



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 124 OF 2018

(FORMERLY MISC. CRIMINAL APPL. NO. 16 OF 2014)

BETWEEN

ALBERT KABITU MAUMBA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from the original conviction and sentence of Hon.D. Ogola– Ag.CM dated 5th February 2014 at the Principal Magistrate’s Court at Ogembo in Criminal Case No. 28 of 2012)

JUDGMENT

1. The appellant, **ALBERT KABITU MAUMBA**, was charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the charge were as follows:

On the 16th day of November 2012 at Ogembo township in Gucha District within Kisii County, being armed with a dangerous/offensive weapon namely wooden frame, robbed LBM mobile phone valued at Kshs. 2,000/= and cash Kshs. 950/= and immediately before the time of such robbery struck and wounded the said LBM using the said wooden frame.

2. The appellant now appeals against conviction and sentence on the basis of his written submissions and the thrust of his case is that the offence was not proved beyond reasonable doubt. He contends that he was not identified as the assailant and all the prosecution evidence was inconsistent and contradictory.

3. Learned counsel for the State concedes the appeal on the ground that the appellant was not identified as the assailant.

4. Even though the State conceded the appeal, I am still duty bound to re-appraise all the evidence independently and reach an independent conclusion as to whether I should uphold the conviction and sentence.

5. He complainant, Lydia Bocherre Maina (PW 1) testified that she was at home on the night of 16th November 2012 when she was attacked. She testified that the assailant hit her and kept hitting her until she fell. She screamed and her screams attracted neighbours. PW 1 testified that she did not see the assailant.

6. One of the people who responded to PW 1’s her screams was Ezna Nyangenyi (PW 3) who rushed and found her on the floor having been beaten. Together with other neighbours she took PW 1 to Gucha Level 4 Hospital. PW 3 testified that PW 1 told her phone was stolen and Kshs. 950.

7. A few months later in the second week of January 2013, PW 1 recalled that she the appellant one afternoon at about 4.00 p.m. He stopped her and she narrated what happened as follows:

He stopped and asked me why I was looking at him like that. He told me even people who have disagreed can be friends. When I asked him where we had differed, he told me he is the one who had attacked me two months earlier. He asked me if I had forgiven him as he came closer to me. He asked me three times. When I turned back, he asked if I was going to report him at the police station. He threatened me that if I reported him he would come back at night and finish me. I went up to the bus stage as he followed me. I told touts at the stage. He turned back towards the market. On my way to the police station, I again saw accused. I

again told the youth who caught him but left him. I went to the police station to report that I had seen the accused. I went to community policing who convinced me to go the following day. I slept in a neighbour's. The following day, his brother was arrested. Accused was also then arrested near my house as he surveyed. The phone was not recovered. When he told me it was him, I could see he was in the same clothes he had attacked me.

8. PW 3 confirmed that PW 1 later called her and told her that the person who had beaten her had asked for her forgiveness.

9. The investigating officer, Corporal Francis Kosgei (PW 4) recalled that on 6th January 2013 at about 11.00 am, the appellant was brought to the police station on the suspicion that he had attacked PW 2. He took statements and charged the appellant.

10. Wycliffe Alambo (PW 2), a Clinical Officer at Gucha Level 4 Hospital, testified that PW 1 reported to the hospital on 16th November 2012. At the time he examined her on 7th January 2013, various cuts on the head and face which had left scars as a result being stitched. He opined that the injuries were caused by a blunt object and he classified the injuries as harm.

11. In his sworn statement, the appellant denied the offence. He told the court that he used to work in Kericho and he came to visit his brother in law in Ogembo when he was arrested. He denied that he knew the complainant.

12. The offence of robbery with violence under **section 296(2)** of the **Penal Code** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see ***Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, Oluoch v Republic [1985] KLR 549*** and ***Ganzi & 2 Others v Republic [2005] 1 KLR 52***).

13. I have no doubt from the testimony of PW 1 and PW 2 that PW 1 was assaulted, injured and her mobile phone and money stolen on the material night. The facts all confirm the ingredients of robbery with violence.

