



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL APPEAL NO. 54 OF 2015

CHIMERA NDEGWA MUNGAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being and appeal against the decision of Hon. Magistrate J. S. Mushele (SPM) in Mombasa Chief Magistrate's Criminal case No 2348 of 2002 delivered on 2nd November,2003)

JUDGMENT

The appellant, CHIMERA NDEGWA MUNGA and another were jointly charged with the offence of robbery with violence contrary to section 296 (2) of the penal code.

The particulars being that;

“On the night of 8th -9th July, 2002 at Kafuduni village Mwatate Location in Kwale district within the Coast Province the appellant jointly with others not before the court being armed with dangerous weapons namely pangas, stones, and clubs robbed off MERCY MZUNGU CHANGOTI one Tv set (coloured) one amplifier ne deck, two wall clocks, one wrist watch, cash ksh 10,000 three handbags and assorted household goods all to the total value of ksh 186,110 and at or immediately before or immediately after the time of such robbery wounded the said MERCY MZUNGU.

The appellant was arraigned in court on 2nd September, 2002 where he entered plea of NOT GUILTY to the charge and the trial commenced on 21st May,2003. The prosecution called a total of four (4) witnesses in support of its case. At the end of the full trial, the appellant was convicted and sentenced to serve a DEATH sentence.

The appellant was aggrieved by the conviction and sentence, hence filing this appeal, which carries the following five (5) grounds (amended by application).

That the learned trial magistrate erred in law and fact by:

1. misdirecting himself in considering the recognition evidence by Pw1 at the scene without considering that Pw1 in her testimony told the court that she did not manage to identify any of the robbers at the scene of the alleged robbery;
2. by considering the evidence of Pw2 without seeing that Pw2 did not witness the said incident and that his evidence should be considered or afterthought.

3. by considering the circumstantial evidence of Pw1 without finding that the same was not proved to the stand of law hence in safe to be considered to warrant a safe conviction.

4. by not seeking that the source of his arrest was not established to have had connection with the offence in question, for those who arrested him never testified to clear the doubt of his arrest.

5. by failing to consider his reasonable defence statement.

He prayed that the conviction to be quashed and sentence set aside.

It has been held over and over by High courts in Kenya, pursuant to the principle in the case of OKENO VRS REUBLIC 9 1977) E A 32, that the first appellate court has the duty to revisit the evidence tendered before the trial court analyses it afresh, evaluate it and come to his own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to givefor that.

The prosecution adduced evidence of four (4) witnesses.

Pw1, MERCY MZUNGU, who is the complainant in this case told court that on the night of 8th and 9th July, 2002 at about 2.00am, she was asleep in the house, when she heard a loud bang on the main door which smashed open and six (6) men entered and broke the glass to the lamp which was on. she said that the men ordered her to give them all the money she had from selling a cow. She confirmed that she had given the appellant a cow to sell on her behalf and got Khs 10,000 as proceeds from which money was in a handbag on the wall. Pw1 stated that they tied her hands backwards and took her clothes, TV set make Sanyo, 2 video cassettes make Sanyo, an amplifier cassette deck, shoes, sufurias, soap (toss) as one stepped on her stomach. The men left after urinating on her and locked the house from outside. She then shouted for help and her 13 year old son untied her. The complainant (Pw1) went and reported the matter to Mariakana police station from where she was referred to Samburu police station and then hospital where she was treated. She recorded her statement and an identification parade was conducted. Pw1 said that she pitched the 2nd accused because he had been mentioned by 1st accused person.

