to the scene and they went in search of Fred Nyongesa Wekesa but did not trace him at his second wife's house. PW2 said he saw the appellant using a flashlight.

PW3 Emily Simiyu corroborated PW2's evidence. About 11.00 p.m. she saw flashlights outside, woke up PW2; that PW2 armed himself with a metal bar and went to the sitting room. PW3 watched from the door as PW2 struggled with the attackers; that one of the intruders stood on the table and ordered PW2 to lie down or he would shoot; then PW2 took a small table to shield himself with; that neighbours came and the robbers ran off.

PW4 Martin Wabwile, a shop keeper in Bumula was awoken up by people's footsteps outside his house; there was a bang on the door and people entered his house; the people had spotlights which they shone on his face. He was ordered to lie down. The persons were armed with pangas. One demanded money from the wife and she gave them shop goods i.e. sugar, 2 bales of wheat flour, Techno phone. After they left, he ran to the neighbor's house and found that his door had also been broken too. He did not identify any of the robbers.

PW5 Belinda Kiprop of Bumula Dispensary examined PW3 on 8/3/2014. She found PW3 to have been injured on the forehead and shoulder.

PW6 Patrick Njeru of Bumula Police Station received a call from Julius Muthingi complaining of a spate of robberies at Lunau Area of Bungoma. He proceeded to the scene with 2 other officers, found PW1 who complained of an attack by a gang and had lost property. PW1 stated that he could identify the robbers; that PW2 also complained of attempted robbery and confirmed that the door to his house had been broken and that he could identify some of the robbers; that PW2 mentioned one of the robbers as Fred Nyongesa. He went to the appellant's house and was informed that he has 3 wives. PW6 went in search of the appellant in the 1st and 2nd wife's houses but did not get him.

When called upon to enter his defence, the appellant (DW1) stated on oath that he left for home at 6.00 p.m. on 4/3/2014, i.e. for Emily's house and next day, went to his wife Janet Wekesa's house, who told him that he was wanted at Bumula Police Post. He went there and was arrested; that a search at his house produced nothing.

Emily Akhaenyi (DW2), testified that she is a wife to the appellant; that on 5/3/2014, the appellant went to her house, they ate and slept and next day, he went to the co-wife's house.

The first charge that the appellant faces is robbery with violence Contrary to Section 296(2) of the Penal Code. To prove a charge of robbery with violence, the prosecution has to prove beyond reasonable doubt, any one of the following ingredients:

a. The offender was armed with a dangerous and offensive weapon or instrument; or

b. The offender is in company with one or more person or persons; or

c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence on any person..... (See Oluoch v Republic (1985) KLR.)

The Court of Appeal stated that proof of any of the above ingredients is sufficient to establish the offence of robbery with violence.

All the three complainants (PW1, 2 & 4) said that they were accosted by three men and that satisfies the second ingredient.

According to PW1, the robbers were armed with pangas and rungas. PW2 said he was hit with a stone while PW4 said one of the robbers had a panga. That evidence satisfies the first ingredient, that the robbers were armed with dangerous weapons. Both PW1 and 2 were injured. PW2 who got more injuries sought medical attention. I am satisfied that the 3rd ingredient was also satisfied. An offence of robbery with violence was committed.

The offences were committed in the night. This case therefore, turns on the question of identification. I will consider the evidence of each complainant on the question of identification.

In his testimony, no question was put to PW1 regarding the lighting in his house on the fateful night. It is in cross examination that he replied that he used the Television light to identify the appellant. Where a case depends entirely or to a great extent on the identification of an accused, the courts have held over and over again that the court must warn itself of the need for caution before convicting the accused based on such evidence. The case of **Republic –vs- Turnbull & Others (1973) 3 ALL ER 549** gave guidelines on what the court needs to consider in such circumstances.

Lord Widgery CJ said:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

In the instant case, PW1 did not tell the court about the intensity of the light from the Television; where the Television was positioned in relation to the intruders; the incident was at 1.45 a.m. when PW1 was asleep, so had the Television been left on or at what stage did he switch on the Television. These questions remain unanswered and in my considered view, the circumstances that prevailed in PW1's house did not afford favourable conditions for positive identification of the appellant and there would have been need for corroboration of this evidence.

As regards the 2nd complainant Daniel (PW2); he was asleep when he was attacked about 11.00 p.m. On being woken up by the wife and informed that there were people outside, he got hold of an iron bar. He hit the 2nd person to enter his house, who fell, got up and ran but one person remained and stood on the table, hit PW2 on the right shoulder and PW2 blocked another blow with the metal bar. He was then hit with a stone on the forehead and got confused and was overpowered.

He then took a table with which he tried to shield himself. From the above narration, once the people entered the house, there was so much activity going on. PW2 however said that he told the village elder who came there that he had identified Fred Nyongesa whom he had known from childhood. He said that he used a flash light to see the appellant?

However, PW2 never explained at what stage he used the torch to see the appellant. Was it when they first entered when he was holding a metal bar? if so, how powerful was the torch and how long did he flash the torch at the appellant?

PW3 who was in the same house with PW2 also said she saw the appellant but never told the court how she managed to see the appellant. In the case of "***Roria v Republic (1967) EA 583 (P584)***", the court in considering identification under unfavourable conditions said:

"A conviction resting entirely on identity invariably causes a degree of uneasiness as LORD GARDNER L.C. said recently in the House of Lords in the course of debate on S.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts.

"There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten - if there are as many as ten - it is in a question of identity."

The danger of course is greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on the identification should never be upheld, it is the duty of this court to satisfy itself that in all circumstances, it is safe to act on such identification.

In ***Maitanyi v Republic (1986) KLR 198***, the Court of Appeal held that in such difficult circumstances of identification, the court has to conduct an enquiry to ascertain the nature of the light available, the size of the light, its position and relativity to the suspect which are important factors in testing the evidence of visual identification.

In Kiarie Vs Republic the Court of Appeal made it clear that before a conviction can be entered against an accused person based on visual identification, evidence must be watertight as it is possible for even an honest witness to make a mistake. Generally, in such cases, based on identification, the law is long settled that there is need for the court to exercise extra care before convicting an accused on evidence of single identifying witness. In this case, PW3 did not tell the court how she was able to see the appellant. On the other hand, PW2 did not explain at what stage he had a flash light that enabled him see the appellant amidst all the activity he narrated to the court. In my view, the circumstances were not favourable for according a positive identification of an intruder.

The prosecution never lead evidence on identification. In my view, the court erred in finding that PW1 identified the appellant on the strength of the light from a television or that PW3 corroborated PW2's evidence because PW3 did not tell the court how she managed to see and recognize the appellant at night. PW3 never said that there was any light from a torch. In the end, I find that PW1, 2 & 3's purported identification of the appellant was not watertight.

PW1 & 4 testified to having lost several items from their houses. However, the prosecution never led any evidence to prove that indeed any theft took place from PW1's house in such evidence would be in the form of production of receipts or any other evidence.

PW1 & 2 told the court that they were injured. Indeed PW2 was treated for injuries he sustained. There may have been a robbery committed where the complaints were injured but as to who actually committed the robbery is still in doubt. This is a criminal case where the burden of proof rests on the prosecution to prove beyond reasonable doubt. If there is a scintilla of doubt in the case, that doubt should be resolved in favour of the appellant.

In the end, I find that the conviction is unsafe. I quash it and set aside the sentence. The appellant is set at liberty forthwith unless otherwise lawfully held.

Signed and Dated at Bungoma this 23rd day of November, 2018.

R.P.V. Wendoh

JUDGE

Coram:

Court Assistant: Gladys

Court Prosecutor: Mr. Akello

Appellant: Present