14. What is in issue is whether the appellant was identified as the assailant since PW 1 was positive she did not see the assailant. What implicated him is the statement he made to PW 1 implicating himself as I have set out elsewhere in this judgment. In as much as the appellant was not identified at the *locus in quo* and was indeed a stranger to PW 1, the statements made to PW 1 by him are admissible confessions.

15. This issue of confession made by an accused to persons other than the police was dealt with by the Court of Appeal in ***Sango Mohamed Sango & Another v Republic MLD CA Criminal Appeal No. 1 of 2013 [2015] eKLR*** where it observed as follows regarding such statements;

We do not see anything in the Evidence Act as amended that prohibits an accused person **voluntarily** making a confession to a private citizen. Indeed, if the intention was to introduce a general prohibition of confessions even to private citizens as the appellant's claim, there would have been no need to retain the provision in section 26 of the Evidence Act which specifically prohibits confessions made to persons in authority.

Peter Murphy, in his book, ***A Practical Approach to Evidence, Blackstone Press, 2nd Edition, 1985***, page 201, states as follows regarding confessions:

A confession, like any other admission, may be made orally, in writing, by conduct or in any way from which a proper inference may be drawn adverse to the maker. Usually, confessions are made to police officers or other investigators as a result of interrogation, but may equally be made to the victim of an offence, a friend or relative or any other person.

The real issue in the appellants' alleged confessions is whether they should, in the circumstances of this appeal, have been admitted, because the trial court must be convinced first about the voluntary nature of the confession and secondly that the confession has the ring of truth.

16. As I understand, it is for this court to consider the import of such statements and determine whether those statements were credible enough to support the conviction. On the issue of credibility and the evidence, the trial magistrate found as follows:-

It was the prosecution's case that accused was only arrested after he himself met the complainant and confessed to having been the one who had attacked and robbed the complainant on the material night. The accused has denied this fact, bringing up the issue of who again is truthful in his testimony. This court notes that the complainant had been sincere enough to the police and neighbours that she had not identified the attacker. And in her testimony, it is accused who stopped her with the confession and demanding forgiveness. If the complainant had not falsely accused anyone over this incident of 16/11/2013, I do not see any reason whatsoever why she would now turn back and falsely accuse the accused before the court, a man who was a total stranger to her. In my view, she was truthful on this save that accused identified himself to her leading to his arrest. Also worth noting is the similarity of the evidence of prosecution and accused on how accused was arrested i.e that it was on 6/1/2013 at sofa set area of Ogembo town and by members of community policing. This, to me, gives evidence on the evidence of the complainant on what exactly took place leading to arrest of accused. And I do not see any possibility of any stranger approaching the complainant herein in broad daylight to confess such a serious crime to her and demanding for forgiveness from the victim if he was not the man responsible. I am therefore convinced that it was accused who attacked and robbed the complainant of her phone and cash 950/= on the material night only to meet her close to two months later and confess same to her.

17. Having analysed the evidence, I also reach the same conclusion as the trial magistrate. PW 1 was a stranger to the appellant. He is the one

who went to tell her who he was and what he had done. Thereafter, he threatened her and there was no reason for her to lie about a stranger. The appellant's defence was a mere denial and I find he was properly convicted. I affirm the conviction.

18. Before I conclude this judgment, I note that the appellant had filed **Kisii HC Misc. Application No. 16 of 2014** which was in substance an application for retrial. Unfortunately, the application was not heard as the record could not be traced. After the trial court record was found, I directed that an appeal file be opened as the record was ready as the appellant had been waiting since 2014 to be heard. I therefore deem the application as having been determined as an application for extension of time to lodge the appeal out of time. As this appeal had now been heard on its merits, I consider that substantive justice has not been done and the appellant has not been prejudiced at all.

19. The appellant was sentenced to death. As the mandatory death penalty for murder and robbery with violence was declared unconstitutional (see *Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR* and *William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR*), I set aside the sentence and call upon the appellants to make their mitigation.

DATED and DELIVERED at KISII this 18th day of DECEMBER 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.

Appellant in person.