



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
HCCRA No.231 OF 2013
BETWEEN
SILVESTER MATEKWA WANYAMA.....APPELLANT
AND
REPUBLIC.....RESPONDENT
(Being an appeal from the judgment of Hon. C. Kendagor, Acting SRM
in Kakamega CMC CR. Case No.426 of 2013 delivered on 18/12/2013)

J U D G M E N T

Introduction

1. The appellant in this case, Silvester Matekwa Wanyama was charged and tried on two counts of robbery with violence contrary to Section 296(2) of the Penal Code. In count 1, it was alleged that on the 6th day of January 2013 at Hill School in Municipality Division in Kakamega Central District within Western province jointly with others not before Court being armed with dangerous and offensive weapons namely metal rod robbed SHEM LIKHANGA SHITITI of his motor cycle Reg No.KMCU 162F TVS Star valued at kshs.87,000/=.

2. In Count 11 it was alleged that on the 18th day of January 2013 at St. Joseph primary School at Municipality Division, Kakamega Central District within Western province jointly with others not before Court, being armed with dangerous weapons namely stones robbed DAVID ALEMBI ONGONGA of his motor cycle Reg No.KMCR 349T TVS Star valued at kshs.80,000/=.

3. After carefully considering the evidence on record, including the appellant's defence, the trial Magistrate was satisfied that the Prosecution had proved its case against the appellant on both counts and proceeded to convict him accordingly. The appellant was sentenced to suffer death as by law prescribed the only anomaly being that the learned trial Magistrate did not keep the death sentence in Count II in abeyance.

The Appeal

4. Being aggrieved by both the conviction and sentence, the appellant filed this appeal through his Counsel, M/s C.O Samba & Co. Advocates setting out the following 12 grounds of appeal:-

1. The learned magistrate erred in law and fact in convicting the appellant for the offences of robbery with violence contrary to section 296(2) of the penal code against the weight of the evidence.
2. The learned trial magistrate erred in law and fact in holding that the appellant was positively identified by the two complainants when there was no evidence of identification tendered against him.
3. The learned trial magistrate misdirected herself in law by misunderstanding the legal meaning of identification and that culminated in an unwarranted conviction of the appellant of the offences of robbery with violence contrary to section 296 (2) of the penal code.
4. The learned trial magistrate erred in law in misinterpreting the evidence before court to the prejudice of the appellant.
5. The learned trial magistrate erred in law in failure to appreciate material contradictions in the evidence before court and further misdirected herself in law by failure to give the appellant the benefit of doubt in tandem with the provisions of sections 215 of the penal code.
6. The learned trial magistrate erred in law in convicting the appellant for offences of robbery with violence contrary to section 296 (2) of the penal code on the basis of beliefs, inferences and extraneous issues contrary to the law of evidence.
7. The learned trial magistrate erred in law by failure to identify the correct issues for determination by the court in respect of the offences of robbery with violence contrary to section 296 (2) of the penal code which culminated in the unlawful conviction of the appellant.
8. The learned trial magistrate erred in law in sentencing the appellant to serve illegal sentences.
9. The learned trial magistrate erred by sentencing the appellant to suffer the death sentence twice contrary to the law.
10. The learned trial magistrate erred in law in convicting the appellant for offences of robbery with violence contrary to section 296(2) of the penal code when the charges were at variance with the particulars set out in the charge sheet and when the evidence before court was at variance with the particulars of the charges.
11. The learned trial magistrate erred in law in convicting the appellant for the offences of robbery with violence contrary to section 296 (2) of the penal code when she lacked jurisdiction to hear and determine those charges.
12. The learned trial magistrate erred in law in convicting the appellant on the principle of corroboration when there was no such evidence before court.

The appellant prays that the appeal be allowed convictions quashed and sentences set aside so that he is set at liberty.

