



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 85 OF 2010

MOSES MUTETI WAMBUA APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. J.M. Munguti Senior Resident Magistrate delivered on 27/7/2009 in Machakos Chief Magistrate Criminal Case No. 3287 of 2007)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Moses Muteti Wambua**, was charged with the offence of attempted robbery with violence contrary to **section 297 (2)** of the **Penal Code**.

The particulars of the offence were that on the 24th day of November, 2007 at **Kenanie reserve in Machakos District** of the **Eastern Province**, jointly with another not in court while being armed with a dangerous weapon namely a knife, attempted to rob **Jackson Kioko Wambua** of his money and at or immediately before or immediately after the time of such attempted robbery used actual violence on the said **Jackson Kioko Wambua**.

2. When the Appellant was arraigned in court, he pleaded not guilty to the charge. The case proceeded to full hearing.
3. The prosecution case was that on the 24/11/07 at about 2.00 a.m., the complainant PW1 **Jackson Kioko Wambua** was in his house sleeping. He was woken up by a bang on his iron sheet roof. The complainant went to the sitting room to check what was happening. He found the window to the sitting room had been removed and one person had gained entry into the room. The said person was armed with a knife and he demanded money from the complainant and threatened to kill her. The complainant started struggling with the intruder while screaming for help. During the struggle over the knife the complainant was injured on the fingers. The complainant's grandmother heard the screams and opened the door to the complainant's house. The complainant and the intruder struggled up to the outside. There was bright moonlight and the complainant identified the intruder as the Appellant who he knew as his neighbour. Neighbours who heard the screams came to the scene. The Appellant ran away but members of public gave chase and arrested him. The Appellant was escorted to **Athi River Police Station**. After investigations the Appellant was charged with the offences herein.
4. In his defence, the Appellant stated that he was employed by one **Mr Wama** at a farm. The Appellant stated that one day the complainant's goats entered the farm of the Appellant's

- employer and destroyed some crops. The Appellant detained the goats and the complainant was made to pay Kshs.2,350/= which was the value of the destroyed crops. The complainant then threatened the Appellant with dire consequences. After about one week, the complainant made allegations to the Assistant Chief that the Appellant had robbed him. The matter was investigated and the Appellant set free. After about two days the Appellant was arrested on allegations of having assaulted the complainant. Later the charge was amended to that of attempted robbery with violence.
5. The trial magistrate was satisfied that the prosecution case was proved beyond reasonable doubt. The Appellant was convicted for the lesser offence of robbery contrary to **section 296 (1)** and convicted to serve seven (7) years imprisonment. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-
 - v. **That the conviction was against the weight of the evidence.**
 - v. **That the circumstances were not favourable for positive identification.**
 - v. **That some crucial witnesses did not testify.**
 - v. **That the prosecution evidence was contradictory and uncorroborated.**
 - vi. **That the burden of proof was shifted to the defence.**
 - v. **That the defence case was rejected without any reasons.**
 6. During the hearing of the appeal, the Appellant relied on his written submissions which I have duly considered.
 7. The learned counsel for the State opposed the appeal. It was submitted that there was sufficient moonlight and the complainant recognized the Appellant and also recognized the Appellant's voice.
 8. This being a first appeal, I am duty bound to re-evaluate the evidence and the record afresh and come to my own conclusions and inferences – *See Okeno –vs- Republic (1972) EA 32.*
 9. The complainant (PW1) narrated to the court how he was attacked and injured on his fingers and money demanded from him. The evidence of the Clinical Officer PW3 **Robert Kilonzo** confirmed that the complainant was treated for the injury. PW4 **Esther Nduta**, the complainant's grandmother who lived in the same compound was the first person to arrive at the scene. PW4 saw the attackers running away. Neighbours who heard the screams and rushed to the scene included PW2 **Julius Muia Kioko**, PW5 **Jacob Mule**, PW6 **Laban Maingi** and PW7 **Daniel Mumo Mutune**. The investigations carried out by PW8 **PC Daniel Ruwii** confirmed that the report of the attack was made at the police station and investigations carried out. The evidence of the above witnesses establishes the offence of attempted robbery.
 10. The main question for this court to grapple with is whether the Appellant was the culprit as stated in the prosecution case. It is observed that the offence took place at night. The source of light is described as moonlight. According to the complainant he was able to see the Appellant whom he recognized as one of his neighbour's employee. The complainant further stated that he knew the Appellant's voice and he recognized the same when money was being demanded from him and he was threatened with death.
 11. However, the circumstances of the visual identification were difficult. To rule out the possibility of error, corroboration was required.
 12. PW4, **Esther Nduta** was the only other witness. It was PW4's evidence that she saw the assailants running away at a distance of about 40 metres. Although PW4 testified that there was bright moonlight and she was able to see, it is doubtful if one can see clearly at that kind of distance under moonlight. It is no wonder that PW4 ended up pointing out the wrong person in the dock during the trial. This court's view is that the evidence of PW4 is not reliable and cannot be said to give any material corroboration to the complainant's evidence.
 13. The four neighbours who rushed to the scene (PW2, PW5, PW6 and PW7) did not find the assailants at the scene. These neighbours ended up giving evidence which reflected admissions of guilty made by the Appellant at the time of arrest. This is inadmissible evidence as there is no evidence of any confession obtained under **Section 25 A of the Evidence Act Cap 80 Laws of Kenya.**
 14. The defence raised by the Appellant is that there was bad blood between him and the complainant. Indeed the complainant in his evidence admitted the incident involving the goats

and the destruction of crops. Taking into account the difficult circumstances of identification, I find the conviction is unsafe.
15.The appeal has merits and is allowed. The conviction is hereby quashed and the sentence set aside. The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 19th day of February 2014.

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JUDGE