



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 45 OF 2015

(FORMERLY MERU HCCRA 38 OF 2015)

ALNOLD MUGENDI MBUBA ALIAS DOUBLE DOUBLEAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(An appeal from the Judgment and conviction of B. N. Ireri – P.M made on 12.3.2015 in Chuka
Principal Magistrate’s Court Criminal Case No. 1365 of 2011)***

JUDGMENT

1. On 21st December, 2011, Alnold Mugendi Mbuba alias Double Double, the Appellant herein, was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code in the Chuka Principal Magistrate’s Court Criminal Case No.1365 of 2011. In that case, the Appellant was the first (1) accused. It was alleged that on 6th November, 2011 at Kiereni trading centre in Mugwe Location, Tharaka Nithi, the Appellant, with six (6) others, jointly while armed with dangerous and offensive weapons namely knives, pangas and metal bars, robbed Denis Muchiri Karere of one mobile phone make Nokia, one wallet, one Equity Bank ATM Card, one national identity card, 10 Safaricom Sim Cards, assorted documents and cash Kshs.33,000/= all valued at Kshs.37,700/= and at the time of robbery, injured the said Dennis Muchiri Karere and murdered Salome Sharon Mwendu.
2. The Appellant denied the charge but after trial, he and his co-accused were convicted of the offence and were sentenced to suffer death. All those convicted, including the Appellant, appealed against the said decision. However, at the hearing of their appeals, each of them insisted that his appeal be heard separately. Although the appeals emanated from the same conviction and sentence and that most of the grounds of appeal were similar, this court proceeded to hear each Appellant on his Appeal separately and write separate judgments as per the wishes of the Appellants.
3. In his Supplementary Grounds of Appeal which substituted the original petition of Appeal; the Appellant contended that the trial court failed to consider that there was no name or description of the Appellant given by the complainant to the police; that there was no need of identification parade as this was a case of recognition; that the trial court erred in convicting the Appellant on inconsistent and uncorroborated evidence contrary to section 163 of the Evidence Act; that the trial court wrongly rejected the Appellant’s defence; that the trial court failed to consider that no exhibit or weapon was recovered from the Appellant and that the C.I.D who led to the arrest of the Appellant was not called to testify. This being a first appeal, this court is enjoined to review and re-examine the evidence afresh and draw its own independent conclusions and findings. **See Okeno .V. Republic [1972] EA 32.** However, in doing so, the court must at all times have in mind that it did not have the advantage of seeing the witnesses testify.

