



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 91 OF 2011

DAVID MAKUMI MURIETHIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 2024 of 2009 of the Chief Magistrate's Court at Kibera by F. Nyakundi – Principal Magistrate)

JUDGMENT

1. **David Makumi Mureithi**, the appellant, herein was tried and convicted by F. Nyakundi the Principal Magistrate at Kibera law courts, for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to death as by law prescribed.
2. The brief particulars were that on the 8th day of May 2009 at about 10.30 p.m. at Mundia Flats, Ndemi Road, Adams Arcade within Nairobi jointly with others not before court, while armed with a knife they robbed John Mbugua Munyua of DVD player make LG, one radio make Sony, one DVD remote control, one electronic calculator, a pair of sunglasses, a pair of white shoes, one shirt, one trouser, one jacket, two speakers, earphones, tea leaves, one knife, two Kenya cane bottles of wine, one bottle of soda, cash 900/= all valued at Kshs. 19,750/= and at or immediately before or immediately after the time of such robbery wounded the said John Mbugua. In the alternative he had faced a charge of handling stolen goods contrary to **Section 322(2)** of the **Penal Code**.

Grounds of Appeal

3. The appellant subsequently filed an appeal against both conviction and sentence contending that there was no positive identification; that he was barred from challenging the investigating officer's evidence; that the exhibits were not recovered in his possession and that his defence was rejected for no reason.
4. The State opposed the appeal through learned counsel Miss Nyauncho, who submitted on identification that the appellant was well known to **PW1** because they were friends prior to the attack. That there was moonlight at the time of the attack which enabled **PW1** to see and identify the appellant and that the appellant was found in possession of the stolen items. Miss Nyauncho further submitted that the appellant's defence was duly considered in the judgment.

Case summary

5. The gist of the prosecution case is that the complainant, **PW1**, was asleep in his house at Mundia Flats in Kilimani on 8th May 2009 at around 10.30 p.m. when he heard the sound of a window breaking. On checking he found three people already inside the house. They had a torch and a knife and one of them demanded for money. The appellant identified the intruder, who was holding the knife as David Makumi his friend of two months. He is the appellant now in court.
6. When **PW1** attempted to flee the appellant boxed him in the right eye, stabbed him in the left hip and hit him on the head. He was then bound, gagged and blindfolded, before he was pushed back into his bed. The intruders remained in house for about an hour ransacking it. Neighbours who were alerted by the commotion in the **PW1**'s house summoned the police to the scene and they arrested the appellant. He was later charged as read.
7. The appellant denied the offence in his defence which he tendered without oath and without calling any witnesses. The appellant stated that he was going home from his place of work at about 7.20 p.m. on 9th May 2009 when he met **PW1**. That **PW1** struck up a conversation with him which lasted upto 8.00 p.m. That they went into a club at Nakumatt and had drinks up to 10.00 p.m. That from the club they proceeded to Mother-land bar on Ngong road and drunk some more.
8. The appellant further testified that they retired to **PW1**'s house where after dinner, **PW1** began to touch him in an indecent manner. The appellant repulsed him whereupon a struggle ensued between the two men as **PW1** attempted to rape him. According to the appellant things fell during the struggle and injured his hand. That the police came to the compound and found him in **PW1**'s house. They arrested him but he only learnt of the charges when he arrived in court.

Analysis

9. We have anxiously re-evaluated the evidence on record bearing in mind that the duty of the first appellate court, is not merely to scrutinize the evidence on record to see if there was some evidence to support the lower court's findings and conclusion, but to make our own findings and draw our own conclusions, in line with **Boru & Anor V Republic Cr. App No. 19 of 2001 [2005] 1 KLR 649**. In re-evaluating the evidence we bore in mind that we did not have the advantage of seeing or hearing the witness as they testified.
10. The undisputed facts in this case were that the appellant was arrested on the night of 8th-9th May 2009 at Mundia Flats Ndemi road at Adams Arcade. That **PW1** lives at the said Flats and that the appellant was at **PW1**'s house. It is also not disputed that **PW1** and the appellant were engaged in a struggle just before the appellant's arrest.
11. The questions for determination are whether the appellant was an invited guest, albeit a stranger, whom **PW1** turned against and tried to force himself against him in his house, or the appellant was a person known to **PW1** and he and his cohorts robbed **PW1**. The evidence on record boils down to the word of **PW1** against that of the appellant as to what actually transpired inside the house. We have therefore re-evaluated it carefully to draw our own conclusion.
12. We are aware 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 in respect of identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances there is need for other evidence. See - **KARANI -vs- REPUBLIC, CR. APP. NO. 181 OF 1984 [1985] KLR 290**.
13. We have considered the evidence of **PW2** the Government Pathologist, who testified that he examined **PW1** who had presented on 11th May 2009 with a history of assault and found the following:
 - Stitched wounds on the upper part of the right eye brow;
 - Haematoma right eye
 - Because right eye brow

- Bruise left eye brow
- Stitched wound left hip.

