



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 39 OF 2017

BETWEEN

BONIFACE MURIITHI WAMBUL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both conviction and sentence by Hon. B. M. Ekhubi, SRM

in Othaya PMC Cr.case number 926 of 2016 delivered on 4.7.2017)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

1. The appellant herein, Boniface Muriithi Wambui was charged with two counts of attempted robbery contrary to section 297(2) of the Penal Code. In count I, it was alleged that on the 8th day of October, 2016 at around 23.30hours at Kairuthi Village Othaya within Nyeri County, together with another not before court, the appellant attempted to rob Adolf Gitonga Gichuhi and immediately before the said attempt, used actual violence to the said ADOLF GITONGA GICHUHI.

2. In count II, it was alleged that on the 8th October, 2016 at around 23.30hours at Kairuthi village Othaya within Nyeri County, jointly with another not before court, attempted to rob JOHN GICHUHI GITONGA and immediately before the said attempt, used actual violence to JOHN GICHUHI GITONGA.

3. The appellant pleaded not guilty to the charges. During the pendency of the case, the complainant in Count II died, so the case against the appellant in respect of that count abated.

4. The prosecution called 7 witnesses. PW1 was ADOLF GITONGA GICHUI, (Adolf) the complainant in count I. Elizabeth Wanjiru (Elizabeth) grandmother to Adolf testified as PW2. Number 2011331958 APC Japheth Mwenda (APC Mwenda) testified as PW3, while John Migwi Karanja (John) was PW4. Peter Kihara Mwai (Peter) and number 69536 PC Lucas Mbuke Wachira (PC Wachira) testified as PW5 and PW6 respectively. The last of the prosecution witnesses was Ian Ngumo (Ian), a clinical officer based at Othaya Sub-county Hospital who testified as PW7.

5. The appellant was the only witness for the defence after he was put on his defence.

Judgment of the Trial Court

6. After carefully considering the evidence on record, the written submissions, and the law, The Learned Trial Magistrate was satisfied that the prosecution had proved its case against the appellant to the required standard by well corroborated and cogent evidence. The appellant was accordingly found guilty as charged convicted and sentenced to suffer death as by law provided.

The Appeal

7. Being aggrieved by both conviction and sentence, the appellant filed this appeal in person on the following grounds:-

i. That the trial magistrate erred in both law and fact [in] convicting the appellant herein in reliance that I was the alleged suspect who attempted the alleged robbery without considering that no first report was put in to record with my description.

ii. That the trial magistrate erred in both law and fact in basing my conviction in reliance with the adduced evidence as the cap that was said to have belonged to I the appellant which same was nowhere in the record of the first report.

iii. That the magistrate further lost direction in becoming influenced with my mode of arrest without considering that the same was left into doubt since no sufficient evidence was given by the prosecution side and by that why it took 2 months without I being arrested if I really attempted the said robbery.

iv That the magistrate further lost direction while becoming influenced by the accused evidence of the same prosecution side and he rejected my sworn defence without considering that the same was not displaced by the prosecution side as per section 212 of the CPC Cap 75 Laws of Kenya.

8. It is the appellant's prayer that his appeal be allowed in its totality.

The Prosecution Case

9. From the testimonies of the 7 prosecution witnesses, the prosecution case is as follows:- On 8th October 2016, at about 5.00pm, Adolf, his father John Gichuhi Gitonga (now deceased) and his uncle left for a drink at Kairuthi Shopping Centre in Othaya. Adolf had just come home from Nakuru where he worked. While Adolf's father and uncle took beer, he himself did not take any beer. At about 11.00pm, the trio hired a motor bike to take them home. They all alighted from the motor bike some distance from the home and started walking the rest of the distance, and as they walked they saw a group of about 6 people leaning on the live cypress fence near the home. Among the 6 people were the appellant and one Samuel Mwangi. The two were well known to Adolf since they were neighbours and for that reason, Adolf requested Samuel Mwangi to assist him (Adolf) in carrying the uncle who was too drunk to walk. The appellant who had also come quite close to where Adolf was, was armed with a panga. However, Samuel Mwangi did not offer the help asked for by Adolf because Adolf's father asked Samuel Mwangi to leave them alone. Adolf's father referred to Samuel Mwangi by the nickname 'Kinoos' when he asked to be left alone.

