



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 478 OF 2010

(An Appeal arising out of the conviction and sentence of U. KIDULA – CM delivered on 1st September 2010 in Thika CMC. CR. Case No.2538 of 2008)

KENNEDY ETABALE MUSUNGU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Kennedy Etabale Musungu, was charged with another person who however died before the conclusion of the trial, with the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 30th August 2008 at Githongoro slums Runda Nairobi, the Appellant, jointly with another, while armed with dangerous weapons namely a panga and a rubber whip, robbed Patrick Guchu Githua of Kshs.1,700/- and a mobile phone and at or immediately before or immediately after the time of such robbery, used actual violence to the said Patrick Guchu Githua. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted as charged and sentenced to death as is mandatorily provided by the law. The Appellant was aggrieved by his conviction and sentence and 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 on the basis of the evidence of identification when infact the circumstances favouring positive identification were absent. In particular, he stated that there was no sufficient light to enable any identification to be made. He was aggrieved that he had been convicted on the basis of the evidence of the recovery of money which was produced as an exhibit which in actual fact had not been established to positively belong to the complainant. He faulted the trial magistrate for failing to consider his defence which exonerated him from the crime. In the premises therefore, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He urged the court to allow the appeal. Mr. Karuri for the State conceded to the appeal. He submitted that the Appellant was convicted on the evidence of identification which in his view did not stand up to legal scrutiny. This was because the complainant was robbed at night. There was no evidence that there was sufficient light which would have enabled him to be positive that he had identified the Appellant. He urged the court to allow the appeal.

What are the facts so this case? PW1 Patrick Guchu Githua (the complainant) was at the material time a

resident of Githongoro slums in Runda. He testified that on 30th August 2008 at about 10.30 p.m., as he was going to buy a credit card in a local shopping centre, he was accosted by two men who assaulted him and robbed him of his mobile phone and Kshs.1,700/-. He told the court that during the robbery, he was cut on the head with a panga. Although he did not know his assailants at the time, he described his assailants as follows: one was wearing blue jeans apron while the other was tall and slim. He conceded that he did not identify the second assailant properly. After the assault, he went to the house of PW2 Johana Kiarie Kimani who assisted him to seek medical attention. PW2 called PW3 James Wachira to assist him. PW2 testified that the complainant was bleeding from a wound on his head. He recalled that the complainant told him that one of his attackers was wearing a blue jeans apron and had green boots with dots. He also told him that the other assailant was wearing a green woolen hat with a yellowish light jacket. They sought medical assistance from a local medical practitioner.

They were not successful. They went to a pub near where one of the medical clinics was based. The complainant testified that while at the pub he recognized the two men who had assaulted and robbed him. One of the men was arrested and taken to Runda Police Station while the other managed to escape through a window. PW3 testified that he knew where the suspect lived. He led the police to his house. The police broke into the house and managed to arrest the suspect. That suspect is the Appellant in this case. The first suspect who was arrested at the pub died while in custody during the pendency of the trial before the subordinate court. Other than the cash which was produced in evidence, none of the items robbed from the complainant was recovered in the Appellant's possession. As correctly observed by the Appellant, the money that was recovered (i.e. Kshs.550/-) was not positively identified to have belonged to the complainant. No evidence of any distinguishing mark was adduced by the prosecution to positively identify the notes to have been the particular ones that had been robbed from the complainant.

The other witnesses who were called by the prosecution namely PW4 Teresia Wanjiru Wanjiku and PW5 Amos Njoro Waititu testified as to the circumstances of arrest of the deceased accused person and the Appellant at the pub. PW6 PC Samuel Barno was the investigating officer in the case. He narrated how upon receiving the report of the robbery, he accompanied the complainant to the house of the Appellant where they managed to arrest the Appellant. He searched him and recovered Kshs.500/-. This sum was produced as an exhibit during the trial. The complainant was seen by Dr. Zephania Kamau on 3rd September 2008. He testified that the Appellant had sustained a cut wound on the right front of the scalp. The wound had been stitched. He assessed the injury to have been caused by a sharp object. The degree of injury was harm. The P3 form was produced as an exhibit in the case.

When the Appellant was put on his defence, he denied robbing the complainant. It was his testimony that he was known to PW3 James Wachira prior to the robbery incident. He testified that he had a disagreement with PW3 over a girl called Ciku. It was his evidence that PW3 was not happy that Ciku had chosen to love him in preference to PW3. On the particular 30th August 2008, PW3 met him with Ciku. A quarrel ensued which resulted in a fist fight. They were separated by members of the public. PW3 promised that he would deal with him. It was the same night that the police went to his house and arrested him in regard to an offence that he was not aware of. He attributed his arrest and subsequent charge to a grudge that existed between him and the said James Wachira.

This being a first appeal, it is the duty of this court to reconsider and re-examine the evidence adduced before the trial court, evaluate the same and reach an independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court must always be aware that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. **(see Okeno –Vs- Republic [1972] EA 32)**. In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to support the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

The prosecution basically relied on the evidence of identification to secure the conviction of the Appellant. According to the complainant, he was accosted by a gang of two robbers as he was walking to a nearby shop to buy credit. The incident took place at 10.30 p.m. According to the complainant, one of the men who assaulted him was tall and slim. Another one wore a blue jeans apron. He told the court that he was able to identify the physical features of the robbers by the moonlight. During the course of the

robbery, the complainant was assaulted and injured. He testified that he was abandoned at the scene of the robbery. He was bleeding from a cut injury on his head. He sought assistance from PW2 and PW3. They took him to a clinic near a local pub for treatment. While waiting to be attended to, the complainant saw two men whom he thought were the ones who had assaulted him inside a pub. The two men were taking a drink. The complainant mobilized members of the public who apprehended one of the two men. One of the men escaped. PW3 told the complainant that he knew where the escaped man resided. The man was traced to his residence and arrested with the help of the police from Runda Police Station. That man is the Appellant in this appeal. None of the items that were robbed from the complainant was recovered in the Appellant's possession. In his defence, the Appellant denied being involved in the robbery. He testified that PW3 identified him as a robber because he was settling a grudge that existed between them as a result of a fight over the love of a woman.

Was the evidence of identification sufficient to secure the conviction of the Appellant? We do not think so. For the evidence of identification to stand, the circumstances favouring positive identification must be present. In the present appeal, the robbery incident took place at night. There was no artificial light to aid the complainant to identify his assailants. The complainant said that he was able to identify the two robbers by the moonlight. He did not tell the court the intensity of the moonlight. Even if the moonlight was sufficient to enable identify his assailants, it could not have enabled him identify the colour of the clothes that the robbers wore. We are not satisfied that in the hectic circumstances of the robbery the complainant could have been positive that he had identified the person who robbed him. The trial court should have been alerted to the possibility that the evidence against the Appellant was being contrived when PW2 testified that the complainant had told him that one of the attackers was wearing a blue jeans apron and green boots with dots while the other was wearing a green woolen hat with a yellowish light jacket. The complainant could not possibly have registered these colours with the assistance of moonlight. In all probability, the explanation given by the Appellant that he was framed by PW3 is more the likely scenario.

In the premises therefore, we are constrained to allow the appeal. The prosecution rightly in our view conceded to the appeal. The conviction of the Appellant is hereby quashed. He is acquitted of the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF JANUARY 2014.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE