



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL CASE NO. 19 OF 2010

(Being an appeal arising from conviction and sentence in Kitale chief magistrate's court criminal case no. 1129 of 2008 delivered by D.M. Ochenja Principal Magistrate on 2/03/2010)

JOSEPH WANJALA KALAMA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

1. **Joseph Wanjala Kalama** “the appellant “ was charged alongside three (3) others with the offence of **Robbery with Violence contrary to Section (2) of the Penal Code.**

The Particulars were that the appellant and other on 21st day of May 2008, at Lunyu village in Kwanza district within Rift Valley Province, jointly and while armed with offensive weapons namely “Jembe” and bricks, robbed James Moses Barasa of 4 Bags of shelled white dry maize, a jacket, a wooden Bed and cash Kshs 3,000/-, all valued at Kshs 15,300/- and at the time of such robbery, wounded the said James Moses Barasa.

2. He denied the charge and the case proceeded to full hearing with the prosecution calling a total of seven (7) witnesses. The appellant gave an unsworn defence, and called no witnesses. The three other accused charged with the appellant were acquitted under Section 215 of Criminal Procedure Code while the appellant who was the 4th accused was convicted and sentenced to death.

3. Being dissatisfied with the judgment he filed this appeal citing the following grounds:

i) That the learned trial magistrate erred in both law

and facts when he convicted me, when he failed to

note that there was no legal document including

the receipt for the wooden bed was produced in

court.

ii) That the learned trial magistrate erred in law and

facts when he came to his judgment without

considering that there was proof that the wooden

bed was recovered under his shelter neither the inventory form nor the investigation diary was produced before court.

iii) That the learned trial magistrate erred in both law

and facts when he convicted the appellant

without considering that this was a case of a single

witness.

iv) That the learned magistrate erred in law and facts

when he convicted the appellant without considering

my defence.

4. When the appeal came for hearing the appellant while relying on his written submissions submitted that he was not involved in injuring PW1 and neither was he found with any of PW1's stolen items. He argued that though PW1 said he identified him by voice he never said what role the appellant played in the robbery. PW2 never saw him at the scene, though PW5 claims to have seen him.

5. He further submitted that the bed recovered belonged to him and not the complainant. That PW1 never produced any evidence to confirm ownership. He denied making any confession to PW7. He also submitted that an identification parade ought to have been conducted for the witnesses to identify him. Finally he argued that the evidence on record is not sufficient to support his conviction.

6. The state through Mr Kakoi opposed the appeal. He submitted that PW1 was beaten by a gang of people, and the injuries were confirmed by medical evidence. He stated that the complainant identified the appellant by voice as he knew him well.

Finally he submitted that an unfinished bed of the complainant was found in the appellant's house. So he was found in possession of recently stolen property.

7. The case before the court was that there had been an attempted robbery at PW1's house on 29th May 2008. PW1 was not at home. He was notified of this occurrence by one Felister Wanjala (PW2) who is his cousin. He travelled home in the evening and reported the matter. He was asleep that night, when he heard PW2 screaming for help. He woke up and armed himself with a panga and walked up towards PW2's room.

8. On the way he met his mother (PW3) walking from her room with a lantern as bricks were thrown at her by one Muchuzi, who was never arrested. Muchuzi snatched the lantern from PW3 and put it off. They screamed for help to no avail.

9. He was brutally attacked and beaten as his lantern was hit and it fell down. He later struggled and went to PW2's room, and after a while the robbers went away. He went back to his house and locked himself there. The next morning he called a Kenya Police Reservist (PW5) who came. His house had been ransacked and turned upside down. The items stolen from his house are those mentioned in the charge sheet. Some suspects were arrested and charged alongside the appellant but they were acquitted. Later his unfinished bed was recovered from the appellant's house. The appellant had talked to him from outside that night and he had identified his voice.

10. **PW2 (Felista Wanjala)** , **PW3 (Terry Sitati)** and **PW4 (David A. Imaya)** did not say anything about the appellant. PW5 (Jacob Waswa) only mentioned that on a unmentioned date as him and others

were from the police post, they spotted the appellant who took to his heels when he saw them. He did not participate in the arrest of the appellant. **PW6 Kirwa Labat** the clinical officer who examined PW1 confirmed the injuries complained of vide his evidence and the P3 (Exhibit 1).