In cross examination, PW1 told court that she knew the appellant too well including where he resides. She said that he threatened to kill her if she shouted for help and that she had gone to sell the cow with him during the day. She also said that she did not identify the robbers at the time of robbery. She denied any thing about a grudge due to a land dispute between her family and the appellant. Pw1 said that she did not know the 2nd accused person and that he was mentioned by the appellant. Finally she told court that nothing was recovered from the 2nd accused's house which is far from hers. Pw2, MOHAMED JOTO testified that on the night of 8th and 9th July, 2002, at about 2.00am, he was on his way home after watching video at Kibanda Hesara. That on the way, he decided to answer to a call of nature and in the process heard people's voices from a path leading to the complainant's home. He saw the appellant in a group of eight. Pw2 told court that he had known the appellant for a long time and that they played football together. He then heard, the appellant say that there was Ksh 10,000 as he is the one who had sold the cow. He also heard him say that there was a TV set video cassette and other goods and that since the complainant's husband was away, they should do everything . That one of the men flashed a torch at him and asked what he was doing there. He responded that he was answering to a call of nature and they left him. Pw2 saw that he went and informed his father and the following morning he heard that the complainant had been robbed.

When cross – examined by the appellant Pw2 said that he knew him too well as they used to play football together. He also said that heard them planning to rob and that appellant mentioned the 2nd accused.

Pw3, ERNEST KAI, was a registered clinical officer student at Mariakani Health Centre who testified that he was called to see a patient by the name MECY MZUNGU, who was alleged to have been attacked by known people. He examined the patient and found she had a problem with her abdomen and recommended for an urgent operation. He refereed the patient to Coast Provincial General Hospital

and received a feedback from Dr. WANJALA , who conducted the operation on the patient. He filled the P3 form and classified the injury sustained by the complainant as grievous harm, he produced the p3 form as exhibit 1.

Pw4, no. 42075 pc NOAH NDEGE, told court tat on 9.7.2002, he was on crime stand by duties at Samburu police post with PC Mbuti when the complainant went there and reported that she had been asleep in her house when she heard a loud bang on the door to her house and six (6) men who were armed with torches pangas and rungas entered and ordered her to keep quiet. That these men took her mobile phone and ordered her to lie down as they tied her hands with ropes wile demanding for the money from the sale of a cow. She showed them the handbag which had the ksh 10,700 as they stepped on her stomach. She reported to him that the man carried away a TV set make Sanyo, 2 video machines, 2 wall clocks, 2 bags and many other house hold goods. He booked the report in the occurrence book, issued the complainant with a P3 form while referring her to Mariakani Health Centre for treatment and later visited the scene of crime before opening an inquiry file. Pw4 said that on 22.8.2-002, the 2nd accused was arrested at Mazera by the Administration police when he and another had robbed one Benson Ndegwa. The complainant went there with Pw2 and Pw4 interrogated the appellant who led them to the 2nd accused. He then charge the appellant and another with the offence of robbery with violence after investigations.

In cross examination, Pw4 told the court that they found the door to the house broken and confirmed that the complainant said that she could not identify the people who attacked her. He also said that the person saw the robbers as he was going for a call. And that when he arrested the appellant he led them to various places but they did not get anything.

PW5, NO. 21635 INSPECTOR GILERT SOI, told court that one 27.8.2002 at 2.00pm, he was at Samburu police station when one CHIMERA NDEGWA, the appellant was taken to him to record a statement under inquiry for the offence of robbery with violence. That he told him the reason for recording the statement and the appellant volunteered to give the statement after he cautioned him.

That he talked to the appellant in Kiswahili language in which he recorded the statement, after which he invited him to make comments but he had none. He said that the appellant signed the statement, he counter singed it and made a certificate to that effect. He said that they were alone in the office.

According to the appellant, he saw police officers in civilian clothes at 2.00pm and they arrested and took him to Samburu police patrol Base. He said that they thoroughly beat him and was later taken to the police inspector who forced him to sign away some documents he did not know. He stated that he did not voluntarily recode the statement.

The trial magistrate ruled that no force or inducement was used in making the appellant record the statement and ordered that it be produced and admitted in evidence. Pw5 produced the statement as exhibit P2.

