



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 79 OF 2009

MUSA AHMEDAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of S.M. Mungai SPM in Criminal Case No. 1476 of 2008 delivered on 20th May 2009 at the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant was charged in the original trial Court with the offence of robbery with violence contrary to section 296(2) of the Penal Code. He was the second accused person in the criminal case in the trial court, and was jointly charged with the first accused person. The particulars of the offence were that on the 26th day of June 2008 at Misakwani village in Machakos District within Eastern Province he, jointly with another, robbed Bernard Wambua Muli of his mobile phone make Motorola C113 valued at Kshs. 1,999/=, and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said Bernard Wambua Muli.

The Appellant was arraigned in the trial court on 1st July 2008 where he pleaded not guilty to the charge. He was tried, convicted of the offence and sentenced to death. The Appellant being aggrieved by the judgment of the trial magistrate, has preferred this appeal against the conviction and sentence. The main grounds of appeal are stated in the Appellant's Petition and Memorandum of Appeal filed in Court on 26th May 2009 and Amended Supplementary Grounds of Appeal dated 19th November 2015 that were availed to this Court during the hearing of the appeal.

The grounds of appeal are that the trial magistrate dismissed the possibility of a mistaken identity since the attack happened quickly and was unexpected; the evidence of his arrest was unsatisfactory as no one pointed him out; the trial magistrate erred by failing to observe that PW1 could not have been robbed at 10.30am and an arrest made ½ kilometre away at the same 10.30 am; and that his arrest with nothing in possession was proof of his innocence.

The Appellant also availed to the Court submissions dated 9th November 2015 wherein he argued that the duration of the attack was too short for PW1 to establish his identity. Further, that the circumstances that prevailed at the scene of crime were not good to enable a positive identification of his attackers. He was of the opinion the court should have warned itself of this fact as a basis of conviction, as was in **Joseph Ngumbao Nzaro vs Republic (1991) 2 KAR 212** and in **Paul Etole and Another vs Republic Criminal App 24 of 2000**. The Appellant submitted that nobody pointed him to the members of the public for him to be arrested, and that PW1 found him already arrested and he erroneously believed that he was his attacker. He also noted that there was a variance as to how much the phone was worth in the

charge sheet and in evidence.

The Prosecution opposed the appeal by way of written submissions filed in Court dated 8th February 2016 by Mrs Jackeline Abuga, the Prosecution counsel. The learned counsel argued that the attack happened in broad daylight at 10.30 am and the complainant saw the Appellant stand a few meters away from him. Further, that the 1st accused attacked the complainant first and the Appellant then joined him, and that the attackers came to close proximity with the complainant and he was able to see them and upon arrest he identified him.

The learned counsel further submitted that PW2 and PW3 confirmed that the phone make Motorola C113 was recovered from the 1st accused person which the complainant identified as his. On the doctrine of recent possession it was submitted that the prosecution proved that the phone was recovered in possession of the 1st accused who was in the company of the Appellant. It was noted the phone was recovered within minutes of the robbery. Reference was made to the decision in **Republic V Isaac Nganga, Criminal App 272 of 2005**, and the counsel concluded that the prosecution had proved its case beyond reasonable doubt.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called four witnesses. PW1 was Bernard Wambua Muli who testified that on 26/6/08 at around 10.30 a.m., he was heading to his shop on foot and on reaching Misakwani location near Yiine River he saw the appellant ahead of him. He stated that when he was about to pass him the first accused emerged from the bushes and told him 'toa kitu' (give something). He told him he had nothing and the 1st accused winked at the Appellant. He said that a struggle ensued and the 1st accused put his hand in his right trouser pocket where he stole his phone Motorola C113 worth Kshs. 1990/=.

PW1 testifies that the 1st accused released him and started walking away. It was then that he said he raised an alarm and started chasing at them. He stated that the 1st accused and Appellant were later arrested by the public ½ a mile ahead and were taken to Machakos police station. He stated that his phone was recovered and he produced a receipt to show ownership.

PW2 was Mutuku Aswaskin Mutua, who testified that on 26/6/08 at around 10.30 am he was cutting wood near his home when he heard noises coming from River Yiine. He stated that when he went to the scene he found the Appellant and his co- accused being beaten by members of the public for having robbed the complainant of his mobile phone. He stated that the phone was recovered from the 1st accused. He confirmed that the phone was a Motorola C113 produced in court as exhibit. Pw2 testified that he pleaded with the public against lynching the suspects, and that the suspects were eventually taken to Machakos Police station.

PW3 was Anthony Nthusa Mutisya, who on his part testified that on 26/6/08 at 10.30 am he was heading home when he heard people shouting 'mwizi mwizi' (thief, thief) at Yiini River. He stated that when he went to the scene he found the Appellant and his accomplice having been apprehended being beaten by members of the public. He stated that they had stolen a mobile phone which they were being told to produce. He confirmed that the 1st accused produced the cell phone from his rear trouser pocket. PW3 testified that the phone was a Motorola and identified it in Court.

