



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 29, 30 & 31 OF 2011

1. NZIJE ZIRU NZIJE

2. BODWE ZIRU NZIJE

3 .KUTOKA BODWE MWAONOAPPELLANTS

VERSUS

REPUBLICRESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 1060 of 2009 of the Senior Resident Magistrate's Court at Kwale – Hon. E.K. Usui -SRM)

JUDGMENT

The three Appellants were Convicted and Sentenced to suffer death in respect of Counts No. 1 and 2 for the offence of robbery with violence contrary to section 296 (2) of the Penal Code. They were acquitted on the 3rd Count.

On the first Count the particulars are that on the 20th day of July 2009 at Dzindereni Village Gandini Location in Kinango County of Kwale while armed with dangerous weapons namely pangas jointly with others not before the Court, robbed **MASIKA NGOME MWACHUPA** a mobile phone make Nokia valued at Ksh. 2,799/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **MASIKA NGOME MWACHUPA**.

The particulars on the second count are that on the same day of 20th July, 2009 at Dzindereni Village while armed with dangerous weapons namely pangas jointly, with others not before the Court robbed **MWANAISHA KAMBI MWACHALA** cash Ksh. 5,000/= one hand bag, 4 lessos, 4 Bikers and 2 underpants all valued at Ksh. 9,000/= and at or immediately before or after the time of such robbery used actual violence to the said **MWANAISHA KAMBI MWACHALA**.

The brief facts of this case are that on the night of 20th day of July, 2009 a group of men numbering close to six attacked a trading centre known as Dzendereni while armed with pangas, bows and arrows and inflicted injuries on the complainants PW 1, PW 2, PW3 and PW 5. PW 1 and PW 2 are sisters who were staying in adjoining houses.

PW 3 operated a kiosk in the same neighbourhood. PW 4 is the father of PW1 and PW 2 whereas PW 5 was a watchman at the nearby Zendereni Primary School.

After the attack they made away with valuables as enumerated in the charge sheet.

Only two witnesses identified the Appellants in this case. They are **PW 1 MASIKA NGOME MWACHUPA** and her sister **MWANAISHA KAMBI (PW 2)**.

It is not in dispute that the Complainants were attacked on the material night and their goods stolen. In the course of the attack they sustained injuries and P3 forms were produced to that effect. The main issue in this case is that of identification.

In her Judgment the trial magistrate at page 39 line 20 observes,

“ The evidence of PW 1 and PW 2 however, implicates the Accused persons. PW 1 Masika Ngome who is also the Complainant in Count No. 1 told the Court that she identified the Accused persons as they had torches. She told the Court that they were neighbours in the village, were her stepmothers brothers, gave them casual jobs and were always present when shop deliveries were made in her shop. Her alleged evidence is more of recognition. I however, hold the evidence contradicting that of PW 2 Mwanaisha Kambi. This witness told the Court that when the attackers went to her sisters (PW 1) house, they left Accused No. 2 guarding her. PW 1 says that she recognized the same Accused in her house.

This contradiction raises doubts in my mind as to whether she was able to identify her attackers immediately through the flashlights. I therefore find that the circumstances in her house did not favour proper and accurate identification that can be said to be free of error”.

Having found that PW 1 did not properly identify her attackers at the time she proceeds to explain, why she had arrived at the conclusion that PW 2 Mwanaisha Kambi had properly identified the appellants. This is what she observes at page 40 line 10,

“Mwanaisha Kambi gave a sequence

of how the attackers followed each other to her house. She said that it was the first Accused who entered, 3rd and then the second. She gave a sequence of events as they unfolded in her house.

That the 1st Accused lit a lamp that was in the house and picked tomatoes to eat while they spoke to her. She told the Court that Accused No. 2 went very close to her and she recognized him as she knew him as a neighbour and a frequent visitor to her shop and a person they had attended school together. She also told the Court that the Accused took their time in her house before they left Accused 2 guarding her”.

We note that the learned trial magistrate proceeded to Convict the three Appellants in Count No. I. When she had already made a finding that the circumstances and conditions obtaining in the house of Masika Ngome Mwachupa (Complainant in Count No. 1) did not afford proper identification and therefore not free from error. Nobody else saw the attackers while in her house apart from the Complainant herself.

PW 2 Mwanaisha Kambi was in another house and therefore could not corroborate her sisters evidence as she was not able to observe what was happening in the other house.

We are of the view that having found that there was no proper identification of the attackers at first Complainants house, she had no other alternative but to find the appellants not guilty on the first count

and acquit them accordingly.

We do find that she correctly addressed her mind on identification on the third Count where she did find that no witness identified the appellants and acquitted them.

In respect to the second count we do note that the complainant who is a sister to PW 1 was present in Court when her sibling was testifying.

In respect to identification this is what the second complainant said at page 13 line 1,

“Then they suddenly started hitting the door which I had locked from inside. They hit the door as I called out Masika who was sleeping in a different house. On the 6th attempt the door broke and fell on me. When I held it, I saw accused No. 1 enter with a panga. He ordered me to give him my phone and money. I told him I did not have any. He told me he knew we had a Nokia 1110 and that he would kill me. Then Accused three entered and told me to lie down and he would slaughter me as a goat. I refused. He also had a panga. All had a panga, bows and arrows. Then I saw the first Accused take a match box and put on the lamp. He took tomatoes which he started to eat as they were laughing. He ordered me not to look at him for him not to hurt me”.

Before lighting the lamp, it has not been shown in evidence what light there was which enabled the second Complainant identify the appellants.

There is no evidence to the effect that the houses in question had electricity lights connection. There is no evidence that the appellants were using flashlights before the lamp was lit. So with what source of light was the Complainant using so as to see the appellants and be able to identify them? This question has not been answered in evidence adduced before the trial Court.

It transpires from the evidence adduced before the lower Court that the appellants are relatives of the two complainants (PW 1 and PW 2). At page 12 line 11 PW 1 told the Court,

“ I had no differences against you again you had earlier come to me and warned me you would come and finish my sister”.

This was in cross-examination by the first Accused/Appellant. That bit of evidence, we find, does indicate that the relationship between the Appellants and the two Complainants was rather frosty and the probability of existence of a grudge is very real.

We also do note that the complainants evidence is to the effect that the appellants completely exposed themselves to them, lit lamps in abandon, ate tomatoes leisurely before making away with shop goods and complainants personal items yet those were their relatives. At page 8 line 12 of the proceeding during cross-examination by the 2nd Accused the first complainant stated,

“The following morning, you even came with the lorry and started talking and saying that the shop had been robbed the previous night”.

We find it rather odd for somebody who clearly understood that he had committed a serious crime the previous night and who was aware that he had been clearly seen by the complainant would visit the scene of crime the following morning and even talk of what had happened the previous night. This should have created doubts on the mind of the court.

Lastly there is no good explanation given as to why it took a week to arrest the Appellants if they had been clearly seen with others robbing the victims.

The incident was reported the same day. The appellants were known by the complainants they were relatives, their homes were known.

The upshot is that there was no proper identification and the Conviction was not safe on both Counts.

The Conviction is hereby quashed and the Sentence is set aside. We order that the Appellants be set at liberty unless otherwise lawfully held.

Judgment dated and delivered this 17th day of September, 2013.

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M. ODERO

JUDGE

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M. MUYA

JUDGE

In the presence of:-

Learned State Counsel

Court clerk

Appellants