



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 4 OF 2015

GODFREY NJOGU MWANGI APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal against the conviction and sentence in Senior Principal Magistrates' Court Criminal Case No. 89 of 2013 (Hon. M.A.Ochieng Mrs. (SRM)) delivered on 10th December, 2013)

JUDGMENT

1. The appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code Cap 63. The brief facts surrounding this matter were that the Appellant herein Godfrey Njogu Mwangi on 7th February 2013 at Lau Lau dam in Kajiado District within Kajiado county, jointly with another not before court, while armed with dangerous weapons namely knives robbed Justin Bururra Isaboke of Kshs. 38,517/= and at or immediately after the time of such robbed used actual violence to the said Justine Burura Isaboke.

2. After hearing of the prosecution witnesses and upon hearing of the defense, the trial magistrate convicted the appellant of the offence of robbery with violence and sentenced the appellant lodge this appeal vide his amended grounds of appeal filed on 30th January 2017, he raised the following grounds against the lower court's decision:-

- a. That the learned trial magistrate erred in law and in fact in accepting and adopting written submissions from the appellants counsel in contravention of sections 213 and 310 of the criminal procedure code
- b. That the learned trial magistrate erred in law and in fact by relying on weak recognition/identification evidence of the appellant.
- c. That the learned trial magistrate erred in law and fact by failing to note that the witnesses were all coached and that investigations were done when the appellant had already been arrested.
- d. That the trial court erred in law by holding that DNA analysis was relevant evidence was admissible in direct contravention of sections 122A(i), 122B, 122D of the Penal Code as amended in Act 5 of 2003 of the Criminal Amended Act and conviction of appellant was unsafe
- e. That there was no sufficient ground to support the production of safaricom data apparently under section 77 of the evidence act without calling the maker

f. That the learned trial magistrate had not considered the totality of the evidence, which raised doubt that indeed the appellant committed the offence

g. That the trial magistrate erred in law in failing to consider the appellants defense of alibi and failing to advance any cogent reasons for not believing the alibi

Appellants' submissions in support of the appeal

3. The appellant filed written submissions in support of the petition for appeal and in support of ground 1 he stated that the trial court was in violation of section 213 and 310 of the CPC for accepting written submissions from his counsel. He further went on to cite several authorities in support of his assertions which I have had the opportunity to look at.

4. In support of ground 2 the appellant submitted that the pw1 claimed to be at the scene of the accident but was not able to identify the colour of the motor cycle or the registration number. He further submits that pw1 stated that the appellant was wearing a navy blue coat whereas PW 7 the complainant stated that the appellant was wearing a brown jacket.

5. The appellant also submits that PW1 testified that darkness was fast approaching on the material day and was thus difficult to identify him. He further submits that the evidence of pw2 his former employer prejudiced him as he indicated that PW2 had tried to make advances to him which he declined.

6. The appellant also submits that he was not given in advance the evidence which the prosecution had intended to rely on in the matter including O.B extract that he had requested to be supplied with.

7. He further submits that the evidence of the investigating officer ought to have been disregarded as he took blood samples which is only to be done by a police officer the rank of an inspector and above.

8. On the defense of alibi the appellant submitted that it was the duty of the prosecution to disprove of the same and the burden lies with the prosecution.

9. The appellant therefore prays that his appeal be allowed and the conviction be dismissed and be set free.

10. The State through the office of the director of public prosecution objects to the appeal and implores this honourable court to affirm and uphold the judgment of the trial court together with the sentence passed.

11. The respondent in his submissions asserts that the elements required to qualify the offence of robbery with violence as encapsulated under section 296(2) Penal Code have been proved to wit;

a. Armed with a dangerous or offensive weapon

b. Be in company with one or more other persons

c. Immediately before or after the time of robbery, wound, beat, strike or use any other personal violence to the victim.

12. The respondent further submits that the appellant was positively identified by PW7- the victim herein who stated that he had known him for two years as they used to work together for PW2 at a bar called Santana Wines & Spirits. It was his further submission that PW 3, PW4, PW5 all positively identified the appellant as the victim mentioned the appellants name to them as the one who had attacked him.

