



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 178 OF 2012

JAMES MUNENE MUTHIKEAPPELLANT

-VERSUS-

REPUBLICRESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 419 of 2010 in the Senior Resident Magistrate's court at Gichugu – HON. T.M. Mwangi (SRM))

JUDGMENT

JAMES MUNENE MUTHIKE ‘the appellant ‘was charged and convicted of the offence of Robbery Contrary to Section 296(1) of the Penal Code. He was sentenced to five (5) years imprisonment. He was aggrieved by the judgment and has appealed against the conviction and sentence. He raised the following grounds of appeal

1. The learned Trial magistrate erred in law and in facts by relying on a single evidence of PW1.
2. The learned trial magistrate erred in law and in facts by failing to consider that the evidence of all the witnesses including the PW1 was uncorroborative.
3. The learned trial magistrate erred in law and in facts by failing to consider that no exhibit was produced before the court despite the fact that I was arrested on the alleged scene of crime.
4. The learned trial magistrate erred in law and in facts by not considering that PW1 told the court that he bought many beers to me and that I was very drunk to be able to commit the alleged offence.
5. The learned trial magistrate erred in law and in facts by not considering that the first people to arrive at the scene did not appear in court to adduce their evidence. All other evidence was hearsay.
6. The learned trial magistrate erred in law and in facts by not considering my defence and mitigation.
7. The learned trial magistrate erred in law and in facts by failing to put into account the evidence of PW1 who stated that clearly that I had been left in a bar while the complainant went out accompanied by another person who fled immediately after the complainant raised alarm and that the complainant waited for me to come out of the bar on my way home only to accuse me of being an accomplice of the one who fled without sufficient proof thereof.

The prosecution called a total of four (4) witnesses. The prosecution case was that on 17th May 2010 9.30 p.m. PW1 was at Githonjo market which is near his home. He entered a bar to buy cigarettes inside the bar he met the appellant whom he knew. On his way out the appellant asked him to buy him a glass of liquor which he did. The appellant was in the company of John Kibuchi whom he also knew as a neighbor. Kibuchi asked him to buy him a beer which he did. The appellant and Kibuchi asked him to wait for them on his way home. He did so. They walked

home together with Kibuchi carrying PW1's sack which had a spade and 40 pieces of ropes. As they continued walking the appellant lagged behind. On inquiring on his whereabouts Kibuchi told him he may have gone to answer a call of nature. After going for a few more metres he felt someone hold both sides of his head from behind. The person tried to hold his vocal cords. He screamed and Kibuchi dropped the luggage he was carrying. He deeped his hands in his pockets and removed his shs 8000/= and mobile phone- Motololla C-113. He struggled with the person holding his head and they both fell down. As the person tried to hold his vocal cords he missed them and his hand landed in his mouth. He bit the person's finger and held into him until people came. PW2 was one of those who came and found PW1 still holding onto the attacker who was then identified as the appellant. PW2 responded two PW2's screams. The appellant had no shirt on him. He later showed PW 1 –PW3 where he had left his shirt before the attack on PW1 . Kibuchi disappeared with the items he had robbed from PW1.

When placed on his defence the appellant gave an unsworn defence. He testified that after working on his farm on 17th May 2010 he went to Gichonjo Market to buy paraffin. Before doing so he went to a bar and bought cane beer which he drunk from 7p.m-8p.m. He was bought beer by PW 1 who he left guarding his beer and upon his return PW1 left and did not return. When he left for home he was drunk. He met some people who flashed their touch at him and he fell down. He was beaten until he lost consciousness. When he regained consciousness he was in a police cell.

When the appeal came for hearing the appellant did not submit anything meaningful on the grounds of appeal. He asked the court to consider his reform while in prison and reduce the sentence. The state through the learned state counsel Mr. Stitati opposed the appeal. He submitted that the prosecution had full established its case through the evidence adduced by PW1-PW3.

This is a first appeal. This court is therefore enjoined to re-evaluate and re-examine the evidence adduced and arrive at its own conclusion. I am alive to the fact that I did not see nor hear the witnesses testify. In the case of **MWANGI VERSUS REPUBLIC (2004) 2 KLR 28** the court held thus:-

- 1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence**
- 2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.**
- 3. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusion. 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 had the advantage of hearing and seeing the witness..**

I have considered the submissions by the state and the appellant. I have equally considered the grounds of appeal plus the evidence adduced in the trial court.

The evidence adduced shows that PW1 and the appellant are persons who were well known to each other. It is also a fact that they had met at Gichonjo shopping Centre on the evening in question. It is also confirmed that indeed PW1 had bought the appellant a drink/ a beer while at that bar. All these issues have been confirmed by the evidence of PW1 and the appellant. PW1 stated that he left for home with the appellant and John Kibuchi. H explained that the person who held his head from behind enabled Kibuchi to rob him. He bit this person's finger and held onto him until people came. This person is the appellant. The first person to arrive was PW2. PW2 explained clearly that he was attracted to the scene by screams. And on arrival he found the appellant seated on PW1. He screamed and PW1 held onto the appellants limbs. It is therefore true that PW2 found the appellant at the scene struggling with PW1. When PW3 arrived at the

scene he found several people at the scene. The appellant was already tied up with a rope. PW1, PW2 and PW3 have all confirmed that:

- i. The appellant had no shirt while at the scene.
- ii. He showed them where he had left his clothes before

Coming to the scene. This explains what he was doing when he lagged behind as PW1 and Kibuchi walked ahead.

- iii. PW 3 and PW4 confirm that the appellant had only one shoe when arrested. The next day another shoe was recovered at the scene. It was taken to the station and found to match the one the appellant was wearing. It therefore confirmed that the appellant had actually been at that scene.

The defence of the appellant was well considered by the learned trial magistrate. It was dismissed as it did not dislodge the evidence of the prosecution witnesses. The appellant was squarely placed at the Locus Quo. Indeed the learned trial magistrate found PW1 to have been an credible witness. I have no reason to make me interfere with that finding. There was no reason why PW1 would have framed the appellant. I concur with all the findings by the learned trial magistrate

The sentence for this offence is upto 14 years imprisonment. It is noted that the complainant did not recover any of his stolen items. The sentence of five (5) years was not too harsh in the circumstances. I therefore find no merit in the appeal which is hereby dismissed. The conviction and sentence are confirmed.

Right of appeal explained.

H.I. ONG'UDI

JUDGE

DATED, SIGNED AND DELIEVERED AT KERUGOYA THIS 21ST DAY OF FEBRUARY 2014 in the presence of:

The appellant

Mr Sitati for state

Mbogo Court Clerk