The Appellant, CHIMERA NDEGWA, was placed on defence. He opted to give unsworn statement in defence and called no witness. He told court that on 28.8.2002 he was at his home when he saw a group of people in civilian clothes. They asked him for his identity and he told them. That they then asked him if he knew anything about a robbery and he denied. They handcuffed and escorted him to Samburu police post where he was placed in cells. He said he was thoroughly interrogated and beaten but he kept denying . He was tortured until he felt he was going to die and decided to state things he did not even know. He told court that the complainant is his neighbour who is financially better than him and they have had a boundary dispute for long, so that this case was a frame up.

At the hearing of the appeal, the appellant, who is unrepresented filed written submissions in which he stated that;

- (i) the issue of identification or recognition by Pw1 relied on by the trial magistrate was not safe as she had said that she did not manage to identify any of her attackers.

(ii) the only evidence which linked him to the offence was that of Pw2, who did not witness the incident of robbery and did nothing after hearing what the robbers planned to do

(iii) the trial magistrate did not consider the evidence of confession which was produced in court by Pw4 and the same had no Weight as it was not supported by any independent evidence.

(iv) his arrest or source yet was not proved as the police officers who arrested him never testified in court.

The state, through learned counsel, M/s Ocholla opposed the appeal by submitting that;

(i) the appellant was well known to her and it was the rest of the robbers she did not know.

(ii) though Pw2 did not witness the robbery occur, he met the robbers first before the offence occurred next to the complainant's house, and he recognized the appellant who he knew very well, from his

(iii) the evidence of Pw1 and w2 placed the appellant at the scene of crime and identification was by recognition.

I have considered the grounds of appeal and submissions of both parties. I have also evaluated and analysed the evidence of the trial court as is the duty of the first appellant court, bearing in mind that the trial court had the advantage of seeing the witness.

I find that the issues for determination in this appeal are;

(i) whether the prosecution proved his case beyond reasonable doubt as against the appellant for the offence of robbery with violence

(ii) whether the trial magistrate disregarded the appellant's defence statement.

On the issues of whether the prosecution proved its case against the accused person beyond reasonable doubt, I find that;

(a) it was not in doubt that the complainant was attacked by a group of people on the night of 8th - 9th July, 2012 at Kafunduni village whereby she was robbed of her cash Ksh 10,000 three handbags, and assorted house hold goods. Her evidence was supported by Pw2 who said he heard about it the following day and the investigating officer (Pw4) who the complainant (Pw1) reported the incident. This evidence was not challenged by any witness in evidence.

(b) it is also not in doubt that in the course of the said robbery, the complainant was subjected to actual violence whereby she sustained injuries which Pw3, the clinical officer classified as grievous harm (P3 form exhibit P1) this was again not contested by any witness or evidence.

(c) what is contested is whether the appellant was the culprit as was found by the trial magistrate.

In analyzing the evidence that was adduced before the trial court, I find that the appellant was convicted based on the evidence of

(a) identification;

(b) confession

(c) circumstantial

In his judgment dated 2.12.2003, the trial magistrate, in convicting the appellant stated as follows;

“The evidence on record shows clearly that on the material date in the morning the complainant had given her cow to accused go and sell. He indeed sold and got Ksh 10,000. During the time of robbery the complainant (Pw1) stated that there was a lantern lamp on .she managed to identify the accused.... as for the rest they were strangers to her. It should also be noted that before the robbery (a few minutes before) Pw2 was answering a call of nature in a bush near a path leading to complainant’s house. He was from watching a video and was going home.

He heard a group of people, among them accused, He was a person well known to him since childhood. He was telling the others that he knew the complainant had money about Ksh 10,000 because she had even given him a cow in the morning to sell for her.

That also there were TV set and video cassettes in the house. Pw2 was very close to them he positively identified him (Accused 1) the gangsters repeated the issue of there being money in the house before they knew she had sold a cow.

This confirmed with Pw2 had heard accused 1 telling his companions.....

