



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 10 OF 2017

(Being an appeal arising from Kitale Chief Magistrate's Court Criminal Case No. 1524 of 2016 delivered by P. Biwott Senior Principal Magistrate on 8/2/2017)

MARTIN MWANGI MUTEI APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. **Martin Mwangi Mutei** “the appellant” was charged with the offence of **robbery with violence contrary to section 296(2) of the Penal Code**. The particulars were that the appellant on the **29th day of March 2016 at rafiki in Trans -Nzoia County jointly with others not before court being armed with a dangerous or offensive weapon namely a hammer robbed Godfrey Shikuku of his Equity ATM card and Kshs 11,700/=**.

2. He denied the charge and the case proceeded to a full trial . He was finally convicted and sentenced to suffer death.

Being dissatisfied with the Judgment he filed this appeal citing the following grounds of appeal:

- i) That the trial magistrate erred in law and fact by relying on the evidence of a single person.**
- ii) That the trial magistrate erred in law and facts to convict the appellant since no exhibit was produced in court to link with the matter.**
- iii) That the trial magistrate erred in both law and facts by rejecting my defence without cogent reason.**

3. During the hearing of this appeal the appellant chose to rely on his written submissions. He submitted that his identification was faulty. That PW1 never saw him when he went to withdraw money. Secondly PW1 did not say how he identified him and it was at night. The report he made to the police was that he was robbed by unknown people. PW2 said he saw people fighting and two riders escaped, and one was found hiding. A motorbike Reg. No KMDP 972 N or KMDP 977 M was found at the scene.

The owner was not identified.

4. His submission was that PW1 was not a reliable witness, while PW4 did not do his work diligently as a police officer.

He argued that he was not found in possession of anything, and that David Aswani whom PW4 mentioned was not a witness in this case. He further submitted that no identification parade was conducted, and he was just identified in the dock, which is not reliable evidence. He cited the case of **Gabriel Kamau Njoroge V Republic [1982-1988] KLR 1134** to support this point. Finally he submitted that his defence was not considered by the trial court.

5. Mr Kakoi for the state opposed the appeal submitting that the case was proved beyond reasonable doubt. That PW1 explained how he had asked the rider to increase speed as they were being followed by other riders. The riders caught up with them and together with the appellant attacked them. The appellant was arrested at the scene by PW2 and others and was identified. There was evidence of violence against the complainant .

6. The case presented to court was that **PW1 Godfrey Shikuku** left Nairobi on 19th March 2016 at 9.00 pm and arrived at the Kitale stage at 4.00 am. He went to Equity bank Atm at Oil Libya and withdrew Kshs 6000/- to add on Kshs 5700/- which he already had. He then saw a bodaboda rider coming to offer services. They agreed on Kshs 200/- to Mahele. They left town but on reaching Kipsongo river and Kws he saw motorbike lights following them. He asked the rider to increase speed but he did not.

7. The motorcycles reached them and one of them hit them slightly. PW1 jumped out to run away, but the appellant who had followed held him back by the throat. The rider and another in the following motor bike attacked him and hit him with a hammer on the head. He saw the appellant ransacking him and surrendered all he had. . The motorbikes were all there and he heard the riders saying they should escape. A Kws motorcycle arrived and he explained to the occupants he had been robbed. The appellant who was hiding was arrested and beaten. PW1 was taken to hospital and the matter was reported. The motorcycle belonging to his appellant was KMDP 977 M. He saw it when he was being arrested. He produced his bank statement, (Exhibit 2) confirming the Atm withdrawal.

8. In cross-examination he said he used the lights from his rider's and appellant's motorcycles to see. The appellant's motorcycle and the hammer recovered were taken to the police station. He identified the appellant well.

9 . **PW2 Corporal Alfred Juma Okuso** testified that on 30th March 2016 at 4.30 am he was from Kitalale heading to Kitale when at Kurbs area he saw motor bikes down and there was a fight. He stopped his car and two of the riders took off but one remained. Members of the public searched the area and found the suspect. One person was injured. A hammer was found where the suspect had been hiding. The injured was taken to hospital while the suspect was taken to the station by him. He stated that the suspect's motorcycles was KMDP 977 M.

10. **PW3 John Koima** the clinical officer testified that PW1 had been treated at Kitale District Hospital as O/P No. 32265/2016. He found him to have the following injuries:

- Head , neck and chest were tender
- Both hands had tenderness
- A big cut on right knee
- swollen left knee.

A P3 form (Exhibit 1) was filled and confirmed the injuries.

11. **PW4 PC Kenneth Gatana** was the investigating officer. He said he received a motor bike KMDP 972 N TVs star which was photographed (exhibit 4a & b) plus a hammer (Exhibit 3)and PW1's bank statement (Exhibit 2). He found the motorcycle to belong to David Aswani, who had hired it out to the appellant, to use as he was going for a funeral.