13. On submission of the blood samples to the government chemist for analysis and profiling by PW 11 PC Salim Mwangi, counsel submitted that the provisions of section 122A 122B 122D were never violated since the PW 11 only picked them from the hospital where the medical staff extracted them at the request

of the OCS Kajiado Police Station. He further submits that PW 11 only picked the samples and forwarded them to the Government Chemist Analyst and he did not order for their extraction.

14. Counsel for the respondent further submits that PW 10 a government chemist analyst produced a report which confirmed that the DNA profile generated from the blood stain in one of the Kshs. 100/= bank note recovered from the appellants house matched the DNA profile of the blood sample of the victim PW 7.

15. In response to the appellants defense of alibi the respondent argues that the same is a mere sham as the same is filled with untruths and half truths coupled with inconsistencies. Counsel submits that the evidence of DW1, DW2 & DW 3 is inconsistent as it does not give a full account of the appellant's movements on the 7th February 2013.

16. In order to appreciate the merits or lack thereof of the appellant's appeal, counsel's arguments and, more importantly, for this court to determine whether the magistrates' court's decision should be sustained or overturned, it is important to set out the evidence at the trial; this being the first appeal, it is also incumbent upon this court to evaluate the evidence at the trial afresh and come to its own conclusion as to whether the lower court came to the right decision but bearing in mind that much as the decision of this court may vary from that of the lower court, it is only the latter court that had the advantage of hearing and seeing the witnesses and thus was in a position to appreciate such aspects of the evidence as their demeanor, their disposition et cetera. **(See Okeno versus Republic (1972) EA 32 at page 36).**

17. The complainant **JUSTIN BURURA ISABOKE (PW7)** testified that on 7th February, 2013 at around 6.30 pm he went to JK Bar to collect money and found the appellant Njogu wa Santo whom they used to work together at Santon Bar. It was his further testimony that he asked for a lift on his motor cycle to go to the police station to see his wife but on reaching the railway crossing the appellant requested him to stop and carry a man who was standing there. It was his further testimony that as he started the motor cycle the appellant stabbed him on the back with a knife and ordered him to ride towards a path leading waga river where he put a rope around the victim's neck. It was PW7's further testimony that a struggle ensued and they both fell down and the appellant stabbed him with the knife on the throat, he also cut him on the head, both cheeks and above the chest. He further testified that the appellant continued cutting him as they struggled and in the process the appellant also cut his hands. It was his testimony that the appellant put his hands in his jacket and trouser and removed all the money. He testified that the other man did not touch him and that he ran away. It was his testimony further that he tried to get up and was too weak to do so. He stated that he saw some light and a man (PW1) asked who he was and he managed to tell him (PW1) that it was the appellant who had stabbed him using a knife.

18. PW 7 was able positively identify the appellant as the man who had attacked him as they used to work together at Santana Bar. On cross examination PW 7 stated that the appellant had been sacked from Santana Bar for stealing and that he did not know the name of the appellant's wife. He further stated that no one saw him leave on the motor cycle with the appellant. He further stated that darkness had not set in.

19. PW1 (Brian Sitali Kasenji) testified that on the material day he was walking home around 6 pm and at about 6.40 pm as he passed a bore hole he saw a motor cycle 5m off the road and saw 2 people one tall and another short who appeared as if they were fighting. It was his testimony that he hid himself some makonges that were close to the scene. He testified that the tall man pushed the short one into the river and followed him there but later so him walk off towards town. He testified further that he lit his torch and went to the ditch where the short man had been pushed and on reaching there he (PW7) told him that his name was Justin and that it was the appellant Njogu wa Santon who had injured him. It was his testimony further that he called PW3 the assistant chief and the neighbours in the area. He testified further that he also called PW4 a boda boda operator who later came accompanied with PW3. It was his testimony that PW3 & PW4 left the scene and went to call the police who later came and took PW7 away.

20. It was his further testimony that he knew it was the appellant who stabbed PW7 as PW7 informed him at the scene that it was the appellant who had stabbed him.

21. PW2 (Lorna Mercy Kagwero Mutwiri) testified that the appellant was one of her employees but sacked him because of theft. It was her testimony that on the material day at about 7 pm she was at her office when she heard a knock on the door and saw a person carrying a motor cycle helmet who informed her that one of her employees (PW7) had been beaten and seriously injured at a dam. It was her further testimony that she went to the scene accompanied by her manager and on reaching there saw a motor cycle lying there. She looked down at the ditch and saw PW7 his body covered in blood and without a sweater. It was her testimony further that PW7 was put in a land rover and taken to Kajiado District Hospital and later referred to Kenyatta National Hospital. She further stated that on looking at PW7 she noted that he had a stab wound on the neck. It was her testimony that PW7 told her that she had gone to collect money at J.K bar where he met the Appellant who requested him to offer a lift to take him to the police station to pay bail for his wife. It was while at the railway that the appellant stopped PW7 and requested him to carry another person. It was at this point that the appellant held him by the neck and told him to stop by the river. She testified further that PW7 informed her that the appellant removed a knife and stabbed him.

22. The third prosecution witness **Leonard Lesinko (PW3)** the assistant chief of Iseri Sub-location testified that on the material day at about 7.00pm he was at a club house when he received a call from PW1 and told him that a person had been badly injured at a bore hole. It was his further testimony that he called PW4 a boda boda operator who took him to the scene where he found PW1. It was his further testimony that PW7 was bleeding profusely from the throat. He stated that he called the OCS on phone and rushed to report. The police later came to scene and took PW7. I noted that PW7 did not have a shirt on and he was talking faintly.

23. PW4 (John Mbatha) The fourth prosecution witness testified that on the material date of the accident at about 7.00pm he was at Sakiani area on his way to town when he received a call from PW1 informing him that someone had been injured and thrown at Ireusi river. It was his further testimony that a few minutes later PW3 called him and told him to pick him up and take him to the scene. It was his testimony that it was dark and he carried PW3 to the scene. PW3 later requested that he be taken to the police station. It was his testimony also that on dropping PW3 at the police station he went Maasai Garden stage to look for more boda boda operators who could identify the man at the river. There were 3 boda boda operators who accompanied him to the scene and one of them was able to positively identify him as Justine (PW7). It was his further testimony that one of the boda boda operators left and that he followed him to the shop of one Jacob (PW5) and told him that he suspected PW7 who sells him cigarettes had been injured. At the scene it was PW4's further evidence that PW5 was able to identify the injured man as PW7. He further testified that he did not know the appellant.

24. On cross examination he stated that he did not witness PW7 being beaten and that he was wearing a jeans trouser with no shirt. He further testified that he came to know of PW2 on that day of the incident.

25. The fifth prosecution witness (**Jacob Ntiga Kyalo**) testified that he operates a retail shop and that on the material day at about 7.00 am he opened his shop and PW7 passed by and took from him cigarettes which he was to collect money at 5.00pm. it was his further testimony that at 4.00 pm PW7 passed by the shop and paid him Ksh .1165/- and continued working till 8.00p.m when pw4 came to his shop and told him PW7 was in a ditch and appeared dead. It is his further testimony that on arrival he saw PW7 who was bleeding from the neck and told him that it was Njogu.

26. PW6 (Patrick Njue Mwiriki) testified that he was a manager at Santana wines and Spirits and knew the appellant well as he was once an employee there. On the material day it was his testimony that he was in the office when a person came and told him that PW7 who was there employee had been injured on the dam and that on reaching there he confirmed that it was indeed PW7 who was lying injured in the ditch.

27. Dr. Tom Omoto testified as PW8 and confirmed that he examined PW7 and filled his P3 form. It was his testimony that PW7 had 3 cuts on the right of the face, stab wound on lower part of the neck, 3 cuts on left hand on thumb and 2nd finger base of thumb, 3 cuts on the right hand on 2nd, 3rd, and 4th fingers and 2 cuts on upper part of his right arm. It was his testimony that the probable type of weapon used was likely sharp.

