



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

KIMARU, NGENYE JJ

CRIMINAL APPEAL NO.368 OF 2008

(An Appeal arising out of the conviction and sentence of Hon. Maundu (MR.) - SRM delivered on 16th October 2008 in Kibera CMC. CR. Case No.4401 of 2007)

WYCLIFFE ANANDA YOSE..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Wycliffe Ananda Yose was charged with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 15th July 2007 at Kibera Soweto in Nairobi County, the Appellant, jointly with others not before court, robbed Peter Eshiula Muka of his wallet, his national identity card, his voters card and Kshs.200/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Peter Eshiula Muka. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged. He was sentenced to death. He was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted of the basis of the evidence which was framed up against him by the complainant due to an existing grudge. He took issue with the fact that the trial magistrate had failed to properly evaluate the evidence adduced by the prosecution witnesses and thereby reached the erroneous decision of convicting him. He was of the view that the trial magistrate did not take into consideration the fact that the evidence adduced by the prosecution was insufficient to establish his guilt to the required standard of proof beyond any reasonable doubt. He was finally aggrieved that the trial court had failed to take into account his defence before reaching the verdict that he was guilty as charged. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant made oral submission urging the court to allow his appeal. He submitted that the charge was brought against him as a result of a grudge that existed between him and the complainant. He stated that the complainant's wife owed him money on account of charcoal that he

had delivered to her, and which she had failed to pay. On the material day of the incident, the Appellant recalled that someone stole his clothes from a hanging line next to his house. He was inside the house. When he saw the person, the person ran away. He gave chase. It was about 7.00 p.m. While on the way, he met with the complainant. The complainant was drunk. He was bleeding from his mouth. He was surprised when the complainant told passerby that he was the one who had assaulted and injured him. The complainant asked the Appellant to give him money to go to hospital. When the Appellant declined to pay the money, the complainant told him that he would pay for his refusal to give him the money. It was then that the complainant made the false report to the police. The Appellant requested the court for the OB report of Kilimani Police Station of 15th July 2007 to be produced in court. When the report was produced, it indicated that the initial report that the complainant made to the police was that he had been assaulted by the Appellant. As a result of the assault, the complainant lost a tooth. No mention was made of any robbery. It was the Appellant's case that the allegation that he had robbed the complainant was made with a view to settling a score with him. He urged the court to allow the appeal.

Ms. Aluda for the State conceded to the appeal. She submitted that the prosecution had not established sufficient grounds to enable the Appellant to be convicted of the charge of robbery with violence. She set out three grounds why she was not supporting the conviction. The first ground was that the initial report made to the police indicated that the complainant had made a report of grievous harm and not robbery. The Appellant's request for the Occurrence Book to be produced in the trial court was not given due consideration by the court. Further, the Appellant was denied the opportunity to further cross-examine the complainant when he made the request that he be recalled. The second ground was that there was inconsistency in the evidence adduced by the complainant and his two witnesses. The evidence was at variance in regard to what was actually robbed from the complainant. The third ground was that the charge sheet was misleading in the sense that it was indicated that the Appellant, jointly with others, had robbed the complainant. The reality was that it was only the Appellant who was arrested because he was alleged to have assaulted the complainant and caused him to suffer grievous harm. Learned counsel was of the view that the Appellant ought to have been charged with the offence of causing **grievous harm** contrary to **Section 234** of the **Penal Code** and not the offence that he was charged with. For the above reasons, she was of the view that the conviction was not safe.

This being a first appeal, it is the duty of this court to subject the evidence adduced before the trial court to fresh evaluation with the ultimate objective of ascertaining whether the conviction of the Appellant ought to stand. In doing so, this court must take cognizance of the fact that it neither saw nor heard the witnesses as they testified and must therefore give due regard in that respect (**See Okeno -vs- Republic (1972) EA 32**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**.

The Appellant was convicted on the evidence of the complainant and two witnesses who testified that on 15th July 2007 at about 6.45 p.m., the Appellant and two others, accosted the complainant and robbed him of his wallet containing Kshs.200/-, a voters card and an identity card. In the course of the robbery, the complainant was head-butted and lost a tooth. Whereas from the evidence of the complainant, it appeared that the complainant did not know the Appellant, PW2 Nahashon Olunya testified that he knew the Appellant because he lived in the neighbourhood with a man called "Mrefu". The evidence of the complainant, PW2 and PW3 Josephat Odego Anga was contradictory in regard to what the complainant claimed to have been robbed. Whereas the complainant stated that he was robbed of a wallet containing Kshs.200/-, a voters card and an identity card, PW2 testified that the complainant said that he had been robbed of his memory card and a wallet. PW3 testified that the complainant was robbed of his mobile phone and Kshs.200/-.

What was consistent in the evidence of the three witnesses is that the complainant told them that he had been hit on the mouth as a result of which he lost a tooth. Other than the complainant who said that he had been robbed by three people, PW2 and PW3 saw no one other than the Appellant at the scene. On re-evaluation of the evidence adduced by the prosecution witnesses, it was clear to this court that there was material discrepancy in the testimony adduced by the prosecution witnesses that should have raised reasonable doubt in the mind of the trial court that the narrative given by the prosecution witnesses

regarding whether indeed the Appellant robbed the complainant. If indeed the complainant was robbed in the manner that he stated, why is that the three prosecution witnesses are unable to state with certainty what was actually robbed from the complainant?

A disturbing aspect of this appeal is the manner in which the trial court conducted the proceedings. The Appellant made an application for the OB of 15th July 2007 of Kilimani Police Station to be produced in court. He also made an application for the complainant to be recalled for further cross-examination. The trial court allowed the application but did not follow through to ensure that the request made by the Appellant was complied with by the prosecution. It was all along the Appellant's case that the initial report made to the police related to an assault causing grievous harm rather than robbery. The trial court allowed the prosecution to get away with it when it failed to comply with its directions. If the OB report had been produced before the trial court, that court, would have indeed established that the initial complaint made against the Appellant by the complainant was that of assault causing grievous harm rather than robbery.

The failure by the trial court to follow through on the request made by the Appellant resulted in a miscarriage of justice. This court was unable to comprehend the trial court's decision not to allow the complainant to be recalled for the purpose of further cross-examination by the Appellant. The trial court accepted the flimsy reason given by the prosecution that the complainant could not be traced because he had allegedly relocated to his rural home. This was despite the fact that the prosecution had the complainant's mobile number. Had the complainant been recalled, the Appellant would have had the opportunity to cross-examine him in regard to the initial report that he made to the police.

Taking into consideration the totality of the evidence adduced by the prosecution witnesses, this court finds that the explanation given by the Appellant to the effect there existed a grudge between him and the complainant is plausible. The inconsistency and contradiction in the evidence adduced by the prosecution witnesses points to one fact that the Appellant was framed for the more serious charge of robbery with violence instead of being charged with the less serious offence of causing grievous harm. It was unfortunate that the trial court failed in its duty of impartially and fairly trying the case. It was apparent that the trial court's mindset was to rule in favour of the prosecution in this particular case. The Appellant suffered injustice as a result of the court's bias. Ms. Aluda for the State, correctly in the view of this court, conceded to the appeal. The conviction was a travesty of justice.

The upshot of the above reasons is that the Appeal lodged by the Appellant has merit and is hereby allowed. The Appellant's conviction is quashed. The death sentence imposed upon him is set aside. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF OCTOBER 2015

L. KIMARU

JUDGE

G.W. NGENYE – MACHARIA

JUDGE