



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL APPEAL NO. 67 OF 2015

MUASYA MWANIA ALIAS JUNIOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Criminal Case No. 61 of 2014 by Hon. Z. J. Nyakundi Ag. P M on 22/10/14)

J U D G M E N T

1. **Muasya Mwanja**, “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 **20th day of March, 2014** at about **10.30 p.m.** at **Mutomo Township, Mutomo Location, Mutomo District** within **Kitui County**, while armed with dangerous weapons namely **rungus** jointly with others not before court robbed **Jack Mwema Mwanja** cash **Kshs. 12,000/=** and at or immediately before or immediately after such robbery used actual violence to the said **Jack Mwema Mwanja**.

2. He was tried, convicted and sentenced to suffer death as provided by the law.

3. Being aggrieved by the decision of the court the Appellant appealed on grounds that:

- The charge was defective.
- There was variance between particulars of the offence and evidence adduced by PW1 in respect of the amount of money stolen.
- The conviction was based on sole evidence of identification where the possibility of mistaken identification was not ruled out.
- Provisions of **Section 169(1)** of the **Criminal Procedure Code** was not complied with.

4. Having pleaded not guilty to the charge to prove the case the Prosecution called 4 witnesses. It was the Prosecution’s case that on **20th March, 2014**, PW1 **Jack Mwema Mwanja**, the Complainant, was walking home at about **10.30 p.m.** when he encountered three (3) people. One of them, the Appellant, was known to him. One of them demanded money from him. The Appellant hit him with a club on the shoulder. The impact made him fall down. He hit him with a stone on the face as his accomplices stole his money. He regained consciousness to find PW2 **Jeff Mutua** who had seen persons struggling, one of them lying down and three (3) persons run off as he approached. He took the Complainant to hospital on learning that he had been attacked and robbed. He was later examined by PW4 **Daniel Mulwa**, a Registered Clinical Officer who found him having sustained bruises on the face and tenderness of the left shoulder. The Appellant was later arrested by PW3 **No. 75433 P C James Kidiavai** and charged.

5. When put on his defence the Appellant stated that on the **20th March, 2014** he spent the whole day at **Kimachi Petrol Station** where he was doing some casual work of installing a Petrol Tank. He was paid **Kshs. 500/=** and he left going home. He purchased some basic items and walked home arriving at **6.30 p.m.** On the **23rd March, 2014**, he worked and went back home. At **7.00 p.m.** people went to his home looking for one **Junior**. His wife denied knowing **Junior**. When he went out one of them alleged that he resembled **Junior**. They looked at his Identity Card and left. At **10.30 p.m.** the police went and arrested him. At the outset he was charged with the offence of **Assault** which was later on substituted with **Robbery with Violence**.

6. The learned trial Magistrate considered evidence adduced and found that identification in the circumstances was proper. The Complainant was injured and the case presented by the Appellant was not credible. He concluded that the charge of **Robbery** was proved to the required standard.

7. This being a first Appellate Court, I am duty bound to conduct a fresh and exhaustive re-assessment and analysis of evidence adduced at trial and come to my own conclusion bearing in mind that I had no opportunity of hearing and seeing witnesses who testified. (**See Okeno vs. Republic (1972) EA 32**).

8. It has been alleged that the charge was defective. The basis of the argument by the Appellant was that the charge sheet indicated the sum stolen as **Kshs. 12,000/=** while the Complainant stated that after the robbery he remained with **Kshs. 270/=** meaning that the Complainant was robbed of **Kshs. 11,730/=**.

9. Looking at the evidence adduced, PW1 stated that he had **Kshs. 12,000/=** in his pocket a sum of money that he lost in the course of the robbery. Prior to the case being heard *denovo* by the learned Magistrate who concluded it, PW1 in adducing evidence before **S. Ogot, R M** stated that he had **Kshs. 12,000/=**. Later on when he searched his pockets he found only **Kshs. 270/=**. In his initial testimony the Complainant's evidence implied that he had more money than what was stated in the charge sheet. The question to be answered is whether the charge was at variance with evidence adduced therefore making it defective as alleged.

10. The Appellant was charged with the offence of **Robbery with Violence**. In the Court of Appeal case of **Oluoch vs. Republic (1985) KLR** it was held 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.”

