



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Appeal 45 of 2013

NICKSON BARAWA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from the Original Conviction and Sentence of Hon. N. Shiundu, Ag. Senior Principal Magistrate in Criminal Case No. 381 of 2011 at Malindi Law Courts on 31.05.2013)

JUDGEMENT

1. The appellant was sentenced to death by Hon. Shiundu (Ag. SPM) in Criminal Case No. 831 of 2011 for the offence of robbery with violence contrary to Section 296(2).

PARTICULARS OF THE OFFENCE

2. The particulars of the offence are that on 10th December 2012 at Mida Village, Gede Location within Kilifi County, the appellant jointly with another not before court while armed with dangerous weapon namely a sword, robbed Karama Gona of a motor cycle registration No. KMCN 539F Bajaj Boxer valued at Kshs.82,000/= and cash Kshs.500/= and at or immediately before the time of such robbery wounded the said Karama Gona.

THE PROSECUTION EVIDENCE

3. A summary of the prosecution evidence is that on 10th December 2011 at 1.00 pm, the complainant (PW1) was at Gede stage with his motor cycle registration No. KMCN 539F Bajaj Boxer when two (2) people stopped him and requested to be transported on the motor cycle. They agreed on a fare of Kshs.50/=.
4. On the way to their agreed destination the complainant said one of the two people put a knife on his neck. The complainant fell down and one of the assailants lay on him. The complainant sustained a small cut wound on his throat and right hand. The two took his motor cycle and rode away.
5. The complainant screamed and some people came to his rescue. They followed the motor cycle into the bush where they arrested the appellant and recovered the motor cycle. The knife used to injure the complainant was also recovered.
6. PW2, **WILSON NZOMBO** was at his home on 10th December 2011 at around 11.00 am. He saw

the motor bike passing with three people. Shortly, he heard someone screaming. He rushed to the scene and found PW1 bleeding. PW1 told him that he had been robbed of his motor bike. They started searching for the motor bike and got information that some people had been seen entering into the bush with the motor bike. They entered in the bush and found the appellant with the motor bike. It is PW2's evidence that it was a bush and the appellant was not cutting trees.

7. PW3 **KATANA KALU** was also at his home on 10th December 2011 at noon when he heard screams. He went to the scene and found many people. The appellant was removed from the bush. The motor bike and a knife were recovered. The bush was someone's land and was not government forest.
8. PW4 **KALAMA MASHA KALOLO** is the owner of the stolen motor bike. It was under the control of PW1, his son, when it was stolen.
9. PW5 **IBRAHIM ABDULLAHI** was based at Malindi District Hospital. He examined PW1 on 30th December 2011 and filled a P3 form. PW1 sustained a cut wound on the throat and cut wound on the right hand.
10. PW6, Sergeant **BENARD MUZUNGU** is an administration police officer who was stationed at Majaoni A.P. Post. On 10th December 2011 at around noon he got information that members of the public wanted to lynch someone who had stolen a motor bike. He rushed to the scene with a colleague and arrested the appellant. They took the motor bike and a knife and handed over the appellant to Watamu police station.
11. PW7, P.C. **SIMON MUTUNGA** was stationed at Watamu police station. He investigated the case. He went to the A.P Camp and found many people. He was told that a suspect had been arrested for stealing a motor bike. The suspect had been assaulted. They took the recovered motor bike, a knife and the suspect who was taken to hospital.