12. The appellant gave an unsworn statement in his defence. He stated that on 29th March 2016 he worked in Kitalale. He closed and went for changaa which he drunk into the night. As he went home he became over powered by drunkenness, and slept on the road. He was woken up by about 4 men who he thought were police men, who took him to the police station. He was surprised when these charges were read to him, and he denied it.

13. This is a first appeal and this court has a duty to re -evaluate the evidence and come to its own independent conclusion. It has to bear in mind that it did not see nor hear the witnesses.

See Okeno Vs Republic 1972 EA 32; Kinyanjui & Another V Republic [2004] 2 KLR 364;

14. The appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code.

This court will determine whether;

- (i) Theft was established
- (ii) whether any of the ingredients outlined in Section 296(2) of Penal Code was proved.
- (iii) Whether the appellant was identified, as one of the robbers.

Issue No. i) Whether theft was established

15. The property complained of having been stolen was kshs 11,700/-. PW1 explained that as he alighted he had Shs 5,700/- on him. He then withdrew Shs 6000/- from an Equity bank Atm Oilibya Kitale bringing the total to Kshs 11,700/-.

He produced a bank statement (exhibit 2) showing the Atm withdrawal of the shs 6,000/-. This is the money he was robbed of. There is no evidence to contradict this. I find that PW1 indeed had this money on him, which money he was robbed of.

Issue No.(ii) whether any of the ingredients outlined in section 296(2) of Penal Code was proved.

16. The evidence by PW1 is that his attackers were 3 in number.

PW2 also saw 3 motorbikes. Secondly PW1 was injured during the robbery as is confirmed by PW1, PW2, PW3 and PW4. A P3 (exhibit 1) confirming the injuries was produced. I am satisfied that this was a case of robbery with violence, contrary to Section 296(2) OF Penal Code.

Issue (iii) Whether the appellant was identified as one of the robbers.

17. This incident occurred at around 4.00 – 4.30 am and this was at night. When identification is said to have been at night the court is called upon to carefully examine the evidence before wholly relying on it to convict an accused person.

(See Wamunga V Republic 1989 KLR 424; Osiwa V Republic 1989 KLR 469;)

18. In this case PW1 testified that he was assisted to see the attackers by the light from the motorbike he was carried on and the motorbikes which had followed him.

PW2 who also arrived in his motor vehicle saw 3 motorbikes on the ground and PW1 was injured. Members of the public searched and traced the appellant who was hiding 5M from the scene. He had not left when his accomplices took off with their motorbikes. He was therefore arrested at the scene. There was sufficient light from the three motorbikes and PW2's vehicle.

14. The appellant in his defence did not deny the arrest. He claims to have been too drunk and that's how he was arrested having been found lying on the road. He adds that he was not involved in the robbery. He also submitted that PW1 had talked of a motorbike NO. KMDP 977 M while PW4 dais it was KMDP 972 N, and wondered which one they saw.

20. I have checked the original record and found the registration No. of the motorcycle given by PW4 to be KMDP 977M and not KMDP 972 N as submitted. The photos Exhibit 4 a & b confirm the number to be as stated by PW1 and PW2 as KMDP 977 M. Contrary to the appellant's submission concerning the hammer the record shows that indeed the hammer was taken to the station as stated by PW2, and it was produced by PW4 as Exhibit 3.

21. Coming back to the scene, the evidence is that PW2 and members of the public arrested the appellant from the scene, in the presence of PW1. PW2 then took the suspect to the police station as PW1 was taken to the hospital. There would have been no need for an identification parade as he was arrested in PW1's presence (*see the case of Ajode V Republic [2004] 2 KLR 81.*) The appellant has not denied the arrest. The failure by Daniel Aswani to testify is of no consequence to the prosecution case since he would only have come to confirm if he gave the motorbike to the appellant, or not. The charge facing the appellant is not theft of the motorbike, but robbery of kshs 11,700/- from PW1.

22. I have considered the conditions under which identification was done. There was sufficient light from the three(3) motorbikes and PW2's vehicle. To crown it all the appellant was arrested at the scene of crime.

23. I am satisfied that the prosecution proved its case beyond reasonable doubt. The sentence meted out on the appellant is stipulated in the law.

I find the appeal to be lacking in merit and I dismiss it.

The conviction and sentence are upheld.

Orders accordingly.

Delivered, signed and dated on 30th day of August 2017 at Kitale.

H. ONG'UDI

JUDGE

In the presence of:

Ms Kagai fro Mr. kakoi for State

Appellant – present

Kirong – Court Assistant

Court – Judgment delivered in open court.

Right of Appeal explained.

H. ONG'UDI

JUDGE

30/8/2017