



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 190 of 2010

BETWEEN

MATAIGA MARWA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence of Hon. J.R. Ndururi, SRM, dated and delivered

on 27th September, 2010 in Kehancha SRM's Court Criminal Case No.1347 of 2009)

JUDGMENT

1. The appellant herein Mataiga Marwa was charged with robbery with violence contrary to **section 296 (2)** of the **Penal Code**. He also faced an additional charge of resisting lawful arrest contrary to **section 253 (b)** of the **Penal Code**. The particulars of the 1st count were that on the 27th December 2008 at Sanchwa sub location in Kuria East District within Nyanza Province jointly with another already before court while armed with dangerous weapons namely simi (sword) and rungus robbed DANIEL MARKO MARWA Kshs.10,000/= and at or immediately before or immediately after the time of such robbery wounded DANIEL MARKO on the left hand. The particulars of the 2nd count were that on the 16th September 2009 at Maeta area in Kuria East District within Nyanza Province resisted lawful arrest of APC Okonga and APC Njogu both officers who at the time of the said arrest were acting in due execution of their duties.
2. The appellant denied both counts against him and the case went to trial. The prosecution's case was that the complainant was attacked and robbed in day light on 27th December 2008 at around 12.00 O'clock as he walked home. The complainant (PW1) testified that when he was about 500m away from his home he met with 3 men armed with swords and studded rungus. He recognized the 3 men as the appellant Mataiga Marwa and his brothers Kondo Marwa and Robi Marwa.
3. He testified that when they reached where he was, the appellant started hitting him with a studded rungu on the left shoulder. His brother (Robi Marwa) hit him on the right shoulder. When the complainant fell down, the appellant and his brother hit him all over his body. The appellant then removed his sword and cut the complainant's left thumb. PW1 screamed, people came to the scene but not before the appellant had removed Kshs.10,000/= from the complainant's trouser pocket. The complainant was taken to Kuria District Hospital and subsequently transferred to Nairobi Hospital for

further treatment.

4. The Assistant Chief of Sanchawa sub location one Nyambare Mwita Wambura testified as PW2. His evidence was that on 6th August 2009 at 12.00 O'clock while on his way home he saw one of the suspects being Robi Marwa. He called APs from Maeta AP Camp and they arrested him. They later arrested appellant the following day.

5. PW3 was Samwel Geboka a National Youth Service driver based in Gilgil told the court that on 27th December 2008 at about 12 O'clock he met the appellant and his brothers Kondo Marwa and Robi Marwa each armed with a rungu and a simi. He then saw Robi hit PW1 on the left shoulder. He also saw the appellant removing his simi and cutting PW1's thumb on the left hand after which the appellant took the complainant's wallet as some women who were nearby raised alarm. He then went to the scene and helped PW1 by taking him to Kuria Hospital.

6. PW4 was NO.233946 APC Fredrick Okanga Namufeli stationed at Maeta AP Post. He corroborated PW2's testimony that on 16th September 2009 at 12.00 midnight, PW2 took them to appellant's home. They knocked on the appellant's door who on opening was armed with a bow and arrows. They managed to overpower him and take him to Kehancha police station.

7. PW5 was No.2007122641 APC FRANCIS NJOGU stationed at Maeta AP Post. He corroborated PW4's testimony that on 16th September 2009 at 5.00 a.m. they went to arrest the appellant and that when the appellant opened the door he had a bow and arrows. That they overpowered him and managed to disarm and arrest him.

8. PW6 Edwin Nyatera a clinical officer at Kuria District Hospital produced a P3 form and treatment notes in respect of the complainant. He testified that the complainant had a history of being assaulted with complete amputation of left thumb, that a sharp object had been used. PW6 classified the complainant's injuries as grievous harm.

9. Pw7 was NO.91253 PC Simon Pasha Wachira attached to Kehancha Police station Crime Office. He told the court that on 28th December 2008 the complainant went to the station and reported that he had been attacked. He then visited the scene and spoke to some women who witnessed the incident but who refused to record statements because they came from the same family with the appellant. He issued a P3 form to PW1. Daniel Robi Marwa (a brother to the appellant) was arrested and charged with a case of stealing but they reconciled with the complainant in that case. He was later released by mistake and disappeared to Tanzania.

10. The appellant was then put to his defence. He chose to give an unsworn statement with no witnesses in which he stated that he did not commit the offence and that on the alleged day he was at home since it was a holiday. The appellant's case was that the complainant had framed him.

11. After a careful evaluation of the evidence, the trial court found that the prosecution had proved its case against the appellant person on the first count beyond all reasonable doubts but not on the second count. The trial court found the appellant guilty as charged, convicted him and sentenced the accused to death.

