



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 57 OF 2010

ALEX LICHUA LICHODOAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case Number 305 of 2009 in the Senior Principal Magistrate's Court at Limuru – M. A. Murage (SPM))

JUDGMENT

1. This appeal arises from the appellant's conviction in one count in **Case No. 305 of 2009** in the Senior Principal Magistrate Court at Limuru, on 19th January 2010. He was convicted for the offence of robbery contrary to **Section 296(2)** of the **Penal Code** in count I and for the offence of escape from lawful custody contrary to **Section 123** of the **Penal Code** in count II.
2. The particulars of the charge in count I were that on 7th day of March 2009 at Kamirithu sub-location in Kiambu West District within Central Province, jointly with another not before court, they robbed Joseph Waweru Njeri of cash Kshs.500/= and at or immediately before or immediately after the time of such robbery they used actual violence against the said Joseph Waweru Njeri. In count II it was alleged that while in lawful custody at Tigoni Police Station having been arrested in respect of the offence in count I he escaped from such lawful custody.
3. Briefly stated, the prosecution case was that **PW1** was walking home to Kamirithu on the evening of 7th March 2009 at about 8.30 p.m. when he was accosted by two men. One held him by the neck as the other relieved him of his wallet that contained Kshs.500/=. He screamed for help as he held onto one of the men and the members of the public responded immediately. They helped to apprehend the two men and take them to the village elder. From there two men were escorted to Tigoni Police Station from where they escaped, but were subsequently re-arrested and charged. Neither the cash nor the wallet were recovered.
4. In his sworn defence the appellant denied the offence. He testified that he was an Administration Police Constable and that on the material date he was taking a walk at Kwambira with a friend, when they came upon two drunk persons. His colleague started to talk to them whereupon they screamed attracting members of the public to the scene. The members of the public arrested the appellant and his friend and took them to the police at the road block and later on to Tigoni Police Station. Later that night a police officer at Tigoni Police Station released them. He was later re-arrested and charged.

5. Upon conviction the appellant filed this appeal in which he complained that the prosecution failed to prove their case to the required standard. That the prosecution's case was incredible and the trial court had failed to resolve material contradictions and inconsistencies in the appellant's favour. Further that the court applied wrong principles of law arriving at erroneous conclusions and also failed to accord his defence serious consideration.
6. In his written submissions the appellant contended that no robbery occurred against **PW1** since **PW1** only reported the matter on 16th September 2009, yet he said that when he was robbed he screamed and members of the public came to the scene and arrested his attackers immediately. That **PW1** did not report the robbery to **PW2** the village elder to whom he was taken immediately after his arrest.
7. The appellant also submitted that the trial court erred by failing to summon witnesses from Kamirithu village and especially one Albert who was mentioned by **PW2** to verify **PW1**'s evidence. On this he relied on the case of **Bukenya and others v Uganda Cr. Case No. 68 of 1972 EACA** in which the court pronounced that the court has a right and a duty to call all witnesses whose evidence appears essential to the just decision of the case.
8. Lastly the appellant urged the court to find that the evidence of the prosecution was contradictory in so far as it showed that he escaped from a highly guarded police station where he had been locked inside the cell.
9. In response Mr. Kadebe learned state counsel stated that when he was attacked, the complainant raised an alarm and members of the public responded immediately. That they arrested the appellant whom the complainant was holding onto at the scene of the robbery and handcuffed him using his own handcuffs. Further that the conviction was based on the evidence of the complainant which the court found to be convincing. Mr. Kadebe urged the court to dismiss the appeal.
10. Being the first appellate court, We analysed and re-evaluated the evidence on record afresh keeping in mind that we neither saw nor heard the witnesses' testimonies ourselves, and giving due allowance therefor.
11. On the evidence of identification, we are alive to the fact that although it is trite law that a fact may be proved by the testimony of a single witness, this 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 conditions favouring a correct identification were difficult. - See the often cited case of **Maitanyi v Republic Cr. App No. 60 of 1986 [1986] KLR pg 198**, in which the Judges of the Court of Appeal Nyarangi, Platt, and Gachuhi JJA, summarised the points to ponder when considering the evidence of a single identifying witness.
12. After having carefully warned ourselves of the dangers inherent in basing a conviction on the evidence of a single identifying witness, we find that the case before us is straight forward. First, the appellant and his cohort were arrested at the scene of the robbery by members of the public who responded immediately and found **PW1** still holding on to him as he shouted for help.
13. Second, the evidence on record is that the appellant was handed over to the village elder and was later escorted to the police the same night of the offence. There is therefore no question of lapse of time from the time of the offence to the time of reporting and it is not correct as urged by the appellant, that the report was made on 16th March 2009 when the robbery occurred on 7th March 2009.
14. Third, there was no obligation on the prosecution to summon the inhabitants of Kamirithu village to testify, as long as they presented sufficient witnesses to prove their case. In our view the testimony of the witnesses who came to the scene after the fact and only aided in the arrest may not have added which value to the prosecution case.

15. Fourth, the evidence shows that although the appellant and his cohort were not armed in court I, they numbered two at the time of the robbery and they used force to hold the complainant by the neck and ransack his pockets and rob him of his wallet and cash Kshs.500/=. The ingredients of **Section 296(2) of the Penal Code** were therefore satisfied in the **first count**.
16. In count two however, we find that the prosecution evidence was incredible. It was unclear how an unarmed prisoner managed to escape from a locked prison cell that was guarded by police officers without anyone noticing. The likely scenario may be as presented by the appellant that his fellow officers let him go. They may have gone looking for him when the release came to their superior's notice and he took them to task. We therefore find that a reasonable doubt exists in the prosecution evidence in regard to the **second count** and give benefit thereof to the appellant.
17. On the sentences we must point out that it was improper for the trial court to sentence the appellant to death in the first count and to one year imprisonment in the second count without ordering the second count to remain in abeyance. This is for the simple reason that if the first sentence were to be executed it would be impossible for the appellant to serve the second sentence.
18. For the foregoing reasons the appeal on **count I** fails and is dismissed. The appeal in **count II** succeeds and is allowed.

SIGNED DATED and DELIVERED in open court this 7th day of **April 2014**.

A.MBOGHOLI MSAGHA

L. A. ACHODE

JUDGE

JUDGE