10. No sooner had they started walking again than Samuel Mwangi got hold of Adolf's left wrist as he also slapped Adolf's father bringing him to the ground. When Adolf went to assist his father the appellant attached him by cutting him on the head using a panga. Adolf got up and started running for dear life, as he also screamed for help by calling John, "Miigwi, Miigwi". Adolf ran into the compound through the gate which was open and into the house, but when he saw the appellant and Samuel Mwangi pursuing him, he decided to run out past his uncle's house and to Elizabeth's house. He then hid himself in a store.

11. John responded to Adolf's screams and once he came out of the house, he confronted the appellant demanding to know what was happening. Elizabeth also came out of the house to find out what was happening. Adolf, Elizabeth and John all testified that they saw both Samuel Mwangi and the appellant in the homestead during the attack. Peter also testified that when he heard Adolf screaming for help, he got out of the house and saw both Samuel Mwangi and the appellant at the scene. All the witnesses testified that there was enough light from electric bulbs in the compound which enabled them to clearly and positively recognize the appellant who was a close neighbour.

12. PC Wachira received the report of the attack from Adolf and thereafter carried out investigations. He was able to establish that the appellant and his accomplice Samuel Mwangi were seen at the crime scene by all the witnesses who testified. According to John, the appellant and Samuel Mwangi were both armed with sticks and further that in their bid to escape, the appellant dropped a red hat while Samuel Mwangi dropped a sports shoe which were produced as Pexhibits 2 and 3 respectively.

13. PC Wachira also testified that he issued a P3 form to Adolf. Adolf was treated by Ian, a clinical officer based at Othaya sub-county hospital on 9th October, 2016 vide OP No. 25448/2016. According to Ian, Adolf had a deep cut wound on the forehead. The degree of injury was assessed as harm. The probable type of weapon which inflicted the injury was a blunt object. The P3 form for Adolf was produced as Pexhibit 1.

14. On 31st October, 2016 at about 6.00pm, the complainant went to Kairuthi Police Patrol Base and reported to APC Mwenda that he (Adolf) had spotted the appellant herein. Together with Adolf, APC Mwenda proceeded to Kairuthi shopping Centre and arrested the appellant after being identified by Adolf. APC Mwenda thereafter escorted the appellant to Othaya Police Station since the report had already been made to that police station on 8th October, 2016.

The Defence Case

15. At the close of the prosecution case, the appellant was placed on his defence. He elected to give sworn evidence and offered an alibi defence. He stated that for the whole of 8th October, 2016 he was at work in the Aberdare Forest and that he only went to Kairuthi Shopping Centre at about 4.00pm on 9th October, 2016. That as he walked home from the shopping Centre on 9th October, 2016, he heard someone calling him by name and when he looked, he saw John Gichuhi Gitonga, who was drunk. John Gichuhi Gitonga then demanded 20,000/- from the appellant. The money had allegedly been lent to the appellant's mother. The appellant dismissed the request and left but on 31st October, 2016 while he was at Kairuthi Shopping Centre, he was arrested after the deceased John Gichuhi Gitonga identified him to the police. That even after the arrest John Gichui Gitonga kept asking him for Kshs.20,000/=-. The appellant confirmed during cross-examination that he had no grudge with Adolf.

Duty of this Court

16. Since this is a first appeal, this court is under a duty to reconsider the evidence afresh with a view to reaching its own conclusions in the matter. In exercising this appellate jurisdiction, this court has to remember that it has no opportunity of seeing and hearing the witnesses who gave evidence during the trial, and to make an allowance for this fact. This court has also to remember that it is not a small matter setting aside judgment of a trial court which has had the singular privilege of seeing and hearing witnesses and unless it is clear to the appellate court that the trial court misapprehended the evidence and the law, then the judgment of the trial court must remain intact. This is an onerous duty hence the need for caution. On the above proposition, generally see *Gabriel Njoroge versus Republic [1982-88] I KAR* where the Court of Appeal stated, inter alia:-

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as well as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inference and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see *Pandya versus R [1957] EA 336, Ruwala versus R [1957] EA 570.*”

17. What the above statement by the Court of Appeal means is that this court must closely and carefully analyze the evidence on record, consider the law, the judgment of the learned trial court, the petition of appeal, the submissions and the law before reaching its own conclusions in this matter.

