



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO.113 OF 2015

BETWEEN

MORRIS ANDABO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from Judgment of Hon. S.K.NG'ETICH SRM delivered on 8th October, 2015 in Mumias SPM's Cr. Case No. 772 of 2010)

J U D G M E N T

Introduction

1. The appellant herein Morris Andabo Mukanda was charged in the 1st count with the offence of Robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the 7th day of June, 2010 at Shitoto Village Lubinu sub-location in Mumias District within Kakamega County jointly with others not before Court robbed Philip Osichoro Shikanda of motorcycle registration number KMCJ 155G TVs Star red in colour valued at Kshs.81,500/= the property of Thomas Opindi Andanje and immediately before the time of such robbery used actual violence to the said Philip Osichoro Shikanda.

2. On the 2nd count, he was charged with the offence of grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that on the 7th day of June, 2010 at Shitoto Village Lubinu sub-location in Mumias District within Kakamega County jointly with others not before court unlawfully did grievous harm to one Moses Makhanu Makobo.

3. The case was heard by the Senior Principal Magistrate's court at Mumias in criminal Case Number 772 of 2010. After hearing six (6) prosecution witnesses and the appellant on his defence the trial court found the appellant guilty and convicted him on both counts. He was sentenced to death on Count 1 while the sentence on count 2 was held in abeyance. It is instructive to note that evidence for the prosecution was by heard H. Wandere , PM while S.K. Ng'etich SRM heard the defence case. S.K. Ng'etich also wrote the judgment

The Appeal

4. Being aggrieved and dissatisfied with both the conviction and sentence of death the appellant appealed on the following homemade grounds;-

(i) THAT I pleaded not guilty to the appended charge

(ii) THAT the trial Magistrate erred in law and facts by proceeding with my case in the absence of my advocate.

(iii) THAT the trial Magistrate erred in law and fact by convicting me basing on an agreement produced in court by the investigating officer.

(iv) THAT the trial court did not consider the fact that the agreement did not bear anything like signature to connect me with it.

(v) THAT the decision by the trial court made without proper jurisdiction for my rights of defending myself was overlooked.

(vi) THAT I pray to the honourable High court to consider the circumstances surrounding the case and this appeal be allowed, conviction quashed sentence set aside and I be allowed to be free.

Submissions

5. The appeal was canvassed orally. Mr. Elung'ata submitted on behalf of the appellant while Mr. Ng'etich from the ODPP appeared for the State.

6. In his submissions, Mr. Elung'ata submitted generally on the six (6) grounds laid out by the appellant. He contended that since the case was heard by two magistrates, the judgment by the second magistrate was not precise because he did not see the demeanor of the prosecution witnesses or hear them testify.

7. Mr. Elung'ata also submitted that since the incident occurred at night and the prosecution witnesses gave contradictory testimonies the appellant was not properly identified. That even though the incident happened 500 meters from the appellants home, none of the witnesses went to the said home to check if the appellant was there nor did they report the incident to the village elders. He submitted further that after the attack the complainants decided to seek medical attention at Shianda which is 9KMs away from the scene. It was at Shianda that the complainants informed other bodaboda riders of the incident. Counsel wondered why they did not inform the boda boda riders from Shitoti area. That the complainants' conduct shows something was not clear and further that the appellant was implicated after his arrest. Counsel also claimed that the agreement PExh 9 which formed the basis of the conviction of the appellant was not sufficient evidence to support a conviction.

8. Mr. Elung'ata also submitted that the purchase receipt for motorcycle No. KMCG 155G PExhibit 10 was forged and was an attempt to plant a case on the appellant with ill intention. He maintained that the conviction was not safe due to improper identification and the conduct of the prosecution witness. He prayed that the appeal allowed.

9. Mr. Ng'etich opposed the appeal. On grounds that the issue of two Magistrates handling the trial was addressed by the provision s of Section 200 of the CPC. He added that whereas PW1 did not identify the appellant or any of the attackers, the evidence of identification during trial was that of recognition by PW2, PW3 and PW5.

