



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 292 OF 2012

HESBON KAMAU WAMBOAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 1735 of 2011 of the Principal Magistrate's Court at Githunguri by B. M. Nzakyo – Senior Resident Magistrate on 19th October 2012)

JUDGMENT

1. The appellant has appealed against the conviction and sentence imposed upon him by B. M. Nzakyo, Senior Resident Magistrate in **Cr. Case No. 1735 of 2011**, for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** in count I and II, of attempted murder contrary to **Section 220(b)** of the **Penal Code** in count III and of threatening to kill contrary to **Section 223(1)** of the **Penal Code** in count IV.
2. Brief particulars were as follows:

In count I: on 2nd day of December, 2011 at 10.30 p.m. at Ikinu village they robbed Samuel Munene Kiragu of Kshs.3,000/=, sonny video, camera, Nokia camera, Techno mobile phone, nokia 1110 mobile phone, one speaker, to pairs of shoes, one padlock and one umbrella all valued at Kshs.95,000/=.

In count II: on 2nd December 2011 at 9.30 p.m. at Gathanji market in Githunguri they robbed Priscilla Wangari Ngurumi of cash Kshs.5,070/=. That at or immediately before or immediately after the time of such robbery threatened to use actual violence against the two victims in count I and II.

In count III: on 2nd December 2011 at 11.15 p.m. at Ikinu village, Githunguri they unlawfully attempted to cause death to James Njenga Wambu by aiming to shoot him with 3 rounds of ammunition using an AK 47 Rifle.

In count IV: On diverse dates of 26th April 2011 to 13th December 2011 at Ikinu village Githunguri without lawful excuse they caused James Njenga Wambu to receive a short message service threatening to kill him.

At the end of the trial he was convicted of all four counts and sentenced to suffer death as by law

prescribed in counts I and II, and to serve life imprisonment in counts III and IV respectively.

3. Being disgruntled by the conviction and sentence the appellant filed an appeal on grounds that he was convicted on contradictory, uncorroborated and unreliable evidence; that his identification was not beyond reasonable doubt; that he was framed by his kin and rivals due to an existing grudge between them; that the burden of proof was shifted onto him; that his defence was not considered; and that the learned trial magistrate applied a wrong standard of proof in the case.
4. The appeal was opposed by learned state counsel Miss Maina on behalf of the state. She contended that there was sufficient evidence to support both conviction and sentence and urged the court to dismiss the appeal on grounds that there was sufficient light and the robbery lasted for some 30 minutes. Further, **PW10** conducted an identification parade from which **PW1**, **PW2** and **PW3** respectively picked the appellant. That the attempted murder and threatening sms messages, were perpetrated against the appellant's brother who therefore knew him.
5. The prosecution's case was that in count I, **PW1** Virginia Muthoni was at home on 21st December 2011 at night waiting for her husband when she heard a knock at the door and opened it. Two men entered her house one of whom had a rifle. They ordered her to lie down and robbed her of a speaker, two pairs of shoes, belonging to her husband and mobile phone make Nokia 1110. Her husband arrived just then and the robbers opened the door for him and also ordered him to lie down. They robbed him of Kshs.3000/=, a mobile phone make Techno, a camera make Nelkon, a video camera make Sony, a padlock and umbrella and left the house.
6. In count II **PW4** Pricilla Wangari Ngurumi was at work in her bar. On 2nd December 2011 at 9.30 p.m. when two men burst in with a rifle and ordered everyone to hand over their money. The robbers took her day's takings and also took money and mobile phones from her patrons and left.
7. In **count III**, **PW7** the mother of the appellant was at home on the night of 2nd December 2011 when she saw three people standing outside her yard. She recognised one of them as her son who is the appellant herein. She then heard gun shots before the people left.
8. In **count IV**, **PW5** a brother to the appellant testified that he made a report to the police following several disputes between himself and the appellant. He also advised his mother **PW7**, to report an attempt by the appellant on her life to the police. This incensed the appellant and on 2nd December 2011 at 11.15 he sent him death threats and abusive messages via Short Message Service on no 0713174140. Presently, there were footsteps outside his house and gun shots were fired into his house through the iron sheet walls giving rise to the charges in count III.
9. In his unsworn defence, the appellant stated that on 13th December 2011 he was at home in Nairobi, when a group of people came with a car and arrested him and sped off towards Jogoo road. He raised an alarm and police stopped the vehicle and took him to Buruburu Police Station where he found his sister and brother. On the following day his parents came and pointed at him. He was later charged with the offence before court which he denies.
10. Being the first appellate court we have re-evaluated all the evidence on record, and come to our own conclusions. In the process of re-evaluating the evidence we have been mindful of the fact that, unlike the learned trial magistrate, we did not have the benefit of observing the witnesses as they testified.
11. On the weight of the evidence the appellant contended that the prosecution's evidence was insufficient, contradictory, uncorroborated and unreliable and that his identification was not beyond reasonable doubt. In response Miss Maina submitted that the witnesses corroborated each other and that the prosecution proved their case beyond reasonable doubt.
12. We scrutinized and reassessed the evidence keenly in view of the appellant's complaints. In

considering the evidence of identification we referred to the direction of the Court of Appeal in the case of JOSEPH NGUMBAU NZALO VS. REPUBLIC (1991) 2KAR Pg 212 in which the court stated that:

“A careful direction regarding the condition prevailing at the time of identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error was essential.”

We analyzed the evidence of identification from the identifying witnesses, **PW1, PW2, PW5** and **PW7** against the evidence tendered in defence.

