



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
(CORAM: G.K. KIMONDO & C.W. GITHUA JJ.)
CRIMINAL APPEAL NO. 139 OF 2009

DICKSON MUKASA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. S. Atonga, Senior Magistrate dated 28th August 2009 at Eldoret in Criminal Case No. 955 of 2009)

JUDGMENT

1. The appellant was convicted on a count of robbery with violence contrary to section 296 (2) of the Penal Code. He was sentenced to suffer death.
2. The particulars of the charge read as follows-

“On the 3rd day of February 2009 at Elgon View Estate in Uasin Gishu District within Rift Valley Province, jointly with others not before court robbed Gladys Oganda of cash Kshs 67,000, a bunch of keys, Barclays Bank ATM cards, smartcards for Uchumi, Tuskeys and Nakumatt all valued at Kshs 70,000 and at or immediately before the time of such robbery used actual violence on the said Gladys Oganda.”

3. The appellant is aggrieved by his conviction and sentence. The original petition of appeal was filed on 3rd September 2009. On 26th November 2014, we granted leave to the appellant under section 350 of the Criminal Procedure Code to amend his grounds of appeal. There are four *amended grounds of appeal*. First, that the prosecution failed to prove the charge beyond reasonable doubt; secondly, that the trial magistrate failed to appreciate the variance between the particulars of the charge and the evidence; thirdly, that the trial court failed to consider the contradictions between the evidence of PW2 and PW3; and, fourthly, that the trial court disregarded the defence proffered by the appellant. The appellant relied wholly on his hand-written submissions filed on 30th July 2015.
4. The State contests the appeal. The position of the State is that all the key ingredients of the offence were proved beyond reasonable doubt. In particular, the State submitted that PW1 identified the

appellant and established that he was acting in concert with three unknown persons who entered the compound; attacked PW1; and, locked her up in a toilet. The State submitted that the appellant was also identified by PW2, PW3 and PW4. The State submitted that the guilt of the appellant could also be inferred from a set of circumstances: he never raised an alarm; he was not tied up by the robbers; and, he only suffered soft tissue injuries. It was further submitted that there was no variance between the particulars and the evidence; and, that the discrepancies in the evidence were not material. In a synopsis, the State submitted that the appeal lacked merit and should be dismissed.

5. This is a first appeal to the High Court. We are required to re-evaluate all the evidence on record and to draw our own conclusions. In doing so, we have been careful because we have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
6. The appellant was an employee of PW1 and PW2. He was living in their servant quarters adjacent to their house. PW1 was a key witness at the trial. We shall reproduce her evidence *in extenso*-

“I can recall that on 3.2.2009 at about 9.00 pm I was watching news in the house but the doctor [her husband PW2] had not arrived. I had one servant by the name Dixon Mukasa [the appellant] who was in the kitchen by then.

“I later escorted him to the door so that he can [sic] go to the servant’s quarters. After opening [the] door, the suspects who were outside entered the house and knocked me down. I can't tell whether they had dangerous weapons but they warned me not to make noise since they had guns as they alleged. They filled [sic] my with some clothes. They locked me in a room and.....tied my legs and poured water on me in the toilet for 2¹/₂ hours. My husband came and they forced the toilet door open. Ochieng [PW4] and my husband later came.....he was cut on the left fingers. He was being forced to enter the house. Later my husband rang the Langas Police and they came. The house was in a mess; full of blood and I was taken to Eldoret Hospital for treatment. The accused had fallen in the kitchen and was unconscious. Later we were all taken for treatment and the accused was admitted but the doctor said that he was not injured.

“There were lights during the alleged robbery and I never heard the accused complain at that time. I could not tell that I saw any suspects.....the accused is implicated because that night he spoke to some suspects at around 8.00 pm. The value of the items stolen was Kshs.70,000.”

7. Upon cross-examination by the appellant, PW1 said that she never saw the appellant being tied up or raise an alarm. She said she suspected him *“because the panga used was [the appellant’s] and he talked to the suspects at around 8:00pm”*.
8. PW2, Dr. Oganda, was the husband of PW1. He and PW4 arrived at the house around midnight. He found the lights on. He saw two people emerging from the kitchen heading towards the laundry. He saw the “tall person” open the kitchen door and who forced PW2 to enter the house. He said the robbers had pangas and guns. PW2 was cut on the left thumb. He testified that the three thugs took off when they saw PW4. PW2 locked the door from inside, searched the house, rescued PW1 and called the police.
9. PW2 testified further that he found the appellant in the laundry room. He said the appellant was also taken to the hospital but the doctor told them he was feigning injury. He did not know how the thugs gained access to the house but there was no forced entry.
10. PW4 heard PW2 calling him for assistance. He said he saw one suspect putting on an orange t-shirt and assumed him to be the appellant. He called him but he did not answer. Another suspect, who was wearing a white trouser and carrying a paper bag, escaped by jumping over the fence.
11. PW5, Dr. Robert Tenge, examined PW2 the same night. He said PW2’s suit was blood-stained; his left thumb had been cut and was dislocated. He opined that the probable weapon was a sharp object. He classified the injuries as grievous harm. He filled a P3 form on 12th February 2009 (exhibit 1).