10. Counsel for the respondent further submitted that the discrepancy in the colour of the berets is not fatal to the prosecution case because the identification was based on recognition and at the time of recording statements the appellant was mentioned by the complainant. He also made mention of the receipts of ownership of the motorcycle produced by the prosecution witnesses and submitted that what needed to be proved was who was in possession of the motorcycle at the time of the incident.

11. Regarding the agreement for settlement of the matter he submitted that the appellant had the opportunity to call the mother to clarify or cast doubt on the prosecution evidence and that the injuries suffered were proved as per PExhibits 2 and 3. He urged the court to dismiss the appeal herein.

First Appeal

12. This being a first appeal this court's duty will be to re-evaluate the evidence on record analyze it and make its own conclusion only bearing in mind the fact that it did not see the witnesses when they testified nor did it observe their demeanor see **Okeno – Vrs – Republic [1972]EA32**

Prosecution Case

13. He prosecution called six (6) witnesses. Briefly their case was that on the 7.6.2010 at around 7Pm PW1 together with PW2 who are boda boda riders carried PW3 and PW5 on their motorcycles registration numbers KM CJ 155G and KM CB 708 both TVS Star red in colour. According to their testimony, when they reached Shitoto Secondary school, they saw a group of people standing who had jungle jackets and others who wore red berets standing at a distance of about 20 metres. They thought these people were police men because they stopped them. They stopped at the command of these people but these people instead the gang attacked them and injured them and also robbed PW1 of his motorcycle, registration number KM CJ 155G. PW2 struggled with the appellant. In his testimony PW2 claimed to have seen the appellant and as they struggled the appellant injured him with a rungu on his left hand and eye. He managed to overpower the appellant whom he recognized and identified with the help of the moonlight. PW2 was taken to hospital. He picked the hat left behind by the appellant. The same was produced as PExhibit1. He reported the incident to the police at Makunga where he told the police that it was the appellant together with others who had attacked him and injured him.

14. PW3 and PW5 also testified that they were able to recognize the appellant who they said was wearing a hat which they identified in court. PW3 told the trial court that this hat was usually worn by Morris, Morris is the appellant in this case PW3 stated, “ I often see him with this hat. He is the one who stopped us. I heard his voice. He said “pastor stop”. He talked to me telling me to leave the motorbike go home then come the next day for the motorbike at the police station.”

15. In his testimony PW5 told the trial court that they approached the scene, they saw men standing along the road wearing AP Jackets and green “ kofias”. She was able to clearly see the appellant Morris Andabo who removed ignition keys from the motor bikes he was riding on being No. KM CJ 155G. That the attackers told them to ran away and they obliged and went and informed their neighbours who went back to the scene where they found PW2 who was injured on his hands and head. She reported the incident the following day at Makunga police post. She also identified the hat that she saw the appellant wearing. She claimed to have known the appellant for over five (5) years. She also testified that she mentioned the appellant's name on her first report.

16. PW4 the District Clinical Officer examined both PW1 and PW2 who had earlier been treated on 08.06.2010 at Makunga Health centre and filled their P3 forms. He confirmed the injuries sustained by the two. Their history was that they had been attacked on the 07.06.2010 and they sustained injuries. He produced the treatment booklets PEx2 and PEX3 which guided him in filling the P3 forms. He also produced PExhibits 4, 5A ,5B and 6 being treatment notes for PW2, X-ray films also for PW2 and the P3 form for PW2.

17. PW6 No.83192 PC Thomas Kikwai is the one who investigated the case herein. He received a report from PW1 and PW2 on the 08.06.2010 concerning the robbery which occurred on the 7.06.2010. He told the trial court that the two told him that the appellant was among the robbers, and further explained to him that PW1's motorcycle was the one that was stolen during the robbery. He saw PW1 who had a bandage on his wrist and issued him with a P3 form. On 10.06.2010 PW2 also made a report to PW6 who observed that PW2 too had injuries. PW1 and PW3 also gave him a hat which they claimed the appellant was wearing on the night of the attack. PW6 then recorded witness statements. He went to the appellant's home on the 8.6.2010 but did not find him. Appellant was later arrested at Malaha trading centre. He was identified by PW2 and PW3. He produced the hat and receipts for motorcycle as PEx1 and PEx7 respectively.

