



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 106 OF 2012

MUTHENYA DAUDI APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of the Principal Magistrate J. Karanja PM delivered on 19/7/2012 in Makueni Principal Magistrate Criminal Case No. 641 of 2011)

(Before Beatrice Thurairaja Jaden and J.M Ngugi JJ)

J U D G M E N T

1. The Appellant, **Muthenya Daudi** was charged with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**.

The particulars of the offence were that on the 12th day of November 2011 at **Kavumbu village** in **Kathonzweni District** within **Eastern Province** jointly with another not before court and while armed with a dangerous weapon namely a stone, the Appellant robbed **Joseph Nyungu Muthiani** of cash Kshs.2,000/= and at the time of such robbery used personal violence on the said **Joseph Nyungu Muthiani**.

2. The prosecution case was that on the material day at about 9.00 p.m., the complainant, PW1 **Joseph Nyunyu Muthiani** and his neighbour PW2 **Evans Kioko Mangenge** were walking home from **Kavumbu market**. After walking for about one kilometre they were accosted by a group of five men who surrounded them. The complainant was hit with a stone and grabbed by the neck and robbed of Kshs.2,000/=. The robbers then ran away. A report was made to the police and the complainant issued with a P3 form. The complainant was treated at **Makueni District Hospital**. The Appellant who was named by the complainant as one of his attackers was arrested and charged together with another with the offence herein. The Appellant was convicted and sentenced to death but his co-accused was acquitted.
3. In his defence, the Appellant, **Muthenya Daudi** gave unsworn evidence. No witnesses were called. The Appellant stated that he was going on with his work of selling meat at a butchery when he was arrested and escorted to the police station and locked up. He was then arraigned in court with the charge herein which he denied.
4. The trial magistrate in his judgment found the prosecution case proved beyond reasonable doubt. The trial magistrate relied on the evidence of recognition and the close encounter between the parties under moonlight.
5. The Appellant was dissatisfied with the conviction and sentence and raised the following grounds

of appeal:-

- v. **The charge was not proved beyond reasonable doubt.**
- v. **The Appellant's co-accused was acquitted due to the insufficiency of evidence.**
- v. **The evidence of identification was not free from error.**
- v. **The Appellant's defence was dismissed.**
- vi. **The sentence imposed was excessive.**

The firm of **O.N. Makau & Mulei Advocates** appeared for the Appellant and they made written submissions which essentially expounded the grounds of appeal.

6. **Mrs Gakobo** a Senior Principal Prosecution counsel in her written submissions opposed the appeal. It was submitted that the conviction was based on sound evidence as there was recognition at close proximity and under moonlight.
7. This being a first appeal, we are duty bound to re-evaluate the evidence and the record afresh and come to our own conclusions and inferences – **See Okeno –vs- Republic (1972) EA 32.**
8. The evidence of the complainant (PW1) and that of PW2 **Evans Kioko Mangenge** established that indeed the robbery occurred. The aforesaid two witnesses were walking home when they were attacked by a group of people and the complainant robbed. The complainant was hit with a stone and injured and was treated by a medical officer, PW4 **Samuel Lambi Ngwili**. The evidence of PW3 **P.C. Joshua Wambua** confirmed that a report of the robbery was made at **Kavumbu Police Post**.
9. The main question we are left to grapple with is whether the appellant was one of the robbers. The Complainant (PW1) in his evidence stated that the attack was by five people who emerged from the bushes and surrounded them. PW1 identified the Appellant as one of the attackers, stating that the Appellant stood close to him and that the Appellant hit him with a stone on the eyes. The Complainant further testified that there was moonlight and he recognized the Appellant as he knew him since they were neighbours. The Complainant's evidence was that only Kshs.2,000/= was taken from his pockets by the robbers.
10. PW2 gave evidence that generally corroborated that of the complainant (PW1). However, PW1 testified that the Complainant was robbed of Kshs.2,000/= and a phone. The complainant's evidence was that he was only robbed of the cash and he made no mention of any phone. PW2 also stated that he was about ten steps away from the Appellant when he saw him. PW2 also described the source of light as moonlight. It is doubtful if the evidence of recognition in the melee that ensued during the attack and under moonlight only can be relied upon without any possibility of error. We hold that the recognition was in difficult circumstances and the possibility of a mistake cannot be ruled out.
11. The evidence of **PC Joshua Wambua** (PW3) is that the Complainant was arrested by members of public and escorted to the police post. Nothing was recovered. Although the evidence of PW3 was that the Complainant mentioned the Appellant as one of his attackers, we are unable to say with certainty that the recognition was free of the possibility of mistaken identity.
12. The Appellant's defence was on the fact of arrest. A conviction is however based on the strength of the prosecution case and not the weakness of the defence case.
13. On the submission that the co-accused was acquitted, we state that the acquittal of a co-accused does not necessarily lead to the acquittal of the other accused.
14. Having arrived at the conclusion that there was a possibility of error in the identification of the Appellant, we find that the appeal has merit. We quash the conviction and set aside the sentence. The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

JUDGE

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J.M. NGUGI

JUDGE

Dated and delivered at Machakos this 15th day of October 2013.

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B. THURANIRA JADEN

JUDGE