As regards the accused 1 I find the evidence overwhelming”

In her evidence in chief, Pw1 did not mention whether or not she identified or recognized any of her assailants. She only stated that

“An identification parade was conducted. I picked accused 2 because he had been mentioned by accused 1.....”but in cross examination, she said.

“I know you too well. I know you even where you reside you threatened to kill me if I shouted for help. I did not identify the robbers at the time of robbery.....”

It is worth noting that in her evidence in chief, Pw1 said that;

“The lamp was on when they entered, immediately they entered, they broke the glass”

In fact, Pw1 did not give evidence detailing the circumstance under which she identified or recognized the appellant or that she saw his face and recognized that it was of a person she knew.

Even, the investigating officer (Pw4) in his evidence told court that Pw1;

“said she could not identify the person who attacked her.” as for the evidence of P3, it is said that he

“suddenly heard voices of people coming near his place there is a path to the home of the complainant. On reaching where it was I saw it was accused 1 and another. I had known him (accused 1) for a long time.....They stopped. The accused 1 said they should plan on what to do. They were a group of 8men. He (accused 1) said that there was money (10,000) because he was even the one who sold the cow. Then there was even a TV set – colour TV video cassette and other goods. They planned that since the complainant’s husband was away they would do everything.....”

He even said that he told his father about it.

The question then becomes , with such information or knowledge , what did he do about it? Why did he take long to come forth and let the police know about it ? This is because according to Pw4, stated that;

“On 22.8.2002 accused 2 was arrested by Administration police at Mazeras. He and another had robbed one Benson Ndegwa

Clearly, from my re-evaluation and analysing of the evidence that was adduced before the trial court, the trial magistrate did not analyse the evidence that was adduced by the prosecution's witnesses and acknowledge the inconsistency, anomalies' and shortcomings that were brought out, by these witnesses. He instead framed and came up with evidence which has not been adduced by some of the witnesses.

On the issue of confession, I find that although a statement under inquiring allegedly recorded from the appellant by Pw4, IP Gilbert was admitted in evidence even after the appellant retracted it. The evidence in the same was not considered in the judgment by the trial magistrate.

From the evidence on record, I find that the appellant was arrested, charged, convicted and sentenced based on circumstantial evidence. According to the complainant (Pw1), on the morning of 8.7.2002 when the alleged robbery occurred in her house, she had given the Appellant a cow to go and sell, which he had done and brought her Ksh 10,700 Pw2 also said that he overheard the appellant telling others as they planned to go and rob the complainant that he knew she had money since she had given him a cow to sell that morning and had got Ksh 10,000.

Having established that Pw1 did not identify her assailants at the time of the attack, and the fact that even after he allegedly heard the group of people who he said included the appellant plan to rob the complainant, it is clear that one of these witnesses gave direct evidence connecting the appellant to the robbery that occurred at the complainant's home. This evidence is all circumstantial.

It is settled law that when a case rests on entirely circumstantial evidence, such evidence must satisfy three tests;

- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently firmly established;
- (ii) those circumstances should be of a definite tendency overwhelmingly pointing towards the guilt of the accused;
- (iii) the circumstances taken cumulatively should form a chain to complete that there is no escape from the ...decision that within all human possibility the crime was committed by the accused and none else.

I find no evidence in what was adduced before the trial court to sustain the allegations by the complainant and Pw2 that appellant was among those who attacked and robbed her.

In my own consideration and evaluation of the evidence that was adduced before the trial court, I am satisfied that the same basic legal principle that the burden of forming a criminal charge beyond reasonable doubt lying on the prosecution was not discharged.

I hence find that the appellant was wrongly convicted of the charge and the sentence of death is invited and hereby set aside.

I quash the conviction and set aside the sentence against the appellant.

Judgment delivered, signed and dated this 23rd day of February, 2017.

D. O. CHEPKWONY

JUDGE

In the presence of

M/s Ocholla for the state

The Applicant in person

C/clerk- Kiarie