THE DEFENCE CASE

12. The appellant who pleaded not guilty to the charges said he was arrested while cutting trees at "Gede forest. He said after cutting the trees and while he was putting them together in order to carry them to his home where he was building a house, he heard noise from nearby and he went to see what was happening. He said he saw a group of people who shouted at them and assaulted him. He was arrested and taken to Watamu police station.
13. The trial magistrate found the appellant guilty as charged and sentenced him to death. The appellant has now appealed to this court against the conviction and sentence on the following grounds:-

AMMENDED GROUNDS OF APPEAL

1. **That the learned trial magistrate erred in law and fact in admitting the evidence of a single witness (PW1) without considering that the same was a miscarriage of justice.**
2. **That the learned trial magistrate failed in the rule of law by finding that the appellant was in possession of a motor cycle and a knife without considering that the same was contrary to the prosecution evidence and therefore a misdirection of justice.**
3. **That the learned Hon. Trial magistrate did not consider that the people alleged to have seen some people entering the bush were not called to testify, thus the same creates doubt to the prosecution case.**
4. **That the trial magistrate erred in failing to see that the prosecution failed to prove their case beyond reasonable doubt.**
5. **That the learned Hon. Trial magistrate did not consider the appellant's defence which was reasonable and he did not award him the benefit of doubt.**

THE APPELLANT'S SUBMISSIONS

14. The appellant filed written submissions which he relied on which were as follows: -

1. That it was unsafe for the trial magistrate to rely on the evidence of a single witness on identification.
2. That the complainant did not prove that he is a motor cycle rider without any licenses.
3. That the appellant was arrested by people who were not called as witnesses and they took him to the complainant.
4. That the motor cycle and the knife were not found on the appellant but in the forest and that possession means a state of having something.
5. Finally that the evidence of identification was not satisfactory because the complainant did not describe the physical appearance of the perpetrators or the type of clothing they were wearing.

THE RESPONDENT'S SUBMISSIONS

15. The respondent made oral submissions in court as follows: -

1. That the appellant was arrested immediately after the robbery and the knife used to threaten the complainant was recovered.
2. That the incident occurred at 1.00 pm which is broad daylight and the conditions were favourable for positive identification.
3. That the evidence of the complainant was collaborated by that of PW2 and PW3.
4. That the ingredients of robbery were proved. The appellant was with another person not before court, they were armed and the complainant sustained injuries during the robbery which was classified as harm.

THE COURT'S FINDINGS

16. This is a first appeal and the duty placed on this court is as stated in **IRENE NEKESA PETER V REPUBLIC [2014] eKLR** as follows: -

“..... we are under a duty to re-examine and re-evaluate the evidence on record with the aim of reaching our own conclusions, subject to the caveat, however, that we had no advantage, as the trial court did, of seeing and hearing the witnesses.”

17. The Court of appeal in the above cited case was following the principle set out in **OKENO VS R [1972] E.A. 32** where the predecessor to that court set out this duty in the following manner: -

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M. RUWALA VS R [1975] E.A. 57). It is not the function of a 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. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

18. We have analysed and evaluated the evidence which was before the trial court bearing in mind that the trial court had the advantage of seeing the witnesses. The following are our findings: -

- i. We find that the trial magistrate relied on the evidence of a single witness on the identification of the appellant. In the case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The court held as follows:-

“Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the 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 form 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 or error.”

- ii. In the current case, we find that the incident occurred in broad daylight at 1.00 pm. The complainant had ample time to see the appellant when the appellant approached him and hired his motor cycle. The conditions were favourable for proper identification of the appellant.
- iii. The appellant was arrested shortly after the incident and the motor cycle and knife were recovered. We therefore find that the evidence of the complainant has been corroborated and it is safe to rely on it.
- iv. We also find that PW2 and PW3 were among the people who arrested the appellant. It is therefore not true that the people who arrested the appellant were not called to testify. The two witnesses displaced the appellant's defence that he was arrested in a forest.
- v. The trial magistrate considered the defence by the appellant contrary to his assertion that his defence was not taken into account.
- vi. In the circumstances we find that the evidence herein is overwhelming. The prosecution evidence supports the charge. The prosecution proved its case beyond reasonable doubt.

19. We accordingly dismiss the appeal and uphold the sentence.

Dated, signed and delivered at Malindi this 27th day of April, 2016.

S.J. CHITEMBWE

ASENATH ONGERI

JUDGE

JUDGE