4. The prosecution case was that on 6th November, 2011 at about 8.30 pm, PW2 Dennis Muchiri Kabere (the complainant) was in his house with his wife, Sharon Salome Mwendu and the son watching television. There was a knock at the door and thinking it was a neighbour, he asked his wife to open. On opening the door, about seven (7) male persons entered while armed with knives, iron bars and whips. They cut the complainant with a knife and demanded money. The complainant gave them Kshs. 33,000/= which he had. They then ransacked the house and took away his national identity card (PEXh 3), Equity A.T.M. Card (PEXh.4) and assorted cards (PEXH. 5 (a) – (g)). They also robbed him of his phone. The complainant's wife was all along calling for help but because it was raining outside, there was no help that came their way. The complainant's wife sustained injuries to which she succumbed to later on at Chuka District Hospital. After the robbers had left, the complainant's brother came and took him and his wife to hospital. The complainant was treated and discharged the following day but his wife died. The complainant was later called to Chuka police Station where, on various days he attended identification parades in which he identified all the accused including the Appellant.
5. In cross-examination, the complainant told the court that there was electric light during the incident; that his was a single room; that he did not give any description of the robbers to the police; that before the identification parade, he was kept in a private room. That he identified his attackers in the parades out of their physical appearances as they are the ones who had attacked him. He indicated that the attackers took about 30 minutes during the robbery. He denied the suggestion that the police had described to him the people he was to identify in the parades.
6. PW1 was Dr. Justus Kitili who produced the Post Mortem Report (PEXh 1) for Sharon Salome Mwendu. The report showed that the body of the deceased had a deep cut on the neck and that she died of massive hemorrhage. Bonface Mugendi (PW3) recalled that in the morning of 7th November, 2013 (sic) when he was going to work, he found a mobile phone and papers including the national identity card of the complainant, strewn on the road. He notified the area assistant chief (PW5) who collected the items and surrendered them to the police. Loyd Mugambi (PW4) recalled that on 6th November, 2011 at about 8.00pm, he went to the complainant's shop after he had heard screams coming from there. He had however delayed in responding to the screams because of rain. He saw the deceased lying in a pool of blood and that the complainant looked confused at the time. When going home, he collected about ten mobile sim cards and a 500 note S/No.BN 8724408 which he surrendered to PW5.
7. Bedford Kinyua Mukiri (PW5), the assistant chief told the court how the brother of the complainant came to his house on the night of 6th November, 2011 at around 8pm and told him that the complainant had been attacked by robbers. He thereupon went to the complainant's home and found the complainant's wife being put in a vehicle while bleeding profusely. He called the police from Chuka Police Station. When they came, he and the police entered the complainant's room and found blood on the floor. The complainant told them that he had been robbed by some people but did not mention their names.
8. S.S.P. Benjamin Marua (PW6) who was the O.C.S of Chuka Police Station at the time told the court how he was requested by the investigations officer to carry out identification parades for, inter alia, the Appellant. That on 7th December, 2011 at about 3.40pm he filled the identification forms for an offence of robbery with violence. He organized eight people for the parade, called the Appellant and warned him of the offence. That the Appellant willingly agreed to participate in the parade but said that he did not have a friend to witness the parade. He produced the identification parade form as PEXh 11 which showed that the witness had been kept in the crime office; that the complainant identified the Appellant by touching him, that the Appellant indicated that he was not satisfied with the parade but he nevertheless signed the parade forms. When cross-examined by the Appellant, PW6 denied that he showed the Appellant to the witness. He also denied having conducted any other parade for the Appellant before the 7th December, 2011. He stated that neither the Appellant nor the other people in the parade had any scars on their faces. He stated that the office where the witness was kept did not have holes through which the witness could peep and see the suspects at the identification parade. He further confirmed that the complainant

did not tell him that he knew the Appellant.

9. Corporal Benson Sindani (PW8) was the investigating officer. He recalled how in the morning of 7th November, 2011 he was informed of the robbery by his superiors who had visited the scene the previous night. He visited the scene that morning whereby he found PW5 and members of the public. He recovered from PW5 the documents that had been stolen from the complainant but had been collected from the road (PEXh 2-7). He found the household items scattered all over the room and there was blood on the floor. He then visited the complainant at Chuka hospital who narrated to him how a gang of six to seven (6-7) people had attacked him and his wife the previous night. That he had identified them by way of lamp light which was on. He identified the Appellant by name as one of the suspects as he came from his home area and that he used to see the other attackers at the stage which is near where he worked. PW8 was then led by his colleagues to the home of the Appellant but the Appellant managed to escape. PW8 then circulated the names of the suspects and started looking for them. He later learnt that the Appellant was hiding in Embu. Officers from Chuka went and arrested him and brought him to Chuka Police Station where he was positively identified by the complainant. That there had been a wave of robberies within Chuka. One informer was killed as a result of which many people feared to testify in this case. PW8 caused the body of the deceased to be photographed which photographs he produced as PEXh 18 (a) (b) and (c) and a report of scene of crime as PEXh 19. On being cross –examined, PW8 denied that the Appellant was living in Embu but that he was hiding there. He insisted that the Appellant had escaped after the present offence. On his part, PW9 told the court how he, in the company of other officers went to Embu and arrested the Appellant on 7th December, 2011 at a place called Kianjokoma Market.
10. The Appellant gave sworn evidence but called no witness. He told the court how on 7th December, 2011 at about 2.00am he was asleep in his house at Manyatta, Embu. The police woke him up and he surrendered. They arrested him and brought him to Chuka Police Station. He was subjected to an identification parade. When he was removed from the cell for the parade, he saw the complainant who is his neighbour at home. The complainant told him that the police had told him that he, the Appellant was one of those who had robbed him. That the police had told the complainant that he, the Appellant was a very bad person. In cross –examination, he informed the court that he had moved to Embu in 2009 after being robbed. That his wife had left him after the robbery but was with him in Embu when he was arrested. He denied having committed the robbery on 6th November, 2011.
11. At the hearing of the Appeal, the Appellant relied on his written submissions. In those submissions, the Appellant contended that the prosecution had not proved its case as required by law. He submitted that although the complainant had admitted knowing the Appellant since childhood, the complainant did not disclose to PW4, PW5 as well as PW6 that he knew any of those who attacked him. That since the complainant knew the Appellant, it was a case of recognition and the identification parade conducted on the Appellant was therefore useless. That since PW9 was led by C.I.D officers to where he arrested the Appellant, those C.I.D officers should have been called to testify. He finally contended that the trial court wrongly dismissed his defence as the court failed to consider that he was not arrested as a result of information given by the complainant but by C.I.D officers who did not testify. He urged that his appeal be allowed.
12. Mr Ongige, Learned Counsel for the state opposed the appeal. He submitted that the evidence produced before the trial court was sufficient to convict the Appellant. He further submitted that the prosecution called all the necessary witnesses; that the trial court had properly warned itself of convicting on the evidence of a single witness and that the trial court had properly relied on the evidence adduced to find a conviction. Counsel relied on the case of **Shadrack Omwaka -V- Republic [2016] eKLR** in support of his submissions.
13. The Appellant's first two complaints are that, the trial court failed to consider that the complainant had not given either the Appellant's name or description to the police although he was the Appellant's neighbour and that there was therefore no need of the identification parade. This

