



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 247 OF 2012

GEORGE MUNYINYI KAHUYU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 890 of 2011 in the Chief Magistrate's Court at Kiambu – Mrs. C. Oluoch (PM) on 27th September 2012)

JUDGMENT

1. The appellant has filed an appeal against the conviction and sentence entered against him on 27th September 2012, in **Cm Cr. Case No. 890 of 2011** by M/s C. Oluoch Principal Magistrate at Kiambu law courts. He had been charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**, in which it was alleged that on 20th day of May 2011 in Kiambu county, jointly with others not before the court, they robbed Daniel Kamunya Mukundi of cash Kshs.400/= and one mobile phone make LG valued at Kshs.1,500/=, and at or immediately before or immediately after the time of such robbery wounded the said Daniel Kamunya Mukundi.
2. A snapshot of the case before the trial court was that **PW1**, the complainant herein, was walking home from a matatu stage at about 11 p.m. on the night of 20th May 2011 when three people confronted him. They held him in a stranglehold and robbed him of Kshs.400/= in cash together with a mobile phone. He reported to the police immediately and gave the names of the two people whom he had recognised out of the three assailants. The appellant was one of them.
3. The following Friday he saw the appellant at a mosque and enlisted the help of members of the public to arrest him. Later a second man was arrested since **PW1** had given his description to the police. The two men were subsequently charged together.
4. In his sworn statement in defence the appellant denied the offence and told the court that he was arrested as he was waiting for his brothers at a bar having come from work. He said nothing about the day of the offence itself.
5. The learned trial magistrate assessed the evidence and found that the prosecution had proved their case to the required standard against the appellant and convicted him accordingly. He was sentenced to suffer death as by law prescribed. His co-accused was acquitted of the charge.
6. There were eight grounds ascribed to the appeal as argued on behalf of the appellant by learned

- counsel F. N. Njanja in his written submissions. First, Mr. Njanja questioned the circumstances of identification. He urged that the conviction was based on the evidence of visual identification by a single witness, when the offence was said to have occurred at about 11 p.m. and the only source of light was from a security light from a distant pub.
7. Mr. Njanja contended that the learned trial magistrate did not interrogate the conditions of identification as stated in the case of **Wamunga v Republic [1989] KLR 423** by the Court of Appeal. He also referred to the cases of **Patrick Nabiswa v Republic 80 of 1997**(unreported) and **Republic v Turnbull [1976] 3 ALL ER 549** which dealt with evidence of identification.
 8. Miss Nyauncho learned state counsel opposing the appeal on behalf of the Respondent, submitted that the appellant was properly identified despite the fact that the offence occurred at 11.00 p.m. That there was security light at the scene which assisted **PW1** to identify the appellant, and which **PW1** stated was very near the scene.
 9. Further, Miss Nyauncho submitted that there was evidence of recognition. That **PW1** knew the appellant before and was able to recognize his voice and appearance and to give the police the appellant's name when he reported the incident. She argued that in the case of **Peter Wachiuri Gichira v Republic [2014] eKLR** the court of Appeal upheld the evidence of both recognition and identification by a single witness and dismissed the appeal therein.
 10. An evaluation of the evidence on record shows that indeed, the case for the prosecution rested entirely on the evidence of visual identification by **PW1**, while the case for the defence rested entirely on the evidence of the appellant. We therefore made a careful assessment regarding the conditions prevailing at the time of identification and the length of time for which the witness had the accused person under observation, to exclude the possibility of error. See - **JOSEPH NGUMBAU NZALO VS. REPUBLIC (1991) 2KAR Pg 212.**
 11. We observe that the appellant was known to **PW1** prior to the attack and that identification was by recognition of his voice and appearance. From the testimony of **PW1** we also observe that there was light at the scene coming from security lights at Nameless bar and a chemist nearby. He testified that "the lights were very near the scene".
 12. We also note that **PW1** himself identified the appellant for purposes of arrest a few days later and that in cross examination he maintained that he gave the appellant's name as Goerge Munyinyi to the police. **PW1** testified that he was not drunk at the time of the attack.
 13. On the second and third grounds Mr. Njanja urged that the prosecution evidence was contradictory and uncorroborated. That in particular, **PW1** referred to the 20th May 2011 at 11 p.m. while **PW2** referred to 22nd May 2011 at 9 p.m. as the date and time of the offence. Further, that while **PW1** testified that the appellant was arrested at a mosque, **PWII** stated that he was arrested at a bar. That these two were therefore, not faithful witnesses upon whose evidence reliance could be placed.
 14. In response Miss Nyauncho submitted that the contradictions on the date and time of the alleged incident as highlighted by the appellant were curable under **Section 382** of the **Criminal Procedure Code**. Further, that as to the appellant's place of arrest, **PW1** stated that he saw him at the mosque, and did not say that the appellant was arrested at the mosque. That it was **PW2** whose testimony stated that the appellant was arrested from the bar and the evidence was not contradictory at all.
 15. We have perused the record and find that on the apparent contradictions in the date and time of arrest, **PW1** was speaking in reference to the date and time of the attack when he alluded to the 20th May 2011 at 11 p.m. **PW2** on the other hand was referring to the date and time of arrest when he alluded to the 22nd May 2011 at 9 p.m. This is discernible from the context of the evidence of **PW2** when he went on to state:

“He requested me to assist in arresting the suspect. We arrested the 1st accused and took him to the police.”

As to whether the appellant was arrested at a mosque or at a bar, it is evident that **PW1** first saw him at a mosque and went to enlist the help of **PW2** in effecting the arrest. It is **PW2** who states where they actually arrested the appellant from. We therefore find that there is no material contradiction that would constitute doubt in the prosecution case.

16. We considered the fourth, fifth, sixth and seventh grounds together. In these Mr. Njanja contended first, that it was irregular for **PW1** to go to hospital after the appellant had been arrested and four days after the P3 was given to him. Secondly that the trial court ought to have considered that the appellant was not found in possession of the stolen mobile phone or money. Thirdly, that ownership of that property had not been proved. Lastly, that the Investigation Officer did not conduct any search on the appellant’s premises nor did he produce any search certificate or investigations diary to support his evidence.

17. Miss Nyauncho submitted that the ingredients of robbery with violence were proved since the prosecution proved that **PW1** was violently robbed of his money and phone by three people who inflicted pain on him. That **PW3** the clinical officer did testify that on examination the appellant had tenderness around the neck secondary to strangulation. It was his testimony that the probable type of weapon was a blunt object.

18. We note that although it is prudent for the victim of an assault to seek medical help as soon as possible, the law does not prescribe a limit. We also note that although the appellant was not found in possession of the stolen property, the evidence of **PW1** placed him squarely at the scene of the robbery. We agree that the Investigation Officer should have searched the appellant’s house and produced both the search certificate and investigations diary, but find that failure to do so did not weaken the prosecution case.

19. On the defence statement Mr. Njanja urged that the trial court did not attach the weight due to the appellant’s alibi, that he knew nothing about the offence. Miss Nyauncho replied that the respondent echoed the proceedings of the trial court as well as the judgment reached therein, because they were in agreement.

20. In our view the appellant’s defence did not raise an alibi because his testimony was with regard to the date of the arrest. He did not state that he could not have committed the offence because he was in some other place at the relevant time. We say this in answer only to Mr. Njanja’s complaint for we are aware that this being a criminal trial, the appellant was under no duty to explain his whereabouts at the time of the offence. It was the duty of the prosecution to place him at the scene and prove that he committed the offence. This we find, the prosecution did.

21. Having given careful consideration to all the circumstances of this case, we find that **PW1** was indeed attacked by three persons who included the appellant on the ill-fated night. That he was robbed of cash Kshs.400/= and a mobile phone make LG worth Kshs.1,500/=. That although the robbers were not apparently armed, they wounded him in the course of the robbery, as evinced from the evidence of **PW3** the Clinical Officer who examined him four days later and still noted tenderness in his neck region. In view of the foregoing the ingredients of **Section 296(2)** of the **Penal Code** were satisfied.

22. For the foregoing reasons we find 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 **23rd** day of **June 2014**.

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A.MBOGHOLI MSAGHA

JUDGE

L. A. ACHODE

JUDGE