PW1 had been treated at Masaba hospital. The doctor formed the opinion that the injuries were about 3 days old and had been occasioned by both blunt and sharp objects, and the degree of injuries was harm.

14. On the manner in which the appellant arrived at **PW1**'s house, the appellant told the court that **PW1** brought him home after a night of cavorting in different clubs. That they were strangers to each other before that evening. **PW1** on the other hand testified that he was awakened from sleep by the sound of breaking glass and found the appellant and two others inside his house. That he and the appellant had known each other and been friends for about two months before that night.
15. The evidence of **PW1** was corroborated by **PW4** the watchman at the flats. He testified that on the evening of 8th May 2009 three men came to visit the caretaker who was **PW1**. The three men included the appellant whom he knew because he had seen him before, coming to visit **PW1**. We find therefore that there was no truth in the appellant's testimony that he did not know **PW1** before that evening, or that he arrived at the flats in the company of **PW1**.
16. On the evidence of arrest we considered the appellant's testimony that the police found and arrested him inside **PW1**'s house following a scuffle in which **PW1** tried to force himself upon the appellant sexually while the appellant fought him off. **PW1** on his part, stated that the robbery lasted about one hour and that neighbours who were alerted by the commotion in his house called the police. That he managed to untie himself and remove the blindfold and the gag. That when he went out of the house he saw the appellant still in the compound carrying a paper bag in which they had stashed items stolen from the house of **PW1**.
17. **PW1** shouted to alert the guards at the gate that they should detain the appellant. The appellant dropped the paper bag and attempted to flee but was arrested within the compound. **PW1** identified the items in the paper bag with the Kshs.900/= found on the appellant as his property.
18. The evidence of **PW1** found support in that of **PW3** CPL Karani of Kilimani mobile patrol, who went to the scene in response to a call to the police control centre reporting the robbery. As he was still inquiring from the guards at the gate he saw the appellant who was holding a paper bag try to flee. When ordered to stop the appellant dropped the bag but was chased and arrested in the compound. Just then **PW1** came running and said that the appellant and two others had beaten and robbed him. **PW3** noted that **PW1** had a stab wound in his left side towards the back. He identified the items in the bag as his property.
19. **PW1**'s testimony found further support in the evidence of **PW4** the security guard who testified that he saw the appellant who was carrying a paper bag but retreat when the police entered the compound. **PW4** saw the appellant's two companions jump over the fence but the appellant was cornered and arrested. We find that the question of mistaken identity does not therefore arise and further that the exhibits were recovered from his possession at the time of his arrest.
20. We are cognisant of the fact that this being a criminal case the burden of proof rests unshiftingly upon the prosecution. The appellant was under no obligation to prove his innocence or to explain his presence at the scene. However, we find that his story that a total stranger picked him up, plied him with beer and that he agreed to retire with the stranger to his house for the night, where upon the stranger turned on him to be far-fetched. In our view the story appears to be the product of the appellant's fertile imagination rather than reality. The learned trial magistrate right to consider and reject it as it is untenable in the face of all the other evidence on record.
21. We also find that the appellant's evidence that house hold items falling at random, cut **PW1** so deeply on the right eye brow and hip area requiring stitches was not credible. We further find that the evidence of the prosecution interlocks well and flows properly from the time of the arrival of

the appellant with his cohorts at the gate to the time he was seen trying to exit from the compound with a paper full of **PW1**'s property and was arrested by **PW3**.

22. Having given careful consideration to the evidence and all the circumstances of this case, we are satisfied that the learned trial Magistrate properly convicted the appellant based on sound evidence. We therefore confirm the conviction and sentence and dismiss the appeal.

SIGNED DATED and **DELIVERED** in open court this **14th** day of **April 2014**.

A. MBOGHOLI MSAGHA

L. A. ACHODE

JUDGE

JUDGE