



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL APPEAL NO. 102 OF 2017

ORIGINAL CR. CASE NO. 40 OF 2016 AT PM'S COURT AT MAKUENI

COSMUS NGEMU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Appellant was charged with offence of Robbery with Violence Contrary to Section 296 (2) of the Penal Code.
2. Cosmus Ngemu Mwanja, On the 22nd day of February 2014 at Mbalani village in Kithumani Sub-location in Nzau District within Makueni County, robbed Stephen Mutua Maweu Kshs. 4,200/= and at immediately before or immediately after the time of such robbery wounded the said Stephen Mutua Maweu.
3. He pleaded not guilty and the matter went into full trial. He was convicted and sentenced to death.

GROUND OF APPEAL

4. Being aggrieved by the verdict, he appealed and set out five (5) grounds in the petition namely:-

1. **THAT** the learned Resident Magistrate erred in law and in fact when he convicted the Appellant by relying on hearsay and uncorroborated evidence which ought not to have been admitted in the case.
2. **THAT** the learned Magistrate erred in law and in fact by relying on evidence that was contradictory in all material respect as to prove the charge in question.
3. **THAT** the learned Magistrate erred in law and in fact by finding that the prosecution had proven its case beyond reasonable doubt as required by the law.
4. **THAT** the learned Magistrate erred in law and in fact by imposing an excessive sentence which was contrary to the law.
5. **THAT** the learned Magistrate erred in law and in fact by failing to ascertain that the accused

understood the language that was in use.

5. When the matter came for hearing, he substituted the said grounds with six (6) amended grounds of appeal namely:-

1) **THAT** the charges that were preferred against me by the prosecution side were defective hence could not have been relied upon to sustain the conviction of any kind.

2) **THAT** the trial court faulted the points of law and facts when basing the conviction in the evidence of a single identifying witness without first warning himself on the dangers of relying on such evidence as is provided by the law.

3) **THAT** the trial court grossly faulted the points of law and fact when not finding the evidence adduced in support of the charges were based on malice and conspiracy adduced by members of the same family.

4) **THAT** the trial court gravely erred in points of law and fact when passing the verdict to convict and failing to note that this case/incident was never investigated and neither mode of my arrest not established.

5) **THAT** the trial court erred in points of law when not finding that the prosecution side did not prove their case beyond all shadows of doubts as is required by the rule of law.

6) **THAT** the trial court erred in points of law and fact when rejecting my defense of alibi without giving any cogent reason hence breaking the law under section 169(1) of the C.P.C.

6. The parties agreed to canvass appeal by way of written submission. The Appellant filed and served his written submissions. The state replied via Assistant Director of Public Prosecution orally.

7. The duty of the first Appellate court was to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court.

8. Failure to properly re-evaluate on record would be a serious omission on the part of the first appellate court and could warrant interference by the Court of Appeal. There were instances where the first appellate court could, depending on the facts and circumstances of the case come to the same conclusions as those of the lower court.

9. It could rehash those conclusions and there was nothing objectionable in doing so, provided it was clear that the court had considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision. **(DAVID NJUGUNA WAIRIMU -VS- REPUBLIC [2010] eKLR). (OKENO -VS- REPUBLIC [1972] EA. 32. MOHAMED RAMA ALFANI & 2 OTHERS -VS- REPUBLIC, CRIMINAL APPEAL NO. 223 OF 2002).**

10. The prosecution called six (6) witnesses to prove its case.

11. PW1 complainant narrated that on 22/02/2014 at 7.30 p.m. while on his way home with a sheep he found Appellant waiting for him on the road.

12. The Appellant hit PW1 with a folk jembe on the head and both hands and broke them. Also Appellant hit him on the left leg with a metal bar breaking the same leg. Further, the Appellant pierced PW1 right leg with a metal bar.

13. Appellant removed Kshs.4, 300/= from PW1 pockets and took off with the same. He screamed (PW1). He recognized the Appellant with the aid of the moonlight. He lost consciousness and on gaining consciousness he found himself surrounded by twenty (20) people.

