



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
CRIMINAL APPEAL CASE NO. 68 OF 2014

[Arising from judgment of M.A Nanzushi [Resident Magistrate] in Kimilili

PM's criminal case No. 1356 of 2011 delivered on 26th June, 2014]

DENNIS WAFULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. This is an appeal preferred from the judgment in criminal case No. 1356 of 2014 where the appellant **Dennis Wafula** had been charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. Having pleaded not guilty the matter went to full trial. The appellant was convicted and sentenced to death.

2. Being dissatisfied with the judgment the appellant preferred this appeal on grounds that;

- *The trial court erred in law and fact for failing to conclude the case within the shortest time possible as the case took 1 ½ years.*
- *He was not given witness statements.*
- *The evidence of PW1 was not corroborated.*
- *The investigating officer was not called as a witness.*
- *The trial court ought not to have made reference to MFI*
- *The trial court failed to consider the defence*
- *The trial court shifted the burden of proof*
- *Lastly the appellant's investigation was rejected.*

3. In his submissions the defence counsel stated that the prevailing circumstances at the time the offence was committed was not conclusive for positive identification and the identification parade conducted was

defective.

4. The State opposed to the appeal on grounds that at the identification parade the appellant was positively identified; incident was at 7 p.m, **PW4** said there was light and he could see. The identification parade was proper and procedural. That the prosecution had proved its case and the appeal ought therefore to be dismissed.

5. This being the first appellate court it must consider the evidence afresh, analyze and evaluate the same in order to arrive at an independent opinion. **See Okeno v. R [1973] E.A.**

The prosecution case in brief is that on the on the 27.12.2011 **PW2 Timothy Wanyonyi Wekesa** at around 7.30 p.m was referred by his colleague **PW4** to the passengers who wanted to be taken to Eluhya. He carried the two towards Eluhya and when they passed the area at a certain path they asked to alight as he expected them to pay one of them removed a panga from his trouser and fearing for his life he ran, passersby screamed but the two managed to escape with the motorbike which belonged to **PW1**. Reports were circulated by the police. Later the motorbike was stopped by **PW3**, one of those on the same escaped but the appellant was arrested. **PW2** was the rider at the time. He said he saw the appellant well when they met at the Naitiri stage.

He took the passengers to the place they had wished to be taken to Eluhya and on stopping to allow the passenger to alight they attacked him. He reported the loss, he later heard that a motorbike had been arrested and was at Mukuyuni, he went and identified the bike. Later he attended a parade and was able to identify the appellant.

PW3 A.P.C. Bernard Kipkohili Rotich – he recalled that on 27.12.11 at about 7 p.m he was a vehicle to Naitiri, he was alone and on the way he received a call that a motor bike had been stolen in Naitiri. After a while he saw a motorbike on speed coming from Eluhya he pulled the car aside, the motor cycle hit a pot hole and those on it fell. The passenger ran so did the rider, he gave chase and caught up with the rider, members of the public assisted in taking the rider to Mukuyuni police station.

PW4 Edward Sindani Walubengo a boda boda rider who introduced **PW2** to customers on the night of 27.12.2011 at 7 p.m who when left with the said passenger. Later he learnt that **PW1** had been robbed off the bike. He went with **PW1** to report the matter at Naitiri. Later he learnt that the bike was found and was at Mukuyuni. Next day he attended an identification parade and identified the appellant. He had seen the appellant as there was light at the stage from the veranda of the shop.

PW5 Inspector Samuel Kimathi who called out the identification parade where the suspect was identified by **PW2 and 4**.

6. At the close of the prosecution case the appellant was placed on his defence and in his witness statement he stated that on the 27.12.2011 he operated his power saw upto 6 p.m when he left for home he passed by to have a drink upto 7.30 p.m when he left to go to his home and upon reaching Roman Catholic Church Makinga he met two people who interrogated him and then arrested him and took him to Mukuyuni police station. The next morning he was taken to Kipchonge. Later he was put in a parade and picked by people who had already seen him in the office and later charged.

7. Having considered the evidence and submissions the issue is whether or not the prosecution proved the case against the accused to the required standard from the evidence on record when the appellant went looking for a motorbike for With one other, they just met **PW4** who introduced them to **PW2**. **PW2 & 4** maintain there was light from nearby shops and they were able to identify the appellant. Both also identified him at the identification parade.

PW3 on the other hand came across the appellant when he received a call about a stolen motor bike and when he saw a speedy motor bike that hit a pothole and stopped and its occupants attempted to ran. He chased the appellant and arrested him.

PW7 in his evidence stated that the appellant removed a panga from his trousers which caused him to flee upon which the appellant and his accomplice took the bike and sped off.

8. From the above there is no doubt that the prosecution proved the ingredients of robbery with violence; the appellant was identified positively at the time of commission of offence and at a parade by **PW2 & 4** and I am persuaded that this identification was positive.

Further **PW3** arrested the appellant while in possession of the motor bike and this by all means corroborates the evidence of **PW2 & PW4**.

Turning to the other grounds

9. There is no indication that the appellant had been denied witness statements as alleged, the absence of the investigating officer if any did not in any way water down the prosecution evidence, the trial court did consider the defence, at no time did the trial court shift the burden of proof and indeed the trial court considered the appellants mitigation.

10. Considering the defence, the same is a mere denial and has not otherwise dislodged the watertight prosecution case.

From the above am in concurrent with the conviction and the sentence which is within the law.

11. The appeal must in the circumstance fail. The same is dismissed.

Delivered and Dated at Bungoma this 9th day of June 2016.

ALI-ARONI

JUDGE.