



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL APPEAL NO. 9 OF 2015

RASHID MOHAMMED BULEE.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in **Mutomo Senior Resident Magistrate's Court Criminal Case No. 56 of 2013** by **Hon. S. K. Mutai Ag. P M** on 31/05/13)*

J U D G M E N T

1. **Rashid Mohammed Bulee**, the Appellant, was charged with the offence of **Robbery with Violence** contrary to **Section 296 (2)** of the **Penal Code**. Particulars of the offence were that on the **27th day of March, 2013** at about **11.45 a.m.** at **Mavuko Area Mutha Location** in **Mutomo District** within **Kitui County** with others not before court while armed with a **Rifle** and **Knives** robbed **Mulwa Sana Kshs. 68,000/=** and, at or immediately before or immediately after the time of stealing threatened to use actual violence to the said **Mulwa Sana**.

2. Facts as presented by the Prosecution were that on the **27th March, 2013**, at **11.45 a.m.**, PW1, **Martin Mulwa Sana** (Complainant) a Charcoal Trader was aboard motor-vehicle registration number **KBM 067Z**, at **Mutha** with the driver, turnboy and four (4) other people when the Appellant and another (boy) emerged from the bush and stopped the motor-vehicle. He was armed with an **AK 47 Rifle** that he pointed at the driver. The boy in his company was armed with a sword. The driver stopped the motor-vehicle. They all came out and lay on the ground. The Appellant demanded for money. The Complainant gave him **Kshs. 68,000/=** that he had. They were ordered to leave and they complied. On reaching **Mavuko Centre** they encountered the police. They reported to PW3, **No. 64515 Corporal Benedict Kiptoo** and led the police to the scene of the incident. They went to a nearby **Manyatta** from which the Appellant emerged. He was arrested and charged.

3. When put on his defence the Appellant gave sworn evidence. He stated that he has lived at the **Manyatta** for **12 years**. On the material date he was at home when the police officers arrested him, searched his house but recovered nothing. He denied having committed the offence and said that he discharges his duties as a **Madrassa Teacher** within the area. He called witnesses, **Hassan Hilow Adhan** and **Muktasar Samoo** who confirmed that he is a resident of **Inyali Village** and a **Madrassa Teacher** who owns cattle.

4. The learned Trial Magistrate considered evidence adduced and found that the Appellant was positively identified and the evidence of the Complainant was corroborated by that of PW2. He convicted the Appellant and sentenced him to serve life imprisonment.

5. Being dissatisfied with the judgment, conviction and sentence the Appellant appealed on the grounds that:

- Evidence adduced was inconsistent and contradictory.
- Selective bits of evidence was applied in reaching the conviction while disregarding exonerating evidence.
- The charge sheet was defective.
- There was a language barrier between the Prosecution and the Appellant which resulted into a wrong verdict.
- Doubts arose that were not resolved in favour of the Appellant.
- Testimonies of PW1 and PW2 on identification were inconsistent and at variance.
- The record of the court and proceedings depicted open bias and doctoring of evidence to arrive at a conviction an error that amounted to a mistrial.

6. The State through **C. N. Gakobo, Senior Principal Prosecution Counsel** filed a Notice of Enhancement of Sentence under **Section 354** of the **Criminal Procedure Code** in respect of the erroneous sentence meted out.

7. The appeal was canvassed by way of written submissions. It was submitted by Counsel for the Appellant that there was a contradiction in respect to the colour of T-shirt the Appellant had by purported eye-witnesses; The alleged attack and arrest of the Appellant when the police went to the **Manyatta** was not consistent with the conduct of guilty persons; Evidence adduced did not support the charge; Failure to adduce evidence of which language the Appellant used resulted into a miscarriage of justice as **Somalis** look alike; The Trial Magistrate deliberately altered the original handwritten proceedings by selectively copying afresh selected bits of the proceedings to disguise his perceived incompetence and bias against the Appellant.

8. In her response, learned State Counsel **Ms. Amojong** conceded that some proceedings were missing from the record a fact that casts doubt on what transpired during trial. But considering that the offence is serious, she called upon the court to order a re-trial.

9. This being a first appeal, I am duty bound to subject evidence adduced at trial to a fresh and exhaustive analysis while bearing in mind that I had no opportunity of hearing and seeing witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

10. A perusal of the court record indeed shows that after the Appellant pleaded not guilty to the charges, bond terms were set by the trial court. There is no indication in the proceedings whether or not the surety was approved. The next action was hearing of the case. It is submitted by Counsel for the Appellant that the court examined a proposed surety and declined to approve him and directed the Appellant to find another surety – proceedings that were missing from the court record.

11. Further he submitted that proceedings of **16th April, 2013** where another surety was availed and an order requiring a pre-bail report made were missing. There is a pre-bail report filed on record and a handwritten page where a proposed surety was approved. The page lacks a coram or date therefore it cannot be ascertained when the same was authored.

12. On the **25th April, 2013**, the coram indicates only the Trial Magistrate was present. It is not indicated if any interpreter was present. Nonetheless, the court delivered a ruling and proceeded to place the Appellant on his defence but the provisions of **Section 211** of the **Criminal Procedure Code** were not explained.

13. It is submitted that on the same day the Appellant's Counsel was retained to represent him. He made an oral application to the court to set aside the ruling, and have witnesses re-called for cross-examination. The court adjourned and retired to write a ruling which was delivered, where the court rejected the application. There is no such proceedings on record. What is recorded is an address from the defence Counsel notifying the court the Appellant's option to give sworn evidence and calling of two (2)

witnesses.

14. The Appellant was a person conversant with **Somali Language**. Failure to deliver the ruling in the presence of the interpreter leaves one wondering what language the Trial Magistrate used to communicate with him. This was indeed prejudicial to the Appellant. What the trial court did was an illegality that incurably flawed the trial.

15. The learned State Counsel has asked me to order a retrial in the circumstances. The criteria for ordering a retrial has been consistently stated in various authorities. In the case of **Fatehali Manji vs. Republic (1966) EA 343** it was held that:

“In general, a retrial would be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill gaps in its evidence at the first trial..... each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require.”

16. It has been argued that the learned Magistrate applied selective bits of evidence in reaching his findings. This is admitted by the State. Being the case, there could be a possibility of some evidence favouring the Prosecution having been disregarded as well. It is therefore my considered view that evidence adduced, circumstances of the case and the interest of justice call for a retrial.

17. In the premises, the appeal is allowed, the conviction is quashed and the sentence imposed set aside. The Appellant shall be produced before the Mutomo Principal Magistrate’s Court for a retrial by another Magistrate of competent jurisdiction on the **24th August, 2016**.

18. It is so ordered.

Dated, Signed and Delivered at Kitui this 16th day of August, 2016.

L. N. MUTENDE

JUDGE