14. They took him to hospital. He reported at Emali Police Station. P3 form was issued. PW1 identified Appellant as the attacker. He said Appellant is his cousin.
15. On cross examination, he said he closed his shop at 8.00 p.m. and after walking for about thirty (30) minutes he was attacked. He met first with a dog. He saw then Appellant in a white T-shirt. During the day he had seen Appellant wearing the same T-shirt.
16. DW1 said that he was able to identify the Appellant with the help of moon shine. He said their homes are two hundred (200) metres apart.
17. PW2 Julius Masila Maweu testified that at about 8.00 p.m. while at home heard screams and went to the scene. PW1 was screaming saying “*Ngemu why are you killing me?*” PW2 went accompanied by Muli Mutunga.
18. They found PW1 lying on the ground on a pool of blood. They rushed him to a dispensary. They took him later to Emali Police Station. PW2 said Appellant is his cousin.
19. PW3 Joseph Mutunga Muma testified that on 22/02/2014 at 8.00 p.m. while at home he heard screams and voice saying “*why are you Ngemu killing me?*” he went to the scene and found his father (PW1) in a serious condition. They took him to the dispensary. PW1 is his father accused is his cousin.
20. On cross examination, PW3 said his father said it was Appellant who assaulted him.
21. PW4 Denis Muli Masika testified that on 22/02/2014 at 7.30 – 8.00 p.m. he heard his uncle PW1 screaming saying “*I am being killed by Ngemu*”. He ran to the scene in company of PW2 and PW3. They took PW1 to the dispensary. PW1 said Ngemu assaulted him.
22. On cross examination, PW4 said PW1 is his uncle. That they did not find Appellant at the scene.
23. PW5 Assistant Chief Kithimani Titus Mutungi Kavyu told the court that on 22/02/2014 he was on his way from Kithingiru market at 7.30 p.m. One Gedion Nzioki Maundu called via phone asking him to go to Kithimani to witness PW1 dying.
24. PW5 was told by Gedion Nzioki Maundu that PW1 had been attacked by Cosmas Ngemu. PW5 went to the dispensary where PW1 was being treated but PW1 was not talking. They took PW1 to Emali Police Station then Makindu Hospital. PW5 is a cousin of the PW1.
25. On cross examination, DW5 stated that people who were responding to distress call are the ones who recorded statements.
26. PW6 Doctor Josphine Mueni maitha of Makindu hospital stood for Doctor Kariuki her colleague to produce P3 form. Same disclosed injuries inflicted on the PW1 on the head, hands and leg fractures. The same were assessed as grievous harm.
27. The Appellant was found to have a case to answer and he was put on his defence. The Appellant gave unsworn statement and did not call a witness.
28. In his defence the Appellant stated that on 22/02/2014 at 7.00 p.m. he went to a bar in the market to water news. He took alcohol up to 9.30 p.m. and went home. He found wife asleep. After she served him with supper he ate and slept.
29. At 1.30 a.m., young men woke him up and told him that they were sent by the assistant chief to get him. He was taken to assistant chief then area chief places and explained why he was there.
30. Assistant chief came, chief, church members and his brother. The police came and he was taken to Emali Police Station. He was later charged in court.

SUBMISSIONS

31. The Appellant submits that the charge is defective as evidence adduced in court does not fully with the charge under Section 296 (2) penal code as the assailant was not accompanied by another person. Thus ingredients of offence not established under Section 296 (2) penal code.

32. Further the Appellant complain that the evidence of identification relied on was of a single identity witness. The people who answered the screams PW2 and PW3 are all relatives of the PW1.

33. Further whereas the PW1 was taken to more than one health institution, only P3 was produced but no treatment notes. The maker of the medical report (P3) Doctor Kariuki was also not called to testify. Mode of arrest is also not explained.

34. Further the investigation officer was not called to testify thus relies on case of **GEORGE NGUKU – VS- R CRA 166/1983 KSU** where court held that: **“Investigation Officer is an essential witness. Therefore failure for the prosecution to call him renders the case for prosecution not proved.”**

35. Further, failure to call mentioned witnesses was wrong and would render prosecution case to fail. He relies on the case of **JOHN NJENGA –VS-R CRA 118/67.**

36. Further PW2, 3 and 4 evidence are inconsistent on the fashion of their narrations. Thus relies on **PETER KAMAU –VS- R KAMAU CRA 331/05 MSA CA.**

37. Finally, he submitted that, the case was not proved beyond reasonable doubt. Mr. Orinda Assistant Director of Public Prosecution rejoinder is that the evidence of PW2, 3 and 4 are credible. There is no doubt PW1 was attacked and robbed.

38. PW6 evidence confirmed the degree of injuries. The core issue was only identification. The PW1 says he was aided by moonlight to identify the attacker.

39. PW2, 3 and 4 heard PW1 shout “*Ngemu why are you killing me*”. The Appellant is a cousin of PW1 thus he knew him. None of these relatives PW1, 2, 3 and 4 had grudge with the Appellant. The Appellant dog was seen at the scene during attack. There was moonlight.

40. The conviction is safe.

41. After going through the evidence on record and the submissions tendered, I find the issues emerging are:-

1) Whether the identification evidence was safe to warrant conviction?

2) Whether prosecution proved its case beyond reasonable doubt.

3) Was charge sheet defective starting with issue No. 3, the charge lodged was under Section 296(2) penal code? The same is proved if :-

a. Offender is availed with dangerous or offensive weapon or instrument.

Or

b. If offender is in company of one or more person (s)

Or

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

42. The evidence on record shows that the attacker had a metal bar. The charge does not indicate the weapons and (or instrument used).

43. However, the PW1 says he was attacked with a metal bar which he was wounded as proved by the P3 form and PW6 evidence.

44. Thus the ingredients of Section 296 (2) (a) and (b) were satisfied. You only need either of 3 limbs of the above provisions of Section 296(2) (a), (b) and (c). The charge was therefore not defective.

45. On identification, the time was at 7.30 – 8.00 p.m. There was moonlight. The attacker viciously attacked the PW1 for period and then at close range removed money from his pockets. The PW1 saw him with aid of moonlight and even shouted his name.

46. PW2, 3 and 4 heard PW1 screaming naming Appellant as the person who was attacking him. It was not identification of a stranger but a relative (cousin). He was still wearing the T-shirt PW1 had seen him wearing in the day time. His dog notoriously known was seen at scene by PW1 at the time of the attack.

47. The court finds that the evidence of identification was free from error. The PW2, 3, and 4 including PW1 were all relatives of the Appellant. None of them had grudge with Appellant. The Appellant in his defence did not rebut the evidence on dog and the T-shirt he was seen wearing by PW1 during the day.

SENTENCE

48. The court finds that the defence was an afterthought. The totality of the prosecution evidence was that the case was proved against Appellant beyond reasonable doubt thus the appeal has no merit and is thus dismissed. The conviction is affirmed and sentence confirmed.

SIGNED, DATED, AND DELIVERED AT MAKUENI THIS 21ST DAY OF AUGUST, 2017.

C. KARIUKI

JUDGE

.....