REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 31 OF 2011

[CONSOLIDATED WITH CR. APPEAL NO. 30 OF 2011]

[From Original Conviction & Sentence in Criminal Case Number 1853/2009 in the Chief Magistrate's Court at Machakos – Mr. J M Munguti [SRM]

On 11/2/2011]

JONES MULINGE MUINDI …….....…..…1ST APPELLANT

DANIEL MBUVA MUTUA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT.

1. ***Jones Mulinge Muindi*** and ***Daniel Mbuva Mutua*** were ***convicted*** for the offence of ***Robbery with Violence contrary*** to ***Section 296(2) of the Penal Code***. The appellants were sentenced to death as by law prescribed. Being aggrieved by the conviction and sentenced, they lodged this appeal.

2. It was alleged that on the 1st day of February, 2008 at ***Mutulani Village, Watema location in Makueni District within Eastern Province***, the appellant jointly, while armed with pangas and rungus robbed Paul Mwangangi Kyeva ***one mobile phone make-siemens,Post Bank ATM Card, Identity Card Employment Card(Kenya police civilian staff Eastern Province),aCap, one note book containing payslips and cash Kshs.500/= all valued at Kshs. 6,000/=***and at immediately before or immediately after the time of such robbery threatened to use personal violence to the said ***Paul Mwangangi Kyeva.***

3. The prosecution case was that on 1/2/2008, the complainant herein (PW1) **Paul Mwangangi Kyeva** was at Mutulani shopping Centre at around 7.00 pm. He was joined by one **Michael Kiala (Deceased)** at ***Kaumoni Pub***. The 1st appellant entered the pub and demanded to be bought Vienna beer. PW1 gave him **75/=** to buy vienna beer and he went out. 1st appellant went back at 9.00 pm and engaged in an argument with ***Michael Kiala*** (now deceased). PW1 and **Michael Kiala** left for kwa Ngui bar where they found ***Mutinda Mutiso*** and ***Kavuli Mutiso.*** The1st appellant joined them. Later **Michael Kavula(Deceased)**and both appellants left the bar. Complainant remained with **Kavuli Mutiso.**

4. Then ***Kavuli Mutiso*** told PW1 she had been assaulted by 1st appellant. She requested PW1 to escort her to a meeting where burial preparations were taking place. Later she changed her mind as she feared 1st appellant might reprimand her for being accompanied by PW1. As PW1 waited for Kavuli to

decide on what to do, the 1st appellant appeared and jumped on PW1. He kicked PW1 and PW1 twisted his injured arm. 1st appellant screamed.

5. Then 2nd appellant emerged from the dark to rescue 1st appellant. He stepped on PW1's chest and PW1 lost consciousness until 3.30 am. When he came to, he noted he was injured on his nose bridge and face. He was also dizzy. He further noted that he had lost his ***Mobile Phone, National ID Card, Kshs.500/= and Kenya Police Civilian ID Card.***

6. The complainant reported the matter to Mutulani chief's office and later to Kola Police Post. The complainant further embarked on looking for the appellants so that they could apologize and compensate him for injuring him. He sent one **Kimote Maive** to the 1st appellant and the father of 2nd appellant was sent to 2nd appellant. The appellants did not apologize to him. However, 2nd appellant confessed to have committed the offence after being lured by 1st appellant. The confession was done in the presence of ***Mwau Maula*** (PW2). PW1 reported the matter to the police and both appellants were arrested and charged.

7. Both appellants denied the charge in their sworn Defence and called no witnesses. The 1st appellant admitted that on the material day he was at Mutulani shopping centre with one Michael Kiala (now deceased) who bought him alcohol. That he drank till midnight when he decided to go home. He went home and thereafter continued with his duties till 8/6/2008 when he was arrested by the area chief over boundary dispute with his uncle. Then complainant reported this matter and 1st appellant was taken to Kola Police Post and later charged with assault at Kilungu Law Court. He was eventually charged with Robbery with Violence on 14/1/2009 and 2nd appellant was made a coaccused person.

8. The 2nd appellant also denied the charge and told the court that he could not recall where he was on 1/2/2008. However, on 27/5/2008, he was arrested for an offence of stealing a plough. He was charged in court and jailed for four months. On his release, he was again charged on 14/1/2009 with the present offence. He told the court he did not even know the 1st appellant herein. The appellants were however convicted and thus this appeal.

9. The appellants filed their appeals which have now been consolidated and relied on various grounds. These grounds are:-

(1) ***That, the pundit trial Magistrate erred in law and fact when he relied on the evidence of identification/recognition yet failed to find that the same was not fully supported by a prompt and lodged first report.***

(2) That, the learned trial magistrate erred in law and fact when he relied on the contradictory testimonies instead of resolving the same in favour of the appellants.