court notes that the trial court considered the evidence of the complainant which was to the effect that, he saw the Appellant on the material night. That the complainant had known the Appellant since childhood and he recognized the Appellant as the one who injured him and fatally wounded his wife. The trial court was satisfied with that evidence. Whilst it may be true that the complainant did not disclose the name or description of the Appellant to PW4 and PW5 on the material night, he did so the following day, 7th November, 2011 to PW8 while in hospital. It should be recalled that PW8 told the court that when he took up investigations, he visited the complainant in hospital who named the Appellant as one of the attackers. It is then that PW8 was led by his colleagues to the Appellant's home but the Appellant escaped. In this court's view, the failure by the complainant to disclose the Appellant's identity to PW4 and PW5 on the night of 6th November, 2011 may have been as a result of shock. In any event, there was no evidence that the complainant was asked at that time who his attackers were.

14. In the case of **Amani Kitsao Mweni v. Republic [2015]eKLR**, the Court of Appeal observed that:-

“ Although the complainant did not give a clear description of his assailant to the people to whom he initially reported the robbery, he was sure that he could identify his assailant if he saw him.”

In this case, PW8 told the court that the complainant had named the Appellant one of his attackers whilst he used to see the others at the stage near where he worked. That he could identify them. In this regard, I do not think the trial court was in error on that ground.

15. As regards, the identification parade, the Appellant may be right that since the complainant knew him, there may have been no need for the parade. However from the evidence of PW8, it seems that on the complainant's information, the brother of the Appellant living in Thika was arrested because he was a look alike to the Appellant. In this regard, the parade may have been necessary to clear any doubt that may have been there as between the Appellant and his brother, who had been wrongly arrested. In any event, the Appellant suffered no prejudice by being subjected to the identification parade notwithstanding that the complainant knew him well. In the premises those grounds fail.

16. The other grounds were that the trial court erred in placing reliance on contradictory and uncorroborated evidence and that no exhibit or weapon was recovered from him. The Appellant did not point out which evidence was contradictory. The evidence produced showed that six to seven (6-7) men attacked the complainant on the night of 6th November, 2011 while armed with knives, iron bars and whips. They used force and not only did they injure the complainant during the attack, but also robbed him of inter alia, Kshs.33,000/- and murdered his wife. The complainant named the Appellant as one of the attackers. PW8 looked for and had the Appellant arrested as a result. In the parade conducted on 7th December, 2011, the complainant positively identified the Appellant. In my mind, the prosecution evidence was consistent and there was no contradiction whatsoever which the trial court considered to the detriment of the Appellant as is alleged.

17. As regards corroboration, section 124 of the Evidence Act requires that there be corroboration of evidence in criminal trials. However, section 143 of the same Act provides that there is no particular number of witnesses that are required to prove any fact. In the present case, the only other eye witness who would have corroborated the evidence of the complainant was his wife. She was however, eliminated during the robbery. On the other hand, the complainant's testimony was corroborated by the medical evidence that was produced at the trial, to wit, PExh 1 and PExh 8, respectively. My view is that the trial court was entitled to rely on the evidence of the complainant in the circumstances of this case. In **Wamunga .V. Republic [1989] KLR 424 at 426**, the Court of Appeal held that:-

“ It is trite law that where the only evidence against a defendant is evidence 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 conviction.”