12. The appellant was dissatisfied with the conviction and sentence hence the present appeal.

13. In his petition of appeal filed on 20th September 2010 the appellant Mataiga Marwa has appealed against both conviction and sentence on the grounds inter alia that the trial magistrate did not consider that he was not the real culprit but was victimized because he was with his blood brother who committed the crime but is still at large. He prayed for this court to intervene, quash the conviction and set aside sentence imposed on him as the said sentence was overly harsh.

14. When the appeal came before us for hearing on 18th July, 2012, the appellant handed in his written

submissions. In summary the appellant's submissions revolve around the issue of recognition. He submitted that the complainant never mentioned that PW3 was at the scene of crime therefore evidence from a single witness needs to be treated with care. He also took issue with the fact that PW1's thumb which was alleged to be cut off was not produced as exhibit.

15. Finally he submitted that there was a contradiction between the statements by PW1 and PW3. He prayed for this court to allow the appeal and quash the sentence imposed by the lower court.

16. The appeal was opposed by the state. Mr. Mutuku learned counsel for the state submitted that the prosecution's evidence was watertight and on the question raised by the appellant about PW1 and PW3 not seeing each other, he submitted that PW1 was rescued by PW3 who was in the vicinity. Counsel also submitted that the women who witnessed PW1's attack did not testify as they were related to the appellant. He prayed that the appeal be dismissed.

17. As a first appellate court, we are under a duty to subject the evidence tendered before the trial court to fresh and exhaustive evaluation so as to reach an independent verdict. See generally **Pandya –vs- R [1957] EA 336** and **Okeno –vs- Republic [1972] EA 321**.

18. From the evidence on record the conviction of the appellant was primarily based on evidence of recognition by the complainant (PW1).

PW1 told the trial court thus:-

“I met with 3 men armed with swords and studded rungu. I knew all of them. One was Mataiga Marwa (appellant), Kondo Marwa and Robi Marwa. They are all brothers. We met on the way. When they reached where I was, they stood aside about 5 metres away. They then came back. Mataiga (appellant) was in front. Mataiga (appellant) started hitting me with the studded rungu. He first hit me on the left shoulder,. Mataiga (appellant) removed his sword and cut off my left thumb (shows the court his left hand with an amputated thumb). I screamed. There were some women at the scene and they raised an alarm. People came to the scene. I had Kshs.10,000/= in my pocket at that time. Mataiga (appellant) removed the same from my right trouser's pocket.”

PW3 also corroborated PW1's testimony when he stated:-

“Kondo hit Daniel (PW1) with the club on the chest. Robi hit Daniel on the left shoulder. Mataiga (appellant) removed his simi and cut Daniel on the left hand and the left thumb was cut off. Daniel (PW1) fell down. The three of them started ransacking Daniel's pockets. I saw Mataiga (appellant) take Daniel's (PW1's) wallet. Some women appeared and raised an alarm. Appellant, Kondo and Robi then left.”

19. PW7 also stated that: - **“I visited the scene which was at Sanchawa. I spoke to some women who witnessed the incident but refused to record statements because they came from the same family with accused.”**

20. In Anjononi –vs- Republic [1980] KLR 59 the court stated:-

“Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other”

21. In the instant case, the complainant and the appellant hail from the same area as stated by both the complainant and also by PW2 and PW3. The offence took place at about noon in broad daylight. We are therefore satisfied that the trial court was right in holding that the appellant was properly identified and we find that there could not have been any mistaken identity.

22. The appellant also contended that PW1's alleged thumb which was cut off was not produced as an

exhibit to prove that indeed he (appellant) cut of PW1's left thumb. This contention however does not hold water since during his testimony, PW1 showed to the court his left hand with an amputated thumb. PW6 also corroborated PW1's evidence by observing that PW1 had an amputated left thumb.

23. In conclusion there is no doubt in our minds that the ingredients of capital robbery were proved beyond any reasonable doubt against the appellant. The complainant was assaulted by the appellant and he suffered harm and lost money. The appellant was armed with dangerous weapons and was in the company of two others who were also armed with dangerous weapons.

24. For all the reasons afore stated we find that the conviction was safe and uphold the findings of the trial court on both conviction and sentence. The appeal is therefore dismissed for lack of merit. R/A within 14 days from today.

Dated and delivered at Kisii this 31st day of January, 2013

RUTH NEKOYE SITATI

R. LAGAT-KORIR

JUDGE.

JUDGE.

In the presence of:

Present in person - Appellant

Mr. Shabola (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

R. LAGAT-KORIR

JUDGE.

JUDGE.