Submissions

18. This appeal proceeded by way of oral submissions. Mr. Muchiri was Gathoni for the appellant attacked the learned trial court’s judgment on grounds:-

- a. That no evidence was adduced by the prosecution to show that the appellant attempted to rob the two complainants.
- b. That the medical findings on the injury suffered by Adolf does not support the allegation that the injury was inflicted by a panga which is a sharp object as opposed to the alleged blunt object which, according to Ian, caused the injury.
- c. That there are numerous contradictions in the evidence on record; whether the appellant was armed with a panga or a stick, whether the P3 form produced in this case was truly meant for this case or for another case; whether the assailants attacked Adolf’s father or whether they pursued Adolf among other contradictions.
- d. That the evidence on record does not in fact pin the appellant to the scene of crime.

19. In response, prosecution counsel Miss Jebet opposed the appeal on grounds that the case against the appellant was supported by watertight and cogent evidence which was not shaken by the minor contradictions noted in the evidence. Counsel also submitted that the appellant and one Samuel Mwangi were both seen and recognized at the scene and that they were both armed with the appellant having been seen carrying a panga which he used to cut Adolf on the head. While Samuel Mwangi was armed with a stick. Counsel also submitted that the offence of attempted robbery was proved beyond doubt and that the appellant and his accomplice had the intention of stealing money from Adolf. Finally, prosecution counsel submitted that the appellant’s alibi defence was no defence at all and that it did not shake the prosecution’s case against him.

Issues, Analysis and Determination

20. From an analysis of the evidence I have set out above, the issues that arise for determination are:-

- a. Whether the appellant was properly and positively placed at the scene, and if so,
- b. Whether the offence of attempted robbery was proved.

21. The question of identification of the appellant in this case is critical because the alleged offence took place around 11.30pm against a backdrop that Adolf, his father and his uncle, although Adolf exonerated himself from being drunk when he said that it was only his father and his uncle who had taken beer, to such an extent that the uncle could hardly walk by himself. It was alleged by Adolf and Peter that the appellant was well known to the witnesses, first because he was a neighbor and because he had attended Konyu Primary School together with Peter.

22. In cases such as *Wamunga versus Republic [1989] KLR 424* and *Maitanyi versus Republic [1986] KLR 198*, the courts have emphasized the need for caution when considering evidence of identification of a suspect under difficult circumstances, although the courts have also held that the recognition of an assailant is usually much more satisfactory, more assuring and more reliable than the identification of a stranger. The reasons for such distinction between identifying a stranger and recognizing a relative, friend or neighbor is that the recognition is based on some personal knowledge of the assailant in some form or other.

23. I have now keenly and single-mindedly assessed the evidence on recognition as given by Adolf, Elizabeth, John and Peter all of whom speak of seeing the appellant at the scene, right from the time Adolf and his father and uncle alighted from the motorbike right up to the time the appellant was seen by Elizabeth, John and Peter inside the compound. All these witnesses were certain of one thing, that there was enough light within the compound which enabled them to clearly recognize the appellant who is a neighbour. Adolf stated in part: **“when I got in the house there was security light from the security light I could see the two pursuing me.”** Earlier in his evidence, Adolf stated,

“They came very close to us. The accused person was armed with a panga. I requested Samuel Mwangi to help us carry my uncle who was too drunk and could barely walk.”

24. For Elizabeth, she stated, **“I have electricity in my house. I have security light outside. It has sufficient lighting. They were outside my house. There was sufficient lighting. I could see one of them dressed in a pin-striped shirt.”** John testified that when he came out of his house, the security lights were on and he was able to recognize three assailants. Samuel Mwangi, the appellant and one Ndungu. He testified that the appellant was armed with a panga and wearing a red hat which fell down as the appellant fled. John also testified that he knew the appellant from their childhood days.

25. Peter also testified that when he came out of his house, he saw the appellant with the help of security light which had sufficient lighting and that Samuel Mwangi was armed with a piece of timber. He further testified that he saw the appellant pursuing Adolf and that he (Peter) was able to recognize the appellant with the help of lighting from the security lights. Peter also testified that as the appellant ran away he dropped his red hat which he (Peter) had seen the appellant wearing as he ran.