28. **PW9 (Jonah Chebolet)** a clinical officer at KNH testified that he had a P3 FORM in respect of the appellant who stated that he had been attacked by a group of people known to him, mob justice. It was his testimony further that his injuries were between 1-10 hours injuries on the right hand figures. He also stated that appellant's eye appeared reddish and according to him the injury on the appellant could not have been as a result of a mob justice since the most exposed parts had no injuries.

29. The tenth prosecution witness **Paul Waweru Kangethe** presented the DNA Analysis and the findings matched those of the appellant.

30. **PW 11 PC Salim Mwangi** the investigating officer stated that on the material day at about 8:30 pm he was at the station when PW3 reported to him that PW1 had informed him that there was a man lying in a ditch besides river Laulau and that he was bleeding. It was his testimony further that the appellant was brought to the station by members of the public and that the appellant led him to his house in Majengo Estate and recovered 1000/- , 1,500/-, 1200/- and 1 100/- bank note. He further stated that 2 of 100/= and 1 100/= denomination notes had blood stains where he later took blood samples from both PW7 and the appellant and forwarded them to the government chemist for DNA Analysis.

31. The appellant gave sworn statement and called 2 witnesses to aid in his defense. He testified as DW1 and stated that he works a salesman at Bei Nafuu shop. That he used to work at Santana Wine and Spirits until 2012 and had worked for 2 years which was owned by PW2. He further testified that PW7 used to frame him that he had stolen money. On the material day of the alleged incident it was his testimony that he was with Anna, John's wife at the shop where John later came back at 5.00 pm and that they did calculations up to 8.30pm.

32. **DW 2 John Ewiwru Njenga** testified that he is a businessman and runs a shop at Majengo called Bei Nafuu shop. He testified that he knew the appellant as he had employed him in November 2012 to sell him milk. On 7th February 2013 it was his testimony that the appellant reported to work as usual and went to distribute milk. It was his testimony that the appellant returned to work at 7.00pm where they did calculations up to 8 .00 pm. He further testified that he did not see him injured in the morning and that at 2.00 pm his wife (DW3) called him and told him that the appellant had been injured.

33. The third defense witness Anna Wambui (DW3) testified that he was the wife of DW2 and knew the appellant as he was there employee at Bei Nafuu Shop. It was her testimony that she spent the whole day with the appellant and left at 8.00pm after doing calculations with DW1. On 8th February 2013 it was her testimony that she was called and informed that the appellant had been arrested and that she followed her to the police station and noted that he was bleeding in the hand and eye which injuries he sustained during the arrest.

34. I have considered the arguments made by the Appellant and the State. My duty as the first appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I do not have the advantage enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR 21**.

35. The appellant represented himself in this appeal and raised 7 grounds of appeal but in his submissions he only argued four.

36. The first ground is whether the provisions of section 213 & 310 of the Criminal Procedure Code violated. The appellant avers that the trial court received written submissions from the appellants counsel after close of the case of the prosecution. I have considered the authorities cited to me by the appellant which have been of great persuasion. I however observe that throughout the trial court proceedings the appellant was ably represented by counsel and not at any one particular point in time did the matter proceed in his absence neither that of his counsel. I also observe from the proceedings that counsel for the appellant had the opportunity to cross examine the prosecution witnesses and ask for clarifications whenever she sought it deem to do so. I further observe that the appellants counsel was accorded an opportunity to argue his submissions orally before a ruling was passed as to whether the appellant had a case to answer or not. ***Refer to page 63 of the proceedings line 1-line 5.*** It is therefore my finding that the

appellant fails on this ground.

37. The main issue for consideration is whether the appellant was identified as one of the assailants who attacked and stole from PW 7.

38. On the issue of identification, it is noteworthy that the test in law is that the while a conviction may be based on the evidence of identification by a single witness, the court must be satisfied that the conditions under which identification took place were favorable and eliminated the possibility of mistaken identity as was held in *Abdalla Bin Wendo v R* [1953] 20 EACA 166 and *Samuel Gichuru Matu v Republic CA NRB Criminal Appeal No. 88 of 2000 (UR)*.