(3) ***That, the learned trial magistrate erred in law and fact when he relied on confession alleged made by the 2nd appellant***.

(4) That, the learned trial magistrate erred in law and fact when he rejected their plausible defense on weak reasons.

10. When the appeal came up for hearing on 15/10/2013, Miss Kwamboka for the State opposed the appeal. She supported the conviction and the sentence meted out by the trial Court. She averred that PW1 correctly identified the appellants as he knew them well since they come from the same village. The state also submitted that the evidence was well corroborated and the confession by 2nd appellant was truthful and admissible in law.

11. That, there was violence meted on PW1 (complainant) as there was use of Pangas and Rungus and the P3 form showed complainant had suffered injuries. That the prosecution was able to establish the

offence of Robbery with Violence. The appellants were therefore convicted and sentenced on sound evidence and she urged the Court to uphold the conviction and sentence

12. This being a first appeal we have reminded ourselves that we are duty bound to re-evaluate the evidence afresh and come to our own conclusion and inference as was held in the case of **Okeno Vs Republic 1972 (EA) 32** and also the Court of Appeal holding in the case of **Odhiambo Vs Republic Cr. Appeal No. 280 of 2004 (2005) KRL** where it was held:-

"On a first appeal the Court is mandated to look at the evidence adduced before the trial afresh, re-evaluation and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witness when they testified as the trial court and therefore cannot tell their demeanor".

13. The issues for determination in this appeal is whether the prosecution proved beyond reasonable doubt that an offence of Robbery with Violence was committed. Whether the alleged confession was admissible in law and whether the court relied on inconsistent evidence by the prosecution witnesses.

14. To prove the offence under Section 296(2) of the **Penal Code,** one must prove that the person charged assaulted another while either in order to steal something or while trying to prevent or overcome resistance to the theft. The findings in **Johanna Ndungu Vs Republic Cr. Appeal No. 116 of 2005** (unreported), clearly sets out what constitutes the offence of Robbery under **Section 295** and when it progresses to **Robbery** with **Violence** under Section 296(2) of the Penal Code. Section 296(2) of the Penal Code provides:-

(i) If the offender is armed with any dangerous or offensive weapon or instrument, 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 assault, he wounds , beats, strikes or uses any other personal violence to any person he shall be sentenced to death".

15. In the instant case PW1, the complainant told the court on page 16 of the proceedings.

"Before Kavuli left, the 1st accused (now 1st appellant) emerged and kicked me. I grabbed his hand which had been injured and twisted the hand and he cried. Accused No. 2 (2nd appellant) emerged and stepped on my chest and I lost consciousness after being kicked on my chest by second accused person".(2nd appellant).

16. The complainant did not tell the court that the attackers were armed with pangas and rungus as stated in the charge sheet . The complainant had adduced evidence to the effect that he had sent for the two appellants so that they could apologize to him for the injuries he sustained and compensate him. Complainant's main concern was the injuries and not the robbery. So was there robbery visited on PW1 on the material day?. ***PW3 No. 64412 PC Armstrong Mula*** told the court that PW1 reported a case of robbery on 3/2/2008 at Kola Police Post. He testifies that on Page 29***" They attacked him with a panga cutting his head".***

17. However, it is very clear that PW1 testified that his attackers were not armed but used kicks on him. The evidence of PW1 , PW3 and the particulars of the charge sheet were inconsistent on the mode of attacker visited on PW1 . PW1 also was more concerned that his attackers injured him but did not dwell so much on robbery. What came out from PW1's testimony is that his attackers were out to injure him but not rob him.

18. We have analyzed and re-evaluated the evidence and noted that though there is evidence PW1 was assaulted the prosecution needed to establish that indeed there was robbery. In addition to proving assault and the use of force, there must be established that the attackers had an intention to steal something and that they were armed with dangerous or offensive weapons or was in company with another or others or immediately before, during or after the robbery used or threatened to use personal violence on the complainant.

19. In the instant case, there was no evidence from which inference can be made that an intention to rob the complainant of anything was the motive behind the assault. Such inference can be made either from an act or conduct of the appellants. In the instant case, PW1 alleged that he was attacked on his way home and after he was allegedly kicked by 2nd appellant, he became unconscious. He came too at around 3.30 am and that is when he noted his mobile phone was missing plus the other items.

20. From the evidence on record, if PW1 was lying on the road from10:20 pm to 3:30 am, then any person could have ransacked him and stolen the said items and not necessary the appellants. None of the items were recovered from any of the appellants herein to corroborate PW1's evidence . When PW1 reported the matter to PW3, no search was carried out in the houses of the appellants herein.