The Prosecution Case

5. The Prosecution called 6 witnesses. PW1 was Shem Likhanga Shititi who is the complainant in Count 1 (Shem). He testified that the appellant who was his customer approached him on 05/01/2013 at about 7.20pm and requested to be dropped at Hill School upon agreeing to pay kshs.70/= for the ride. The appellant did not alight from the motor cycle registration number KMCU 162F TVS in colour when they

got to Hill School but instead got hold of Shem by the neck and pushed him off the motor cycle. As Shem fell off the motor cycle he saw two other people emerge from the surroundings and joined the appellant and together the three people punched Shem several times. One of the people hit Shem with a metal bar on the head, while the appellant continued to punch him. Shem fell down. Then the appellant and his accomplices took the motor cycle and left Shem still lying on the ground.

6. Thereafter another motor cycle rider came by and helped Shem to go to Nala Hospital where he was treated and admitted for 3 days. Shem identified the treatment notes from Nala Hospital - PMF 1 – 2 and the purchase receipts for the motor cycle – PMFI – 1.

7. On Friday 15/02/2013 while Shem was in Kakamega town, he spotted the appellant crossing the road and heading towards a hotel near Zamaleck. Shem notified other motor cycle riders who followed the appellant to the hotel which the appellant had entered. The appellant who attempted to run away when he noticed he was being followed was restrained. Upon arrest by members of the public, the appellant was assaulted. He led Shem and other motor cycle riders to Maraba saying that Shem's motor cycle was there. No motor cycle was found. The Police later went to Maraba and arrested the appellant. The Police issued Shem with a P3 form. On cross examination Shem testified that he clearly identified the appellant during the attack with the help of lights from the hospital side. Shem stated further that there was no mistaken identity of the appellant as he had known him before the day of the incident.

8. Josephat Musoga Muchira PW2 (Josephat) told the Court that he was the owner of motor cycle reg No.KMCU 162F. After Shem informed him of the robbery at about 7.35pm on 06/01/2013 he rushed to Nala hospital where Shem was being attended to by doctors. PW2 stated that he had bought the motor cycle for kshs.87000/=

9. David Alembi Ongonga the complainant in Count II testified as PW3. His testimony was that: On 18/01/2013, he was in Kakamega town and after fuelling his motorcycle at Total Petrol Station, the appellant whom he had ferried a week before stopped him and asked to be dropped at St. Joseph's. Before they set out for St. Joseph, Josephat asked the appellant why he was going to St. Joseph's and that is when the appellant told him he (appellant) was going to see his girlfriend.

10. When the two reached St. Joseph's the appellant asked Josephat to stop at a certain gate which the appellant pointed out. This was near Hill School. Josephat said that he had dropped the appellant at that place before. Before the appellant alighted from the motor cycle he got hold of Josephat by the neck. A struggle ensued. Just then two people emerged from the napier grass which was nearby. One of the two persons held the motor cycle and ran away with it. The second person came armed with a stone and while the appellant was still holding onto Josephat the person armed with the stone hit Josephat with stones on the head. The appellant then let go and he together with the remaining person also ran away.

11. After the robbers ran away, a guard at the nearby church approached Josephat who was by that time bleeding. With the help of the guard, Josephat called his brother Matcom Ocholi, PW4 and informed him of what had befallen him. A good Samaritan took Josephat home but later that evening, PW4 took Josephat to Nala Hospital for treatment. A report was also made to Kakamega Police Station and a P3 form issued to Josephat. Josephat identified the P3 form – PMF1 – 5 and the treatment notes, PMFI – 6. He also identified the blood-stained clothes he was wearing on the day of the attack, being a blood stained checked shirt – PMF1 – 7 and a blood stained and muddy pair of jeans – PMF 1 – 8.

12. Josephat also stated that on 15/02/2013, he received a telephone call from Shem who informed him about the arrest of the appellant by members of the public. He joined Shem and other members of the public when the appellant took them to Maraba to show them the motor cycles, but none were found.

13. During cross examination, Josephat stated that he clearly identified the appellant while at Total Petrol Station and that there was no mistaken identity as he (Josephat) had mastered the appellant's physical appearance.

14. PW4, Matcom Ocholi testified that when he saw Josephat after the attack, Josephat had a deep injury

on the forehead and also had another injury on the arm. PW4 also accompanied Josephat to the Police Station. PW4 also told the Court that Josephat described the appellant to him.

15. Patrick Mambili Senior Clinical officer at Kakamega Provincial General Hospital testified as PW5. He is the one who filled P3 forms in respect of Shem and Josephat. Regarding Shem, PW5 stated that Shem was hospitalized between 6/01/2013 and 09/01/2013 with cuts on the head. At the time of examination on 08/05/2013 Shem had a healed wound on the forehead and had been stitched at Nala where he had been treated for injury on both eyes but with no other injuries. He also stated that he filled the P3 form some 16 weeks after the injury and that the weapon used to inflict the injury was a blunt object. The P3 form for Shem was produced as PExhibit 3 classifying the degree of injury as harm. The treatment notes together with Shem's out-patient card for Nala were produced as PExhibit 2.

16. Regarding Josephat, PW5 stated that Josephat had a cut on the right upper eye-lid which had healed. That Josephat also had a cut between the two eyes and a healed scar on the left hand (top muscles). PW5 also testified that the injuries suffered by Josephat were caused by both blunt and sharp objects. The injuries were classified as harm. The P3 form together with the treatment outpatient card plus notes from the hospital were produced as PExhibit 6.

17. The last prosecution witness, PW6 was Number 63708 Police Constable Janson Mwasho. He is the one who received the appellant at Kakamega Police Station on 15/02/2013. PW6 also investigated this case after being informed that the appellant had stolen motor cycles. PW6 stated that during investigations, he established that the two complainants had been robbed of their motor cycles at Hill school area and at St. Joseph's school area on two different dates. PW6 also stated that according to documents availed to him Josephat purchased his motor cycle on 09/03/2012 for kshs.87,000/=. The purchase receipt was produced as PExhibit 1. The transfer receipt to David Alembi, PW3 was produced as PExhibit 4. The blood stained jeans trouser and green shirt for David Alembi were produced as PExhibit 7 and 8 respectively. During cross examination, PW6 testified that no recoveries were made. The Prosecution then closed its case.

The Defence Case

18. At the close of the Prosecution case, the appellant was found to have a case to answer. After due compliance with Section 211 of the CPC, the appellant elected to give sworn evidence and called no witnesses. He denied committing the offences and stated that on 06/01/2013, he was at Canoe Hotel in Kakamega town when he realized that he was being trailed by a group of people. As he stepped out of the hotel, one of the people trailing him jumped on him and held him by the collar of his shirt. He was slapped and thrown down. Other people who were at the scene beat him thoroughly calling him a thief. He stated that during the assault, kshs.3000/= and his ID were stolen. The people held his hands and pulled him along the ground as a motorcycle on which his hands were tied moved along. Later his (appellant's) brother came and called the Police who took him (appellant) away to the hospital where he remained hospitalized for 3 days. The Police later interrogated him and took his finger prints. He denied being a criminal.

19. During cross examination, the appellant told the Court that he was rescued from mob justice by the Police. He also stated that at the time of the attack, he was staying with his brother.

Duty of this Court

20. This is a first appeal and on this appeal, the appellant expects us to submit the entire evidence to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter, only bearing in mind the fact that we do not have the opportunity to see and hear the witnesses and as such, we are to make an allowance for the same. Once we make our own findings in the matter, we shall also be in a position to say whether or not the learned trial Court's findings should be supported. For the above propositions generally see **Okeno –vs- Republic [1972] EA 32** and **Mwangi –vs- Republic [2004] 2 KLR 28**.