26. From all the above statements by the witnesses, I am satisfied that the appellant was at the scene. That he was armed with a panga while his closest accomplice, Samuel Mwangi was armed with a piece of timber which was also referred to as a stick.

27. The next and more difficult issue is whether the offence of attempted robbery was proved. The case of **Charles Mulandi Mbula versus Republic [2014]eKLR**, relied on by the learned trial magistrate is apt on what constitutes attempted robbery under **section 297(2) of the Penal Code**. In the case the court stated that:-

“With regard to the element of attempted robbery under section 279(2) of the Penal Code, the record supports the finding at the time of committing the offence, the appellant was armed with a club, which he used to hit the complainant on the head and shoulder, causing him serious injury. This brings the club within the meaning of ‘dangerous’ or ‘offensive’ weapon under section 297(2) of the Penal Code, and therefore the offence with which the appellant was charged, thereunder.”

28. In the other case of **Sammy Maina Karanja versus Republic [2013]eKLR** cited by the trial court, the court persuasively held that :-

“To constitute an attempted robbery, the appellant must be shown to have assaulted the complainant and specifically with the intention to steal something and that at or immediately before or immediately after the said assault he used or threatened to use violence in order either to obtain the thing intended to be stolen or to prevent or overcome resistance to its being stolen.”

29. In the present case, the medical evidence confirmed that Adolf was cut on the forehead. According to Ian, the cut wound was deep. The point of contention regarding the injury to Adolf is whether it was caused by the panga allegedly in the hand of the appellant or whether the injury was caused by a blunt object which would be the plank of wood which Samuel Mwangi was said to be carrying. Counsel for the appellant submitted that this contradiction touching on the weapon used to inflict the injury on Adolf should have been for the appellant’s benefit. I have myself examined the evidence and confirmed that Adolf was viciously injured on the head by the assailants who were both armed with dangerous or offensive weapons within the meaning of section **297(2) of the Penal Code**. Since the appellant was in the company of another who was armed with a blunt object. The commission of the offence was by both of them, and I do not think that Ian’s evidence reduces the weight of the prosecution’s case against the appellant.

30. There is evidence on record to show that the appellant and his accomplice believed Adolf who worked in Nakuru had some money on him and they wanted to have access to that money. The purpose of the attack in my considered view was to disable Adolf so that Adolf could not thwart their mission. But as it turned out, Elizabeth, John and Peter came out of their houses in good time and when they sought to know what it was the appellant and his accomplice wanted, the two fled, but not before seriously injuring Adolf on the head.

31. In view of the evidence as highlighted above, I find that the appellant’s alibi defence was of no consequence. If anything, that evidence supported the prosecution’s case against the appellant. I am satisfied that the recognition of the appellant was not mistaken. The submission by the appellant’s counsel that this case was a frame up is therefore hollow. If there was any truth in the said allegation nothing would have stopped the appellant from putting pertinent questions on the same to Elizabeth, John and Peter or even to Adolf with whom the appellant said he had no grudge.

32. As regards other contradictions in the prosecution’s case as highlighted by appellant’s counsel, I find that the same do not affect the totality of the prosecution’s case against the appellant.

33. The last issue is one of sentence. The development of jurisprudence on the issue of the death sentence for capital offences, culminated in the Supreme Case of **Francis Kariokor Muruatetu & another versus Republic [2017]eKLR** to the effect that the law providing for the death penalty as the only sentence in case of murder and other capital offence cases is unconstitutional as it deprives the courts of their discretion when it comes to sentencing. The new position is that death need not be the only sentence upon conviction of such offences.

34. The above being the position, I now make the following final orders in this appeal:-

a. The appeal on conviction is dismissed.

b. The sentence of death is quashed.

c. The appellant shall now give his mitigation before the final sentence is passed.

35. The appellant has a right of appeal to the Court of Appeal within 14 days from the date of this judgment.

36. It is so ordered.

Judgment written and signed at Kapenguria

RUTH. N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Nyeri on this 20th day of December, 2018

NGAAH JAIRUS

JUDGE

In the presence of

Nyakio for appellant

Njue for respondent

Rahab - Court assistant