13. We considered the circumstances under which the two identifying witnesses identified the appellant in **counts I, II** and **III** with great caution since the attack occurred at night, bearing in mind what was stated in the case of Republic Vs. Turnbull & others (1976) 3 All ER 549, that mistakes can be made even in cases of recognition, and that an honest witness may none the less be mistaken.
14. We examined the evidence to establish the manner of lighting and the position of each witness during the robbery, vis-a-vis the attackers. In count I **PW1** confirmed that there was florescent light inside the house by which she was able to see the faces of the robbers clearly. She identified the appellant as the one who carried the rifle. **PW2** the husband to **PW1** lent support to **PW1**'s evidence. He too testified that the appellant was among the robbers and it was he who wielded the rifle. It was the appellant who took the items listed in the charge sheet from him.
15. In count II **PW4** testified that the robbers struck at 9.30 p.m. but that there was a pressure lamp in the bar. She was clear that the appellant was one of the two men she saw in her bar and that he was the one carrying the rifle. All three witnesses picked out the appellant at a subsequent identification parade at Githunguri Police Station.
16. In **count III** James Njenga could not identify the person who fired the shots into his house. However **PW7** Susan Wanjiku Wambu who is his mother and also mother to the appellant confirmed that she positively identified the appellant as one of the people she saw standing in her compound on the fateful night and who fired the three gun shots into the house of her son James Wambu. She identified him by voice and categorically confirmed that she could not mistake the voice of her son, and that appellant was present outside her house before the shots were fired.
17. There is no doubt that the three shots fired were aimed at James Wambu. They could have caused fatal consequences on him if they were on target. James Wambu heard voices outside his house saying his luck had ran out before shots rung out. Photographs of the house of James Wambu were produced as exhibits. A look at the photographs clearly show bullet holes and marks on several spots inside the house. A cartridge which was spent was also produced. The cartridge was recovered from the vicinity of the same house owned by James Wambu.
18. In **count IV** James Wambu alleged he received various text messages from the appellant. A list of all the messages from various telephone numbers was exhibited to this court. The messages were indeed threatening to kill James Wambu and some were abusive. The appellant was later arrested in possession of a mobile phone and two sim cards. Some messages were retrieved from the two sim cards recovered from the appellant.
19. From the evidence the witnesses in both count I and count II saw and identified the appellant in good light. There is no evidence that the robbers were camouflaged in any way or that the witnesses were blind folded. Contrary to the appellant's assertions there were no contradictions in the evidence. The witnesses corroborated each other well and their evidence flowed well. We therefore find that the evidence of identification was sound and reliable.
20. We are persuaded that there was no error in the identification of the appellant herein since this

was not a case of a single identifying witness. The conditions under which the identification was done were favourable.

21. On the ground that the appellant was framed by his kin and rivals, Miss Maina responded that there was no existing grudge between the appellant and his family since they had taken him in when he returned from jail following an earlier conviction. Miss Maina maintained that the current case arose out of the actions of the appellant and not some family grudge. Miss Maina pointed out that by allowing the evidence of his relatives **Section 53** and **77** of the **Evidence Act** was not breached because he committed the offence against them and they could therefore testify.

22. We scoured the lower court record and did not find any evidence of a pre-existing grudge between the appellant and his family. If anything it is the appellant who appears to have been a source of harassment to his family and not the other way round. If the appellant were to be believed the evidence of **PW1**, **PW2** and **PW3** who are on record as having told the court that they did not know him prior to the robbery would not be explained. In any case the question of pre-existing grudge did not come up in his cross-examination of any of the witnesses nor in his defence. Arising at this late stage in the proceedings, it is our considered opinion that it is an afterthought meant only to exonerate the appellant. We therefore find that it has no substance and discard it.

23. On the ground that the burden of proof was shifted to the appellant and that his defence was not considered Miss Maina submitted simply that the court had considered the appellant's defence. The appellant gave unsworn testimony which the trial court considered and commented upon. We have stated elsewhere on numerous occasions that in a criminal trial the burden of proof rests unshiftingly upon the prosecution. The appellant therefore is under no duty to give sworn or unsworn testimony.

24. It was even open to him to keep quiet and offer no explanation as to his circumstances if he so wished. In that light, the court misdirected itself by seeming to fault the appellant for giving unsworn testimony which could not be tested by way of cross-examination. All in all however, the record shows that the learned trial magistrate considered the defence and drew the conclusion that it had no probative value in the case, and that it did not manage to controvert the prosecution evidence. We find no reason to conclude that he shifted the burden of proof to the appellant.

25. In conclusion, we are satisfied that in all four counts the appellant was convicted on sound evidence. The appellant was sentenced to suffer death in **counts I** and **II** and to serve life imprisonment in **counts III** and **IV** respectively. Although the appellant did not advance any grounds of appeal with regard to the sentence, none the less we feel compelled to comment thereon in line with the decision in **OSBON ONDITI OUKO AND ANOR. VS REPUBLIC CR. APPEAL NO. 173 OF 2006** (Unreported). In the above case two appellants were convicted on three counts and were sentenced to serve 5 years imprisonment for the charge of possession of firearm, and at the same time, to suffer death by hanging in respect of the two robbery charges. The honourable Judges of Appeal sitting at Kisumu had this to say:

“In passing, we must state that those sentences were improper as the appellants could not be hanged twice over and still serve a five year sentence. Only one sentence of death ought to have been imposed while the others would remain in abeyance.”

26. All in all we find that the appeal on conviction in respect of each of the four counts is wanting in merit. We dismiss the appeal and uphold both the conviction and sentence imposed by the trial court.

SIGNED DATED and DELIVERED in open court this **27th** day of **May 2014**.

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A.MBOGHOLI MSAGHA

L. A. ACHODE

JUDGE

JUDGE