In a nutshell what the Prosecution is expected to do is to prove one of the elements of the offence of **Robbery with Violence**. (Also see **Daniel Muthomi M'arimi vs. Republic (2013) eKLR**).

11. In the case of **Sigilai vs. Republic (2004) 2KLR, 480** it was held that:

“The principle of law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”

12. This position is embodied in Statute Law. **Section 134** of the **Criminal Procedure Code** provides thus:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such

particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

The particulars of the offence stated in the charge sheet disclose ingredients of the offence of **Robbery with Violence**. These elements of the charge that were made known to the Appellant enabled him to follow proceedings, cross-examine witnesses who testified and ultimately defend himself.

13. The purported discrepancy was immaterial as it was not fatal. It was not prejudicial to the Appellant. It was an irregularity curable under **Section 382** of the **Criminal Procedure Code** that provides:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.’

The alleged discrepancy did not make the charge inconsistent with the evidence.

14. It is argued by the Appellant that this was a case of mistaken identity. In the case of **Wamunga vs. Republic (1989) KLR 424** it was stated thus:

“It is trite law that where the only evidence against the defendant is evidence of identification of 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 possibility of error before it can safely make it the basis of a conviction.”

15. This was a case of visual identification. In the case of **Republic vs. Tumbull and others, (1976) 3 All ER 549, Lord Widgery C J** set out what courts should consider in such cases. He stated that:

“First, whenever, the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation. At what distance? In what light? Was the observation impeded in any way Had the witness ever seen the accused before? How often? If occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police.....

Recognition may be more reliable than identification of a stranger, but, even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.....”

16. In his evidence PW1 stated that as he walked home he saw **Junior** a person known to him behind him. Electric lights from a nearby building enabled him to see and he knew him from the village. He stopped to greet him that is when he was hit. Initially he stated that the light was at the Sacco Building. But when the matter begun afresh he said light was at the Petrol Station which was some 200 meters away. PW2 saw three people struggling. He stated that he saw the accused, a person he knew very well

sitting on the Complainant. He tried to separate them and he injured him on the right hand. Light emanating from the Sacco Building enabled him to identify the Appellant.

17. PW3 the Investigating Officer had this to state in his evidence in chief:

“..... On 21/3/2014 I was at the station, one Jack Mwamu reported that he was assaulted by 4 people and he lost 12,000 the previous night. I told him that we knew one person called Junior, I sent him to Mutomo Mission Hospital. I recorded statement of Complainant and witnesses, I recorded a P3 form (sic). I charged the accused with a present offence who was arrested by P. C. Yator. The person arrested is before court.”

On cross examination he stated that:

“..... You are the only person who was arrested. The other person was arrested by Peter Elyon, the person was called Juma Ahmed alias Junior but the complainant identified you.....”

18. The fact that **Juma Ahmed Junior** was arrested following the Complaint made to the police would be a suggestion that in that neighbourhood there was more than one person called **Junior**. It is important to note that both PW1 and PW2 identified the Complainant’s assailant that they recognized as **Junior**. None of them gave his other names. Other than telling the court that they knew the person very well they did not give details of how often they used to see him and how exactly they knew him.

19. In his finding the learned trial Magistrate stated that the Prosecution’s case was well corroborated and the court had no reason to doubt the evidence by the Prosecution. What the trial Magistrate should have interrogated is why another person known as **Junior** was arrested and released. What were circumstances that led to the arrest of **Juma Ahmed alias Junior** and subsequent release. What role did **Peter Elyon** play in investigation of the matter. Could the two suspects have been arrested because the Complainant and his eye-witness did not know with certainty the persons who attacked the Complainant on the material night? These are questions that remain unanswered. They created a doubt to the Prosecution’s case which remained unresolved.

20. In the circumstances it was unsafe to convict on evidence adduced. The appeal therefore succeeds. I quash the conviction and set aside the sentence imposed. The Appellant shall be released forthwith unless otherwise lawfully held.

21. It is so ordered.

Dated, Signed and Delivered at Kitui this 29th day of September, 2016.

L. N. MUTENDE

JUDGE