Issues for Determination

21. After carefully reconsidering and evaluating the evidence afresh the following issues arise for determination:-

- a. Whether the appellant was properly identified by both victims as the assailant.
- b. Whether the offence of robbery under Section 296(2) was proved.
- c. Whether the conviction on both counts 1 and 11 was safe; in other words was the conviction based on properly framed charges?

Analysis and Findings

22. a) whether the appellant was properly identified by both victims

Shem the complainant in count 1 stated that on 05/01/2013 at about 7.20p.m he was at the stage when the appellant whom he had carried on his motor cycle about one week before approached him and asked to be dropped at Hill school. The fare was agreed at kshs.70/=. Shem stated that as they went along, he asked the appellant why he wanted to go to Hill school. He also stated that when they got to Hill school, the appellant grabbed him by the neck instead of alighting from the motor cycle. He also stated that at Hill school where the incident took place there was light from the hospital side and that he could not have mistaken the appellant for another because he saw him well with the help of those lights.

23. Shem also stated that on 15/02/2013, he recognized the appellant when he saw him in town. He raised an alarm and the appellant was arrested.

24. We are of course aware that where the Prosecution case rests on the identification of the appellant, a Court must exercise great caution before convicting an accused person on such evidence, lest conviction results in a miscarriage of justice. We are also fully aware of the inherent dangers that are associated with the identification of an assailant by a single witness as is the position in the present case. In this regard, we must be satisfied that the conditions prevailing at the material time and the length of time for which both Shem and Josephat had the appellant under observation is or was sufficient for error-free identification of the appellant. See **Nzaro –vs Republic [1991] 2KAR 212 or [1991] KLR 70** and **Odhiambo –vs- Republic [2002] KLR 241**.

25. In the instant case and regarding Shem's identification of the appellant Shem stated that the appellant was his customer and when the appellant asked him at bout 7.20pm on the material day to take him to Hill school area he did not hesitate to do so. Shem also stated that when they got to Hill school where the appellant was supposed to alight there was light from the hospital side. We are satisfied that there was no mistaken identity of the appellant because Shem did not point out any other person until 15/02/2013 when he saw the appellant in town and recognized him as the assailant and then raised an alarm as a result of which the appellant was apprehended by members of the public before the Police came to his rescue.

26. As held in the case of **R –vs- Turnbull [1976] 3 All ER 549**, it was easier for Shem to recognize the appellant because of previous interactions between the two of them and secondly because of the presence of electric light from the hospital side at Hill school as he (Shem) was being attacked.

27. Mr. Samba submitted that Shem did not give any peculiar marks on the appellant which would have satisfied him beyond doubt that it was the appellant and no one else that attacked him. On this issue, we agree with Mr. Omwenga Counsel for the respondent that as a customer, Shem knew the appellant and easily recognized him as such when he asked Shem to carry him to Hill school area for about kshs.70/=.

28. We now come to the appellant's identification by David Alembi PW3. This is what David said of the encounter between him and the appellant.

“I recall 18/1/2013. I was at Kakamega.....I took fuel at Total Petrol Station. Someone stopped me. I recognized him. I had ferried him one Sunday the week before. I did not know his name. I asked him where he wanted to go. He asked me to drop him at St. Joseph’s. He said he was going to see his girlfriend after I asked him what he was going to do there as I knew him as a customer. He asked me how I knew him.”

29. From the above evidence, it is clear to us that the appellant was someone PW3 knew and recognized. Applying the same principles in the Turnbull case (supra) it was a case of recognition and not identification by PW3 of the appellant. The evidence also clearly shows that the appellant was surprised that PW3, David knew him by face though not by name and that PW3 stated when recording his statement that he had been robbed by a customer known to him. PW3 denied that he was mistaken about the identity of the appellant as the two had talked on all the occasions that PW3 had carried the appellant.