39. In this case the attack happened between 6.30 pm and 7.00 pm. It was PW7's testimony that he identified the appellant as "*Njogu wa Santon*". PW7 was clear and categorical in his testimony that he gave him a lift on his motorcycle with the guise that the appellant was going to see his wife at the police station who had been arrested and on their way they stopped at a railway crossing where they picked another person who was known to the appellant. It was at this juncture that the appellant removed a knife and ordered PW7 to ride to a river where he attacked him and emptied his pockets.

40. PW1, who was first to arrive at the scene also witnessed the incident as he hid behind some makonges and after the attack; PW7 informed him that it was the appellant who had attacked him. PW1 confirmed that it was indeed the appellant who stabbed PW7.

41. From the foregoing I am also convinced that the appellant was positively identified by PW7 and PW1 who was at the scene when the incident happened. It is also noteworthy that it was between 6.30 and 7.00pm and therefore it was very easy to identify the appellant. The appellant was also known to PW7 as they had worked before at PW 2 wine shop. For the following reasons this ground also fails and contend that the appellant was properly identified.

42. On the defense of alibi, the appellant contends that on 7th February 2013, he was not at the scene when the crime was committed. It was his testimony that he was with DW2 where they did calculations until 8.30 pm. From the testimony of DW1, DW2 and DW3, I have encountered numerous inconsistencies in their testimonies. For instance the DW1 claimed that DW2 arrived at work at 5.00pm where they stayed together until 8.00pm. On the other hand in his defense DW2 states that he returned to work at 7.00pm after the incident. No explanation was advanced as to what time the appellant arrived from milk delivery. DW3 only stated that the appellant went to deliver milk and returned to the shop where they spent the whole day together. No time is indicated when the appellant arrived from milk delivery nor what time DW2 went to the shop. I therefore find that similarly this ground of appeal fails.

43. On the ground of Analysis, the appellant submits that the DNA evidence should be expunged from the record as the contravene sections 122A (i) 122B and 122D of The Penal Code (Amendment Act No. 5 of 2003). It is trite law that DNA samples are to be extracted by a police officer of or above the rank of inspector. PW 11- PC Salim Mwangi testified that he took the blood samples to the Government Chemist Analyst for profiling having taken the samples from both the appellant and PW7. I have considered the arguments advanced by both the appellant and the respondent in this matter and the authorities submitted on this issue. I am of the view that in as much that the samples were forwarded to the Government Chemist for analysis by PW 11 a Police Constable I am of the opinion that failure to comply with the requirement that the samples ought to be extracted and forwarded to the government analyst by a police officer of or above the rank an inspector as envisaged by the aforementioned provisions of law, in my view the same is a procedural step which in the circumstances, did not prejudice the appellant in any way and for this reason the omission did not vitiate the trial. Similarly this ground of appeal fails.

44. Finally, was there sufficient evidence to convict the Appellant with the charge of robbery with violence, I am guided by the decision in *Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)* which sets out what constitutes robbery with violence under section 296(2) of the Penal Code as follows:

a. If the offender is armed with any dangerous or offensive weapon or instrument, or

b. If he is in the company with one or more other person or persons, or

c. If at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person.

45. I am also alive to the requirement that proof of any one of the above ingredients of robbery with violence is enough to base a conviction on under section 296 (2) of the Penal Code as was held in **Oluoch vs. Republic, (1985) KLR 549.**

46. In the present case PW7 states that he was attacked by the appellant who stabbed him with a knife. It was also his testimony that the appellant requested me to carry a stranger at the railway crossing who later ran away after the appellant stabbed him with a knife. PW7 also testified as to the fact of the robbery and stated that he lost Kshs.38, 317/=.

47. The requirements of robbery and use of violence were therefore present in the present appeal, and it is my finding that there was sufficient evidence of commission of the offence of robbery with violence in this regard.

48. I therefore uphold the sentence and conviction of the appellant.

49. There is only one sentence prescribed under section 296(2) of the ***Penal Code***. The appeal is dismissed.

DATED and DELIVERED at KAJIADO this 19TH day of APRIL, 2017.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Akula for the Director of Public Prosecutions

Mr. Mateli Court Assistant

Appellant