The last witness (PW4) was P.C David Kiprono who testified that he was attached to Machakos Police Station, and that he investigated the case after the suspects were brought to the police station by members of the public. He stated that he recorded the statements and took the exhibits which were a phone S/No 351547013188870 and a receipt which he produced in Court.

The trial court found that the Appellant had a case to answer and complied with section 211 of the Criminal Procedure Code in that respect. The Appellant gave unsworn testimony and did not call any

witnesses. He stated that he did not rob the complainant, and that on the material day he was headed to Eastleigh to sell clothes when he met two men who asked where he was coming from. He stated that the two men told him that they would take him to the police station to explain. The Appellant stated that he was then taken to the police station where he was booked for robbing the complainant.

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that the grounds of appeal raise two issues. These are firstly, whether there was proper identification of the Appellant; and secondly, whether the Appellant's conviction for the offence of robbery with violence was based on consistent and sufficient evidence.

On the issue of identification, **the** Court set out what constitutes favourable conditions for a correct identification by a sole testifying witness in Maitanyi vs Republic, (1986) KLR 196 as follows:

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error”.

I have also reminded myself of the guidelines in the case of Mwaura v Republic [1987] KLR 645, in which the Court of Appeal held, *inter alia*, that:

“In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light”.

In addition it has been stated by the Court of Appeal in Anjononi and Others vs Republic, (1976-1980) KLR 1566 that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

In the present appeal, the robbery took place during daylight. PW1 testified that he saw the Appellant before the robbery when he came in front of him and he testified that he also saw the Appellant after he had been apprehended by the members of the public a short while later. Therefore, no difficult circumstances were present as to cloud the complainant's memory, as he had seen the Appellant before he was attacked and also during his arrest. I accordingly rely on PW1's sole evidence of identification

On the issue of whether there was sufficient evidence to convict the Appellants for the offence of robbery with violence, section 296 (2) of the Penal Code provides as follows:

“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.”

The prosecution must prove theft as **a central element of the offence of robbery with violence, as the offence is basically an aggravated form of theft.** The other elements of the offence of robbery with violence were elaborated by the Court of Appeal in Ganzi & 2 Others v Republic [2005] 1 KLR and in Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported) as follows:

1. **If the offender is armed with any dangerous or offensive weapon or instrument, or**
2. **If he is in the company with one or more other person or persons, or**
3. **If at or immediately before or immediately after the time of the robbery, he wounds, beats**

strikes or uses any other violence to any person.

I am alive in this regard to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction of robbery with violence under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549.**

In the present appeal, the Appellant was said to be in the company of the 1st accused person at the time of the robbery by PW1. PW1 testified in this regard as follows:

“On 26/6/08 at around 10.30am I was heading to my shop. I was walking. When I reached Misakwani Location near Yine river I saw the second accused (identified) standing ahead of me. When I was about to pass him the first accused came and told me “toa kitu” He emerged from the bushes. I told him I had nothing. He winked at accused 2. When I turned to check the 1st Accused he threw a slap at me but I bent and it did not contact me. Accused 1 then held me. Accused 2 tried to kick me but I turned. Accused 1 then put his hand in my right trouser pocket and took my cell phone... accused then released me and they started walking”

This evidence of PW1 of the Appellant being with the 1st Accused person is corroborated by the fact that the Appellant was later arrested together with the 1st Accused person by members of the public.

Notwithstanding the above findings, I am however inclined give the Appellant the benefit of doubt for various reasons. In the first instance, the person who perpetrated the robbery as shown in PW1's evidence was the 1st Accused person and not the Appellant, and it is this 1st Accused person was later found in possession of the phone stolen from PW1. The requirement of being in the company of others for the offence to qualify as robbery with violence is with respect to the offender, that is the person who commits the act of stealing.

The Appellant in my opinion cannot therefore be the offender within the meaning of section 296(2) of the Penal Code as he did not commit the act of robbery neither was he found in possession of the stolen phone, and it cannot therefore be said that he was guilty of robbery with violence merely because he was in the company of the 1st Accused person.

Secondly, no offensive or dangerous weapon used by the Appellant in the robbery was brought in evidence, neither was there any evidence of any injury or harm caused to the PW1 by the Appellant. The evidence by PW1 of the Appellant's attempt to kick him is in my opinion in the circumstances an assault. The evidence by PW1 in this regard was also not corroborated. It is thus my finding that that there was insufficient evidence to convict the Appellant with the offence of robbery with violence, and that the said conviction was unsafe.

I accordingly quash the conviction of the Appellant for the charge of robbery with violence contrary to Section 296(2) of the Penal Code, and set aside the sentence of death imposed upon him for this conviction. I also order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF MARCH 2016.

P. NYAMWEYA

JUDGE