



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 390 OF 2010

REPUBLICRESPONDENT

VERSUS

RICHARD OCHIENG RUTOAPPELLANT

*[Being an appeal from the original conviction and sentence by Hon. U.P Kidula C.M. dated 6th July 2010
in Kibera CMCCR Case No.8113 of 2007]*

JUDGMENT

1. The appellant, **Richard Ochieng Ruto**, was charged with robbery with violence contrary to section 296/2 of the Penal Code. The particulars are that on the 16th day of November 2007 at Kibera Line Saba within Nairobi Area Province, jointly with others not before court being armed with a pistol robbed **Dominic Nzioki Kinyingi** cash KShs.10,000/- and immediately before or immediately after such robbery threatened to use actual violence to the said **Dominic Nzioki Kinyingi**.
2. The prosecution called 3 witnesses from whose testimonies the facts of the case emerge. Dominic Nzioki Kinyingi PW1 testified that on the material date, he was selling paraffin at the paraffin shop in Kibera Laini Saba when the appellant and two other persons attacked him. In his account, one of the attackers placed something like a pistol on his (PW1's) ribs while one of them (the appellant) jumped over the door and headed to the cash box from where he removed money and passed it to his two colleagues.
3. PW1 further testified that he repulsed the attackers by hitting the one who held the pistol and that when the pistol fell, the third attacker picked it up and together with the second attacker they escaped. He then turned to the 1st attacker who was inside and subdued him while screaming for help. Members of the public came and assisted in arresting the attacker whom they escorted to the Chief's Camp from where he was escorted to the Kilimani Police Station. PW1 testified that he lost KShs.10,274/40 in the robbery. That it was the appellant who removed the cash from the till and passed it over to his accomplices who then escaped with it.
4. PW2 Stephen Kariuki testified that he was the owner of the shop and that PW1 was his employee. He stated that on the material date (16th November, 2006) at about 8.00p.m, he saw a crowd near his shop and on approaching heard people shouting that there were robbers. He found one of the robbers (the appellant) having been arrested by the mob which wanted to lynch him. He escorted the attacker to the Chief's camp. In his testimony PW2 stated what he was told by PW1 how the robbery was executed. He produced a delivery note dated 13th November, 2007 to show that he had purchased paraffin stock a few days earlier.
5. **No. 48771 P.C. Joseph Kimanzi** was the Investigating Officer in the matter. He testified as PW3. He told the court that he was assigned the case by the officer in charge on 21st November 2007 at 10.00a.m. That he proceeded to interrogate the appellant and summoned both PW1 and

- PW2 who narrated to him what had happened. He testified that the appellant denied the charge while the complainant (PW1) told him how he was accosted by 3 men who robbed him of KShs.10,274/40 and that the appellant is the one who entered the shop and removed the money from the till.
6. He further told the court that the complainant raised the alarm and started beating the appellant and that members of the public assisted in arresting the appellant. The Investigating Officer concluded his testimony by stating that after interrogating the complainant (PW1) PW 2 and the appellant, he was convinced that the appellant committed the offence of robbery with violence with others and charged him accordingly. He identified the appellant as the person who was charged before court.
 7. After hearing the prosecution evidence, the trial court was satisfied that the appellant had a case to answer and put him on his defence. The appellant testified as DW1 and gave an unworn statement. He stated that he had gone to the paraffin shop to buy paraffin and while waiting to be served, two people entered the shop and immediately thereafter he heard screams from the shop. That the two people came out of the shop and ran away while the pump attendant screamed and pointed at him calling him a thief. He testified that the members of the public started beating him and he lost consciousness only to come to at the Chief's camp. He denied any knowledge of the offence.
 8. The trial court dismissed the appellant's defence as false and an afterthought. It found that the prosecution had proved its case beyond reasonable doubt and convicted the appellant under Section 215 of the Criminal Procedure Code. He was sentenced to suffer death as by law prescribed. According to the record, the judgment was delivered on 26th October 2009 in the absence of the accused who by then had escaped from lawful custody. He was later arrested and charged in Criminal Case No.294/2010 with the offence of escape from lawful custody and presented before the trial court on 6th July 2010 for the reading of his judgment and sentence. The appellant was aggrieved by the judgment hence this appeal.
 9. The appellant has faulted the judgment of the trial court on the grounds that the trial court erred in law and fact by relying on the mode of arrest; and not considering that there was mistaken identity; by not considering that no exhibits were produced in the case; by not giving the accused adequate time to prepare his defence and by rejecting the appellant's defence without reason.
 10. This appeal is before us as a first appeal. In the circumstances, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter, remembering only that we do not, as an appellate court, have the privilege of seeing and hearing witnesses who testified before the trial court. See generally **Pandya Vs- Republic [1957] EA336; Okeno -Vs- Republic [1972] EA 32 And Selle & Another -Vs- Associated Motor Boat Company Ltd. & Others [1968]EA 123.**
 11. In the latter case, the Court of Appeal for East Africa laid down the duty of a first appellate court in the following words by Sir Clement De Lestang, V.P:-

“Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif -vs- Ali Mohammed Sholau [1955] 22 EACA 270)”

12. In addition to the above, a trial court is also bound to weigh and consider the judgment of the trial court, with a view to determining whether the findings therein can be supported. See **Mwangi Vs. Republic [2004] 2 KLR 28.**
13. In her submissions before us, **Ms Abuya** the learned counsel for the appellant, condensed the grounds of appeal in the home made memorandum filed by the appellant into two. Firstly, it was her contention that the appellant was arrested, tried and convicted on a case of mistaken identity. Secondly, she contended that the prosecution's case was not proved beyond reasonable doubt. On the first ground, **Ms. Abuya** submitted that the appellant was standing outside the paraffin shop

- when a robbery took place and that upon an alarm being raised by the shop attendant, he was arrested and beaten. To support her submission, she referred us to **Criminal Case No. 63/2002 & Criminal Case No. 589/1999** on the principle of identification.
14. The appeal is opposed by the Republic. It is the respondent's position that the appellant was properly convicted for the offence of robbery with violence. In supporting the conviction and sentence, **Ms. Ikol**, for the respondent submitted that the evidence of PW1 showed clearly that the appellant was the one who entered the shop and was arrested inside the shop. She observed that there was a scuffle between the shop attendant and the appellant and the appellant was overpowered. Further, counsel submitted that the ingredients of the offence were proved as there were two other persons in the company of the appellant one of whom was armed with a pistol and who perpetrated violence against the complainant while the appellant robbed him of the money in the cash box.
 15. This appeal must turn on one central issue, that is whether the appellant was properly identified and whether the case against him was proved by the prosecution beyond reasonable doubt. We proceed to consider this in the paragraphs that follow.
 16. From the proceedings and judgment of the trial court, the prosecution presented 3 witnesses. As already outlined above, the complainant (PW1) testified that he was the victim of the robbery; that he fought off the robbers and managed to subdue the appellant. In PW1's testimony, he subdued the appellant inside the shop while the appellant stated in his unsworn statement that he was arrested outside the paraffin shop when PW1 started screaming "thief" pointing at him.
 17. From the testimonies of PW 1 & PW 2, it is clear to us that the appellant was the person who was arrested initially by members of the public and taken to the chief's camp and later handed over to the police who later charged him. PW1 was clear and unshaken in his testimony. PW 2 is the owner of the shop and testified to having escorted the appellant who had been arrested by members of the public to the Chief's camp. His testimony in so far as relates to the arrest of the appellant corroborates that of PW1. His testimony was that he was the owner of the shop and that he had restocked the shop a few days earlier; and, that from the calculation of the sales the money which was lost in the robbery was KShs.10,274/- corroborates that of PW1 that the robbers took off with some money.
 18. PW3 on the other hand testified in court that he interrogated both PW1 and PW2 and they told him what had happened. He stated thus:- *"They narrated to me what happened. The complainant told me that the accused confronted him with two others.... I was convinced that the accused person committed the offence of robbery with violence jointly with others not before court and I charged him with this offence."* From this account, it is apparent that the testimony of PW3 did not in any material way corroborate the testimony of PW1 with respect to identifying the appellant as the person who committed the robbery in the company of two others.
 19. It follows then that the court heavily relied on the evidence of one identifying witness (PW1). On this issue, the appellant's counsel has submitted that the appellant was arrested on mistaken identity and that he was wrongly charged and convicted. We have critically examined the testimony of PW1 which as stated earlier remained unshaken in cross-examination. PW1 testified that he struggled with the appellant inside the shop and overpowered him and with the assistance of members of the public arrested him. All other customers were being served through the window as they stood outside the shop.
 20. On arrival at the scene, PW2 escorted the arrested person to the Chief's camp. We find the evidence of PW1 and PW2 cogent. We reject the proposition that there might have been mistaken identity as it is evident that the person who was arrested was the intruder inside the shop. On cross-examination by the appellant, PW1 was firm that all customers were served while outside the shop. PW1 categorically stated that "the accused jumped over the lower part of the door and entered inside. I arrested him when he was still inside". In the premises, we find the conviction of the appellant though based on the testimony of a single identifying witness was safe. We believe the testimony of PW1 that he arrested the accused inside the shop and that members of the public responded to his alarm and helped in subduing the accused who was later escorted to the Chief's camp by PW2 and other members of the public. We do not see the possibility of error in identification as contended by the appellant.
 21. For the foregoing reasons, we uphold the conviction and sentence. The appeal is thus dismissed.

Judgment dated and delivered at Nairobi this 17th day of June, 2014.

.....

.....

R. LAGAT-KORIR

D. NJAGE MARETE

JUDGE

JUDGE

In the presence of:

.....: Court clerk

.....: Appellant

.....: For the appellant

.....: For the State/respondent