



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

HCRA. 157 OF 2015

NGOME MWACHUPA.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

(Being an Appeal against the conviction and death sentence by Hon. N.S Lutta (SPM) in CR. CASE No. 432 of 2014 delivered at Kwale Law Courts on 4th day of August 2015)

JUDGMENT

1. The Appellant was sentenced to death for the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the penal code.
2. The particulars of the charge were that on 21st May 2014 at Pemba village, Mwatate Location within Kwale County, the Appellant robbed KANZE JAWA of Kshs. 750/= and immediately after or before the time of such robbery stabbed the said KANZE JAWA.
3. The prosecution evidence was that on 21/05/2014, the complainant was returning to her home at 10pm at night after visiting a patient when she met the Appellant who snatched a basket which the complainant had after pushing her to the ground and he also removed a knife and stabbed her on the stomach. The Appellant took the money which was in a cloth in the basket and he ran away. The complainant went for treatment and reported the matter.
4. PW2 was at his home on the material day when he heard the complainant screaming. He rushed to the scene and saw the Appellant taking the money and running away. PW3 who also witnessed the incident gave a similar account.
5. The Doctor who produced the medical examination report testified as PW4. He said the complainant had an injury and a stab wound on the left lumbar region.
6. The Appellant said on 21/05/2014 while he was asleep in his house when some people broke into the house. The Appellant said he screamed and many people came and those who arrested him started alleging he had stolen some money.
7. The Appellant called one witness who said on the material day he heard some noise and when he went to the house of the Appellant he found many people who were drunk.

8. The trial Magistrate convicted the Appellant and sentenced him to death. The Appellant has now appealed to this court on the following grounds:-

(i) That the learned trial Magistrate erred in law and fact in basing the conviction and sentence on a defective charge sheet.

(ii) That the learned trial Magistrate erred in law and fact by failing to inquire what sort of light provided at the scene of crime for proper and sufficient identification by PW1, PW2 and PW3.

(iii) That the learned trial Magistrate erred in law and fact by failing to note that there are certain glaring contradictions and inconsistencies in the prosecution case.

(iv) That the learned trial Magistrate erred in law and fact by shifting the burden of proof by requiring the Appellant to explain why the witnesses who had no grudge with him should implicate him in the offence.

9. The Appellant filed written submissions as follows:-

(i) That the charge was incurably defective in that there was no specification of a knife or the words “while armed with a dangerous weapon”. The Appellant submitted that the particulars of the charge did not indicate that the Appellant was armed with a dangerous weapon.

(ii) The Appellant also submitted that the complainant alleged she was alone at night when she was attacked and the issue of identification was not established.

(iii) That the prosecution did not make inquiry about the moonlight at the scene and how intense was the moonlight and how long the attacker was under observation by the complainant.

(iv) That the evidence of PW1 and PW2 is at variance on the place the complainant was injured. The complainant said she was stabbed on the stomach and PW2 said she was stabbed on the rib area.

(v) The Appellant also submitted that the trial court did not consider his defence in which he explained the reason the prosecution witnesses implicated him in this matter.

10. The Respondent opposed the Appeal and submitted as follows:-

(i) That the charge sheet is not defective as it contains the statement of the offence and the particulars of the offence.

(ii) That the ground that the offence was not proved, the prosecution testified that there is evidence that the Appellant was armed with a knife and that he used violence on the complainant and that he was identified as the assailant.

(iii) On the ground that the source of light was not ascertained, the Respondent submitted that the identification was by recognition. The complainant said she greeted the Appellant before the attack and she was able to recognize him as there was moonlight.

11. I have carefully re-evaluated the evidence adduced before the trial court. My findings are as follows:-

(i) My role as a first appellate court was stated in the case of **Okeno Vs Republic [1972] EA 32** as follows:-

“An Appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination [Pandya Vs Republic [1975] EA 366] and to the

appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions [Shantilal M. Ruwala Vs Republic [1975] EA 570]. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had advantage of hearing and seeing the witnesses, (see Peters Vs Sunday Post, [1958] EA 424)."

(ii) I find that the evidence on identification in the current case is wanting. The incident occurred at night and the conditions were not favorable for proper identification. It is not clear how strong the moon light was. In the case of Wamunga v Republic (1989) KLR 424. The Court had this to say on the issue of identification:-

“Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a greater extent on the correctness of one or more identifications of the accused which he alleges to be mistaken the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification ... 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 possibility of error before it can safely make it the basis of a conclusion ...”

(ii) *The incident occurred at 10pm in the night. The intensity of the moon which was the only source of light has not been disclosed. I find that the conditions were not favourable for proper identification of the Appellant*

(iv) In the circumstances I find that the prosecution did not prove its case to the required standard in criminal cases and the conviction herein is not secure. On that ground alone the Appeal succeeds. I quash the conviction and set aside the death sentence.

I further order that the Appellant be set free unless lawfully held for any other reason.

Delivered and signed at Mombasa this 16th day of November, 2016.

ASENATH ONGERI

JUDGE.