21. The other issue was identification of the appellants by the complainant. PW1 told the court that he was attacked by the two appellants in the presence of one Kavuli. The complainant herein is the sole identifying witness. In the case **of Cleophas Otieno Wamunga VS Republic Cr. Appeal No. 20 of 1982** the Court of Appeal held as follows:-

"Evidence of visual identification in Criminal case can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whether the case against the Defendant depends wholly or to a great extend on the correctness of one or more identification of the accused which he alleges to be mistaken, that court must warn itself of the special need for caution on the correctness of the identification".

22. The complainant alleged that he identified the two appellants as he had been with them a while ago before the attack. He was also in the company of one Kavuli Mutiso. However, Kavuli Mutiso was not called as a witness. The court of appeal held in the case of **Roria Vs Republic (1967) EA 583 at page 583** that:-

"Subject ***to certain will known exception, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care, the evidence of a single witness respecting identification especially when it is known that the condition favoring a correct identification were difficult".***

23. In the instant case, the complainant adduced evidence that he had been taking alcohol since 7.00pm. The trial magistrate observed in his judgment on page 57:-

"***Having considered the evidence on record, I note the robbery took place at night between 10.00 pm to 12 midnight on 1/02/2008. The complainant was somehow drunk if not fully drunk considering the time he had spent in the bar".***

24. We find with respect that having made the above observation, the trial magistrate ought to have taken great care on the evidence of PW1 the single identifying witness in this case. He failed to do so. PW1 had testified that he was with one **Kavuli Mutiso** before the attack. The said Kavuli was not a witness. He also testified that he reported to the area chief of Mutulani location that he was assaulted by the appellants.That chief was not a witness. Again complainant allegedly sent one Kimote Maive to 1st appellant to ask him to go and apologize to PW1 for injuring him. He also allegedly sent the father to 2nd appellant on the same mission.

25. The above stated witnesses were not called to testify and corroborate the evidence of PW1 on identification. Why?. It was held in the case of **William Ndubi Ikiao alias Benson Makori Vs Republic Cr. Appeal No.130 of 2002** and quoting the case of **Nganga Vs Republic (1981) KLR 483** that:-

"It ***is the trite law that when prosecution fails to call a material witness, they do so at their own risk. An adverse inference will be drawn that the evidence of that material witness if called would be adverse to the prosecution".***

Having analyzed the circumstances of this case and the evidence on record, we will not hesitate to make such an adverse inference herein.

26. The other observation we have made is that though the complainant alleged that he was attacked and robbed by person known to him on 1/2/2008, the appellants were not arrested until 8/6/2008 when 1st appellant was arrested. 2nd appellant was arrested on 24/12/2008 after he was released from prison. The appellants were first charged with an offence of assault at Kilungu Law Court. Why did it take long for the appellants to be arrested and charged and PW1 allegedly knew them?.

27. Though PW1 alleged he wanted the appellants to apologize and compensate him, that kind of action is not for a person who is violently robbed. If anything happened to PW1, he was assaulted but not violently robbed.

28. We have also observed that the trial magistrate relied on the confession that was allegedly made by 2nd appellant to the complainant in the presence of **PW2 Mwau Maula.** The trial magistrate stated on page 58 of the judgment.

"When one considers the confession of the second accused person which is confirmed by PW2, a very old man whom the court found truthful, I have no reason to doubt the confession".

With profound respect, to the learned trial magistrate, the above observations were misdirection. Section 25A of the Evidence Act provides that:-

"A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless , it is made in court before a judge, magistrate or before a police officer (other than the investigating officer) being and officer not below the rank of Chief Inspector of Police and a third party of the persons choice".

29 The alleged confession that the trial magistrate relied on was not admissible as it was not made before the right persons as provided by ***Section 25 A of the Evidence Act***. It was wrong for the learned trial magistrate to find that case was proved beyond reasonable doubt relying on an inadmissible confession.

30. The other observation that we have made is that when theappellants appeared in court on 6/9/2009 before S.M Mungai, SPM, for plea taking, the record shows that the subsistance of the charge and every element were read over and explained to the accused persons and they replied in Kamba. However, the record does not show the replies by the appellants herein. In the case of **Baya Vs Republic Cr.Appeal No. 30 of 1984** the Court of Appeal held that:-

"The charge and all its essential ingredients must be explained to the accused in an vernacular or some other language that he understands and the accused own words in reply should be correctly translated into English and then carefully recorded"..

31. We have noted that in this case, there is nothing on record to show that the appellants admitted or denied the charge. We have thus observed that there were irregularities at the time of taking plea

32. Having carefully considered this Appeal, we do agree with the appellants that the evidence on record could not sustain the offence charged. We therefore find merit in this appeal, quash the conviction and set aside the sentence. We consequently order the release of the appellants forthwith unless they are otherwise lawfully held.

The appeal succeeds.

It is so ordered.

B . T. JADEN **L N GACHERU**

JUDGE **JUDGE**

DATED and **DELIVERED** at **MACHAKOS this** 21st day of January 2014

B . T. JADEN

JUDGE