11. **PW7 No. 669284 Erick Kirui** is the investigating officer. He received the report of the robbery on 22nd May 2008 9.07 am from PW1 and PW2. He visited the scene on 23rd May 2008 and confirmed the report, and was given names of suspects. Later he recovered PW1's unfinished bed from the appellant's house. That the appellant was arrested by Kenya Police Reservist (KPR). He interrogated the appellant who admitted the offence.

12. In his defence the appellant gave an unsworn statement. He said he was at Kwanza on 26th May 2008 when he was requested by a certain lady to ferry some luggage for her to the market. Thereafter he went back to the stage and continued with his work. Later him and his colleagues went to take busaa. While there some area vigilantes came and arrested him and a colleague, and interrogated and escorted to Kitale police station and thereafter charged with this offence.

13. This is a first appeal and this court has a duty to reconsider all the evidence and arrive at its own conclusion. It should always bear in mind that it did not see or hear the witnesses. The court of Appeal had this to say of the duty of a first appeal court in the case of **Patrick & Another Vs Republic [2005] 2 KLR 162**

“ 3. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. It is not the function of first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions.”

14. I have carefully analyzed the evidence on record, grounds of appeal and the submissions by both parties. The issue that I find falling for determination is whether the appellant was identified as one of the people who robbed the complainant (PW1). It has been confirmed by the evidence of the witnesses that indeed robbers invaded PW1's house on the night of 21st May 2008. In the course of the robbery PW1 was injured. The injuries have been confirmed vide the evidence of the clinical officer (PW6) and the P3 (Exhibit 1) he produced. The degree of injuries was assessed as “harm”.

15. There is evidence that the items stated in the charge sheet were stolen. It has also been confirmed that the robbers were more than one. I am therefore satisfied that indeed an offence of robbery with violence as defined under Section 296(2) of Penal Code occurred and the victim was PW1.

16. The next issue to determine is whether the appellant was one of the robbers. I will first deal with the issue of identification. PW1 at Page 28 line 22-25 states:

“At the time of the incident I heard the voice of the 4th accused. He was the one talking to me from the outside. The 4th accused was later arrested and he implicated his co-accused i.e 2nd, 3rd accused and one Muchuzi who is at large.”

Further in cross-examination at page 30 lines 19 he states;

“ I recognized you by your voice. I heard your voice.”

17. From the narrative (given by PW1 in his evidence) he was asleep in his house when he heard PW2 screaming. He left his house armed and went outside. While there he did not talk to anyone. He was attacked, beaten until he fell down. The appellant is not among the people he identified as he lay down there by the help of moonlight. From outside he first went to PW2's room then to his room. The question that begs an answer is at what point he recognised the appellant by voice identification. It is not in the evidence adduced.

18. The first person he spoke to after the incident was PW2.

There is no evidence to show that he ever told her he had identified the appellant in spite of PW2 having told him whom she had identified. PW5 the Police Reservist who went to PW1's home after receiving the report stated that upon arrival PW1 told them that the 1st accused was among the robbers who had attacked him. That the 1st and 2nd accused had been positively identified by her sister (PW2). If indeed PW1 had identified the appellant as he claims he should have reported this to PW5, and others who came to his home.

19. PW7, the investigating officer testified that on 22nd May 2008 he was on duty when PW1 and PW2 came there to report. He even booked their reports in the O.B. He stated that PW2 told him she could identify the person who raided their home. She did not say she could identify persons. On the other hand PW1 did not make mention of any single person he had identified. PW2 did not tell PW7 that the person she could identify was the appellant.

20. Indeed if he had identified the appellant by whatever means, there is nothing that stopped PW1 from telling PW2, PW5 and PW7 about it. He did not even explain to the court how he was able to recognise the appellant's voice, and at what point they were talking to each other. His evidence on this does not just add up.

21. To support my finding I rely on the case of **Simiyu & Another V. Republic [2005] 1 KLR 192** where the court of Appeal expressed itself on this issue as follows.

“2) In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and support to identify the accused, and then by the person or persons to whom the description was given.

3) The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers' identity.

4) In the present case, neither of the two courts below demonstrated any caution. Further, there was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. In the absence of any inquiry, evidence of recognition may not be held to be free from error.”

My finding is that PW1 did not identify the appellant at the scene of incident. He did not even try to explain the conditions under which he may have been able to identify anyone.

22. The other evidence relied on to convict the appellant was the recovery of an unfinished bed. First of all there is no direct evidence showing how the appellant was arrested. PW7 who is the investigating officer said it was the Kenya Police Reservist who arrested him. The Kenya Police Reservist (KPR) testified as PW5. He states as follows at page 43 lines 19-21

“As we were coming from the police post, we spotted the 4th accused. He took to his heels when he saw us. We never pursued him.

.....After some days I heard that the 4th accused had been arrested and was at the police post.”

This confirms that even the said Kenya Police Reservist (KPR) did not arrest the appellant. So who arrested him? This issue is key because it ties up with how the said unfinished bed was recovered.

23. This unfinished bed was recovered by PW7 who states at page 49 – lines 19-21

“ I later recovered the unfinished bed from the house of 4th accused. The bed was identified by the complainant as his property. I took the bed to the police and kept it as an exhibit.”

In cross-examination by the appellant at page 51 lines 9-13 PW7 stated thus:

“ Thereafter I commenced investigations. I came to your home but you were not present. We searched your house whereof we recovered the unfinished bed. It was identified by the complainant. You disappeared after committing the said robbery. I never arrested you with anything but we recovered a bed from your house.”

When PW1 was cross-examined by the appellant about the unfinished bed he stated at page 30 lines 17-18

“ We were told by your children that the unfinished bed was taken to your house by the 3rd accused.

.....I am not the one who arrested you. I never came to your house. I only went to the police.”

25. It has come out from the above narrative that when this unfinished bed (Exhibit 2) was recovered from the appellant's house the appellant was not present. What evidence was placed before the court to confirm that indeed Exhibit 2 was recovered from the appellant's house? There was no inventory prepared by PW7 to confirm this recovery. At one point PW1 says he was present during the recovery and at another he says he never went to the appellant's house. That he only went to the police.

26. PW1 testified that when Exhibit 2 was found in the appellant's house the children told them the exhibit had been brought there by the 3rd accused. Yes, the bed may have been found there, but has there been proof that the appellant had knowledge of the presence of the bed there and how was this bed (Exhibit 2) Identified as belonging to the complainant? Not every unfinished bed belongs to him?

27. Some of the things to be considered when dealing with the doctrine of recent possession were outlined by the Court of Appeal in the case of Arum Vs Republic [2006] 1 KLR 233 when it said:

“1) Before a Court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, there must be positive proof;

a) That the property was found with the suspect;

b) that the property was positively the property

of the complainant;

c) that the property was stolen from the

complainant;

d) that the property was recently stolen from the complainant.

2. The proof as to title will depend on the easiness

with which the stolen property can move from one

person to another.

3. In order to prove possession there must be

acceptable evidence as to search of the suspect and recovery of the allegedly stolen property and any discredited evidence on the same cannot be suffice, no matter from how many witnesses.

4. In case the evidence as to search and discovery is conflicting, then the Court can rely on the adduced evidence after analysing it and accepting that it considers it to be correct and an honest version.”

28. My finding in this case is that (c) and (d) above were proved positively. The evidence in respect of (a) and (b) was not satisfactory as I have already states above. It was not enough for PW1 just to state that Exhibit 2 was his unfinished bed. He produced nothing and he explained nothing. Ownersip of this unfinished bed PW1 was not proved.

29. The charge against the appellant is a serious offence carrying a death sentence and it behoved the lower court to analyse the evidence keenly. The involvement of the appellant in this robbery was not proved beyond reasonable doubt.

30. I have come to the conclusion that this appeal has merit and it is allowed. The conviction is quashed and the sentence set aside.

Orders accordingly.

Delivered, signed and dated this 28th day of august 2017 at Kitale.

H. ONG'UDI

JUDGE

In the presence of:

M/s Kakoi for the Respondent

Appellant present

Kirong – Court Assistant

Court: Judgement delivered in open court.

H. ONG'UDI

JUDGE

28/8/2017