12. PW6 was Police Constable Kemboi. He rushed to the complainant's house. He found PW1's house had been ransacked. Kshs.67, 000 and other items were stolen. He accompanied PW1, PW2 and the appellant to Eldoret Hospital. PW1 and PW2 were treated and discharged. The appellant remained behind for further observation. The doctor told him that the appellant was feigning injury. The appellant was later charged with the offence.
13. We have then examined the defence proffered by the appellant. In his unsworn testimony, he stated as follows-

“I can recall on 3.2.2009 at about 7.00 pm. I was at Elgon View Estate conducting my work as a houseboy in the house of the complainant. Later at about 10.00pm I wanted to go to sleep in the servant's quarters and the complainant was there when I opened the back door of the house to go outside in the presence of the complainant. The robbery suspects whom I can't tell the number forced their way into the house and I can't tell what happened and I gained consciousness in the hospital. Later, two plain clothes officers picked me from the hospital and escorted me to Langas Police Station where I was falsely charged”.

14. We shall deal first with the question whether the trial court disregarded the appellant's defence. The learned trial magistrate dwelt briefly with the unsworn statement of the appellant at page 39 of the record. The court did not however *analyse* the defence of the appellant or mirror it *against* the prosecution's witnesses. The trial court devoted a lot of time to an analysis of the testimony of PW1, PW2, PW3, PW4, PW5 and PW6. It found their evidence to be credible and corroborative. In that regard, we cannot say that the defence was not taken into account: we can only state that the learned trial Magistrate was *not* convinced that the appellant was telling the truth.
15. The key ingredients for the offence of *robbery with violence* are detailed in section 296(2) of the Penal Code-

“if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, 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”.

16. PW1 testified she was attacked by robbers who threatened her, tied her up, gagged her and locked her up in the toilet. She described in detail the items that were stolen. Her list corresponded with the particulars of the charge. PW4 was injured in the attack. PW5, Dr. Robert Tenge classified the injuries as grievous harm. There were at least three robbers. They had weapons or *pangas*. The key ingredients of robbery with violence were all present. We are unable to hold that there was a material variance between the particulars of the charge and the evidence at the trial. We thus find that the charge sheet was *not* defective.
17. We shall now turn to the identification of the appellant. Evidence of recognition is generally more reliable than identification of a stranger, but mistakes may sometimes be made by witnesses. In Wamunga v Republic [1989] KLR 424, the Court of Appeal held as follows-

“It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.”

18. In Republic v Turnbull & others [1976] 3 All ER 549, the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken. In Kiarie v Republic [1984] KLR 739, the Court of Appeal had this to say-

“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction.

19. It is important to keep two matters in mind. First, the appellant was a house boy for PW1. She and PW2 obviously knew the appellant. Secondly, we are concerned with the recognition or identification of the appellant *at, during or immediately* after the robbery. The key question is whether the witnesses identified the appellant as one of the robbers; or, whether the appellant acted in concert with the assailants.
20. PW1 said the appellant was working in the kitchen. She later escorted him to the door so that he could go to the servant's quarters. After opening door, the suspects who were outside entered the house and knocked her down. It is unclear why she had to escort her servant to the door. What is material is that there was no indication then that the appellant was acting in cahoots with the intruders.
21. PW1 said that "*the accused [was] implicated because that night he spoke to some suspects at around 8.00 pm*". She could not identify the suspects. She may, in hindsight, have developed strong suspicions against the appellant. But we are not persuaded she *recognized* the appellant at the *time* of the robbery as one of the robbers; or, who conspired with them to attack her.
22. There is then the evidence of PW3. He said on 3rd February 2009, he was repairing a bulb in the compound. He then saw the appellant "*standing at his door but one tall suspect came and went to the garage*". PW3 did not say what *time* he saw the appellant. He was later to learn, at 3:00am from PW4, that PW1 and her family had been attacked. Clearly, PW3 did *not* see the appellant at the *time* of the robbery.
23. PW4's testimony was that he saw one suspect putting on an orange t-shirt and *assumed* him to be the *appellant*. He called him but he did not answer. He said another suspect, who was wearing a white trouser and carrying a paper bag, escaped by jumping over the fence.
24. From our reappraisal of the evidence, we find that the appellant was not *positively* identified by the complainant, PW2, PW3 or PW4 as one of the robbers. There is also *no* credible evidence to support the allegation that the appellant invited the robbers to the house. We are fortified in that finding because the suspicions of PW1 and PW2 were fuelled by three matters: that the appellant never raised an alarm; he was not tied up by the robbers; and, he only suffered soft tissue injuries.
25. This was a criminal trial. Mere suspicions and theories, however strong, were insufficient to anchor the charge. The appellant was deemed innocent. His *unsworn statement* may have been *unbelievable*; but our Constitution allowed him to remain *mum*. He was not obligated to fill in the gaps for the prosecution. Lack of positive identification casts a long shadow of doubt on the prosecution's case. The burden of proof fell squarely on the shoulders of the prosecution. It did not shift to the appellant. See *Kiarie v Republic* [1984] KLR 739, *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332 at 334, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).
26. In the end, we are *not* satisfied that the prosecution proved *all* the ingredients of the offence beyond reasonable doubt. It follows as a corollary that the conviction was *unsafe*. The upshot is that the appeal is allowed. The conviction and sentence are hereby set aside. The appellant shall be released forthwith unless otherwise lawfully held.

It is so ordered.

DATED and SIGNED and DELIVERED at ELDORET this 21st day of January 2016

G. K. KIMONDO

C.W. GITHUA

JUDGE

JUDGE

Judgment read in open court in the presence of-

Appellant (in person).

Ms. R. N. Karanja for the State.

Mr. Lesinge, Court clerk.