Defence

18. When the appellant was put on his defence, he opted to give sworn testimony but did not call witnesses. His testimony was that he only heard that PW1 had been robbed of his motorcycle. He admitted knowing the complainant who was a relative. He was arrested at Malaha town center and was not told why he was arrested. He was shocked to learn of the charges herein when he appeared in court. He maintained that he knew nothing about the robbery.

Determination

19. The offence of robbery with violence as well as its ingredients are provided for under Section 296(2) of the Penal Code in the following terms;-

“ If the offender is armed with any dangerous or offensive weapon or instruments or is in company with one or more other person or persons, or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”

20. The ingredients of robbery with violence were also properly set out in the case of **Oluoch vrs – Republic [1985] KLR 349** in the following manner;-

“The ingredients of the offence of robbery under Section 296(1) of the Penal Code are;-

a) stealing anything and

b) at or immediately before or immediately after the time of stealing

c) using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.”

21. The above stated ingredients were also affirmed in **Daniel Muthoni M’arimi – vrs – Republic [2013] eKLR** where the court stated that proof of any one of the three elements of the offence of robbery with violence would be enough to sustain a conviction under Section 296(2) of the Penal Code.

22. Applying the above principles to the appeal herein, I find that the three elements were proved as analyzed hereinabove. It has been demonstrated that there was an attack on PW1, PW2 PW3 and PW5 and that they were attacked by a group of men who were armed.

23. Though PW1 was not able to identify his attackers, but PW2 and Pw3 clearly identified the appellant herein. PW2 had an exchange physically with the appellant. He had ample time to see the appellant because they were close and the light from the moon helped him identify him. The appellant is a person whom PW2 had known for a period of three (3) years. PW3 also recognized the appellant by the hat he was wearing. As analyzed hereinabove the hat was like a trade mark of the appellant as he used to wear it many times while in the village. PW3 had also known the appellant are people who know each other. They are from the same village. . PW3 also knew the appellant for some time. He could recognize his voice.

24. The prosecution witnesses PW2 and PW3 told the police that in their first reports that they saw the appellant at the scene and that it was him who attacked them that night.

25. I am further satisfied that the evidence of the prosecution witnesses is well corroborated. They were all attacked at the same time and at the same place by a group of men who included the appellant herein. The circumstances during the attack are clear. It was a bright night as there was sufficient moonlight. It was near PW3 and PW5’s home. A motorcycle was stolen and PW1 and PW2 were injured during the attack. There was violence meted out on PW1 and PW2. PW3 and PW5 escaped in the process and managed to alert the village and the villagers responded by going to the scene.

26. From the record, the case herein was heard by two Magistrates. The record also shows that before the

second Magistrate could proceed he complied with t the provisions of Section 200 of the Criminal Procedure Code as can be seen at page 43 of the proceedings.

27. The agreement made by the appellant's mother and PW3 is not what led to the conviction of the appellant. It was the conduct of the appellant after the incident. The trial court found that the evidence by PW3 on the proposal to settle the case which was not dialoged suggested that the appellant was acting through his mother to end the matter which was a further betrayal of the appellant's guilt. In my considered view, there was no other sufficient evidence connecting the appellant to the crime.

28. The trial court also looked at the defence by the appellant and concluded that he knew of the robbery and that the complainants' motorcycle was stolen during the robbery incident. The trial court considered the defence evidence which it concluded did not shake the strong evidence placing him squarely at the scene and showing his participation in the robbery. I also so find.

Conclusion

29. In conclusion, I am satisfied that the findings of the trial court were based on sound evidence and the law and there is therefore no basis for interfering with those findings. Accordingly the appeal does not have any merit and is dismissed in its entirety.

Right of appeal to the Court of appeal within 14 days.

Orders accordingly

Judgment delivered, dated and signed in open court at Kakamega this...27th day of October,2016

RUTH N. SITATI

JUDGE

In the presence of :-

.....Mr. Elungata(present).....Appellant

.....Mr. Oroni(present).....Respondent

.....Mr. Polycarp.....Court Assistant