30. We have carefully considered the submissions by appellant’s Counsel against the backdrop of the above evidence and find that the appellant’s complaints about mistaken identify by both Shem and David have no basis. We are satisfied that the conditions for recognition of the appellant by both Shem and David were conducive for clear and error-free recognition of the appellant thereby pinning him to the two scenes at which Shem and David were robbed.

b) whether the offence of robbery c/s 296(2) of the Penal Code was proved

31. The offence of robbery is defined under Section 295 of the Penal Code which reads as follows:-

“Any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to present or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”

32. For the offence of simple robbery defined under Section 295 the punishment is prescribed by Section 296 (1) which provides that:

“Any person who commits the felony of robbery is liable to imprisonment for fourteen years.”

33. Under Section 296(2) of the Penal Code the offence of robbery as defined under Section 295 is punishable by death if the offender:

a) is armed with a dangerous or offensive weapon or instrument,

b) is in company with one or more other person or persons; or if,

c) at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”

34. In essence therefore, the particulars of a charge under Section 296(2) must contain any one of the three ingredients in order for the charge to be valid. In the case of **Said Bakari Ali & 2 others –vs- Republic Mombasa Court of Appeal Criminal Appeal No.90 of 2003** (unreported) the Court of Appeal rendered itself thus on the issue in part of its judgment:-

“of course the gentlemen who engage themselves in robberies will normally be armed in a group and are invariably very fond of actual use or threat to use violence. But that does not matter. If the Prosecution is minded to bring a charge under Section 296(2) they must choose under which one of the three provisions set out hereinabove they wish to proceed.”

32. In the instant case the charge against the appellant states that the appellant was with others not before the Court and that they were armed with dangerous and/or offensive weapons. In respect of both counts the appellant was initially alone when he asked Shem and David on different dates to ferry him to

where he said he wanted to go but as soon as they arrived at the alleged destinations, the appellant grabbed his victims by the neck as other people emerged from the nearby surroundings and jointly with the appellant attacked the victims. The charge in Count I clearly shows that the metal rod with which the appellant was armed was a dangerous and offensive weapon. The charge also states that the appellant was with others not before Court when he committed the robbery against Shem. We therefore find no merit in the appellant's complaint regarding the charge as framed.

33. In count II, the appellant was jointly charged with others not before Court and it is alleged that in carrying out the robbery, they were armed with dangerous and offensive weapons, namely stones with which from the evidence, they hit David on the head.

34. We are therefore satisfied that the Prosecution proved two of the ingredients under Section 296(2) of the Penal Code, namely the fact of the appellant being in the company of others and secondly of being armed with dangerous and offensive weapons. What we are saying is that the two charges disclose an offence known in law against the appellant namely the offence of robbery with violence under Section 296(2) of the Penal Code. This being the case, and from the evidence on record, we have reached the conclusion that the Prosecution proved the offence of robbery under Section 296(2) of the Penal Code on both counts, to the required standard. We therefore uphold the position held by the State during this appeal.

(c) whether the convictions on both counts were safe

35. Having reached the conclusions we have reached on issues (a) and (b) above we need not belabor the point that both convictions in this case were safe. The issue of identification is clear from the evidence of both Shem and David the fact of no recoveries having been made notwithstanding.

Conclusion

36. In conclusion and after carefully reconsidering and evaluating the evidence afresh and also after carefully considering the judgment by the learned trial Magistrate and the rival submissions of Counsel together with the twelve grounds of appeal, we are satisfied beyond any reasonable doubt that this appeal lacks merit on the conviction and sentence on both counts and we dismiss it altogether. We uphold the judgment of the learned trial Magistrate.

37. We order that the death sentence in Count II be held in abeyance.

38. It is so ordered.

Judgment delivered, dated and signed in open Court at Kakamega this 28th day of January 2016.

RUTH N. SITATI

NJOKI MWANGI

JUDGE

JUDGE

In the presence of:

Mr Shivega for Appellant

Mr Omwenga for Respondent

Mr Anunda - Court Assistant