18. In the case of **Amani Kitsao Mweni .V. Republic [2015] eKLR**, the Court of Appeal observed:-

“Unlike in the Maitanyi case in which the identifying witness saw the appellant in stressful conditions with the aid of a safari lamp, the complainant herein saw the appellant under a very relaxed and friendly atmosphere with the aid of a street electric light which must have been reasonably bright as the motor cycle taxis were parked there waiting for prospective passengers. The complainant and the appellant had the opportunity to talk as they negotiated over the distance and the fare. The learned judges reasonably inquired not the nature of light and the time the complainant took with the appellant.”

19. In the present case, the attack took place at about 8.00pm. The house is said to be one roomed and therefore enabling close contact or proximity of the complainant and the attackers. There was electric light in the house. The attackers stayed for about 30 minutes giving the complainant ample time to identify them. In this regard, it can be safely concluded that the circumstances of identification in this case were not difficult as to lead to any error. Further, the trial court properly warned itself on the danger of relying on the evidence of a single witness. This court likewise warns itself. In this regard, guided by the **Amani Kitsao Mweni case**, I find that the complaint properly identified the Appellant and even though nothing was recovered from the Appellant, I find the evidence to have been sufficient and I find no fault with the trial court and that these grounds also fail.

20. The other ground is that the prosecution failed to call the C.I.D officer (s) who led PW9 to arrest the Appellant. That the said officer was a crucial witness. The record shows that PW8 was informed by the complainant while in hospital, that the Appellant was involved in the robbery. PW8 immediately started looking for the Appellant. Although the alleged C.I.D officer directed PW9 to Kianjokoma area of Embu where the Appellant was arrested, it is not the said C.I.D. officer who effected the arrest of the Appellant but PW9. The said C.I.D Officer’s evidence, in my view, was therefore not necessary as PW9 who was the arresting officer did appear and testify as to the manner and reason for the arrest of the Appellant. That ground therefore fails.

21. The other ground is that the trial court did not consider the defence of the Appellant in breach of section 169 (1) of the Criminal Procedure Code. The record shows that the trial court found that the complainant had placed the Appellant at the scene of the crime. When it came to his defence, the Appellant narrated on the events of his arrest of 7th December, 2011 and the subsequent identification at Chuka Police Station. He said nothing about where he was on the night of 6th November, 2011 apart from just denying that he never participated in the robbery. It should be recalled that the complainant had categorically stated that he had seen the Appellant on the material night; that it is he, the Appellant, who cut the complainant with a knife on his head and ransacked him. The trial court found that despite having been placed at the scene of the crime by the complainant, the Appellant said nothing about it. Having evaluated the evidence, I do not think the trial court dismissed the defence of the Appellant on weak grounds as is alleged. There was merit in the dismissal. In this regard, that ground also fails.

22. The other issue which this court need to determine is whether the ingredients of robbery with violence were satisfied. Section 296 (2) is to the effect that robbery with violence is committed in any of the following circumstances:-

- (a) the offender is armed with any dangerous and offensive weapon or instrument: or
- (b) the offender is in company with one or more person or persons; or
- (c) at or immediately before or immediately after the time of the robbery, the offender

wounds, beats, strikes or uses other personal violence to any person.

23. In this regard, once the prosecution proves any of the above three (3) circumstances, the offence of robbery with violence is proved. In the present case, the robbers were about seven (7), they were armed with knives, pangas and metal bars which are dangerous weapons and above all, they used violence upon their victims. Not only did they wound the complainant (PEXh 8) but they fatally wounded the complainant's wife (PEXh 1). In the opinion of this court, the prosecution had proved its case beyond reasonable doubt.

24. In the premises, I find that the conviction was safe and the sentence lawful . I find the appeal to be without merit and dismiss the same.

Dated and delivered at Chuka this 21st day of April, 2016

A.MABEYA

JUDGE

Judgment read and delivered in open court in presence of all the parties

A.MABEYA

JUDGE

21/4/2016