



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO 102 OF 2012**

**Appeal from original conviction and sentence in Principal Magistrate's Court at Kyuso (Mr. B. M. Mararo, PM) in Criminal Case No 4 of 2012.**

PETER MUTHENGI KITEMANGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**JUDGEMENT**

**Background**

Peter Muthengi Kitemange, the Appellant, was arraigned before the Principal Magistrate at Kyuso on charges of robbery with violence contrary to Section 296 (2) of the Penal Code. It is alleged that on 23<sup>rd</sup> August 2011 at Wengemi Village Mutanda Location Mumoni District in Kitui County, jointly with another not before the court, being armed with offensive weapon namely an iron bar robbed Josephine Kasyoka Kilonzo of cash Kshs 5,000, one mobile phone make Nokia 1280, National Identity Card and one bag all valued at Kshs 7,000 and immediately before or immediately after the time of such robbery uses actual violence on the said Josephine Kasyoka Kilonzo.

**The facts of the case**

Josephine Kasyoka, PW1, was inside her kitchen alone at 9.00pm on 23<sup>rd</sup> August 2011 when someone smashed the door open and entered. He demanded money from her. The person was armed with a metal rod commonly used in construction. When she told him she did not have the money he pointed the metal rod at her. She gave him Kshs 4,000. The person took another Kshs 1,000, her Nokia mobile phone and Identity Card and then left.

Charo Digo, PW2, who was employed by PW1, testified that on 23<sup>rd</sup> August 2011 around 10.00pm someone asked him where his employer was. The person told him to sleep and locked him inside the house. He heard his employer's door being broken and he fled through the window. He was beaten and knocked down by one person when the other was attacking PW1. He names the person who attacked him as Musyoka. He testified that the person put soil in his eyes and ears and injured him on the left shoulder. PW2 said he managed to escape to the home of one Musyoki where he spent the night.

Fransis Saku Mwendwa, PW3, testified that PW1 presented a history of pains on the chest, left leg and left hand and multiple bruises on the left leg at the knee. He also testified that PW2 had pain in the left eye which was also red, nose and swelling on the right shoulder. He further stated that the injuries were

12 hours old and that the complainants had not been treated before they went to him for examination.

Sergeant Benjamin Muvevi, PW4, received the report of the attack from PW1 and recorded her statement and referred her to hospital. He visited the scene in search of the appellant but he was informed that the appellant had gone to Embu. At the scene PW4 confirmed that the door of PW1's house had been forced open. He also confirmed that the appellant was later arrested from Siakago by the chief of the area and was brought to Kyuso Police Station.

The appellant testified under oath and told the court that at the time of the alleged offence he was at Kanyariri sub-location in Siakago where he was constructing a house; that he had moved from his home at Mutanda because of a land dispute between his father and the complainant; that he was summoned by the chief of Kanyariri on 30<sup>th</sup> December 2011 and informed him that he was required at Kyuso; that he accompanied the chief to Kyuso where he was put in cells and charged with this offence.

The trial magistrate considered this evidence and was convinced that the prosecution had proved its case. He convicted the appellant and sentenced him to life imprisonment. It is against that conviction and sentence that the appellant is challenging before this court.

### **Grounds of Appeal**

The appellant had prepared a petition and grounds of appeal in person. Mr. Mbaluka who represented the appellant in this appeal prepared supplementary grounds of appeal. He informed the court that the appellant would rely on both sets of grounds of appeal. In his original grounds of appeal, the appellant is alleging that the complainant fabricated and tailored the evidence because of a grudge she had with the appellant; that the magistrate relied on contradictory and inconsistent evidence; that conditions were not favourable for positive identification and that the trial magistrate failed to consider his alibi defence.

The supplementary grounds of appeal can be summarized as follows:

- i. The learned trial magistrate erred in law and fact in finding the appellant guilty of the offence
- ii. The learned trial magistrate erred in law and fact in failing to take into consideration the appellant's defence
- iii. The sentence is harsh and excessive
- iv. The learned trial magistrate erred in law and fact in failing to make a finding that the prosecution evidence was contradictory
- v. The decision was against the weight of the evidence
- vi. The trial magistrate erred by considering the evidence of the clinical officer

Mr. Mbaluka identified four issues for consideration:

- i. Whether there was sufficient evidence to convict the appellant on the charge of robbery with violence.
- ii. Whether the prosecution case was credible, strong and unchallenged by the defence.
- iii. Whether the trial court sentenced the appellant without giving reasons.
- iv. Whether the case was procedurally conducted.

### **Submissions**

Counsel for the appellant submitted that robbery with violence is a serious offence and the standard of proof is beyond reasonable doubt; that the appellant's defence that he was not at the scene of the crime was not considered by the trial court; that the trial court failed to follow procedure in that the language of the court is not indicated and that the appellant told the court he would give unsworn defence but he was cross examined. Counsel urged this court to evaluate the evidence and determine whether the ingredients of robbery with violence have been established. He submitted that the prosecution case was weak and was challenged by the defence; that the trial magistrate did not give reasons on how he arrived at his findings. Counsel relied on the case of **Ogeto v Republic Criminal Appeal No 1 of 2004**. He asked the court to

allow the appeal, quash the conviction, set the sentence aside and acquit the appellant.

In opposing the appeal the learned State Counsel Mr. Mailanyi submitted that the appellant was positively identified by PW1; that PW1 knew him before and was aided by light from a lantern to see the appellant's face; that the appellant was recognized which is more reliable than identification and therefore there is no mistake.

Counsel submitted that the appellant chose to give a sworn defence and that he testified in Kiswahili and as such the prosecution had a right to cross examine; that there is no record that the appellant gave unsworn statement of defence and therefore the trial court did not deviate from procedure.

On the language of the court, counsel submitted that the language of the court is indicated on the day the plea was taken as Kamba/Kiswahili and English and therefore the appellant understood the proceedings and participated in them; that it is an afterthought for the appellant to claim that he did not follow proceedings because of the language used. He submitted that there are no contradictions in evidence. He asked the court to dismiss the appeal and uphold the conviction and sentence.

### **Determination**

We are under a duty to examine and evaluate all the evidence adduced at the lower court afresh with a view to arriving at our own independent findings. PW1 was alone in her house. The time of attack is given as 9.00pm although PW2 gives the time as 10.00pm. The difference is one hour. We take note that it is possible to confuse time and unless someone has a watch it is possible to give a different estimate and a difference of one hour is not too big under the circumstances. Of importance to us is that it was at night and it must have been dark. PW1 said the lantern was on and using its light she was able to see the appellant's face. She testified that she knew the appellant before as a neighbour. This is confirmed by the appellant himself who admitted that PW1 was his neighbour although he claimed to have relocated from Mutanda to Kanyariri in Siakago. The appellant vigorously cross examined PW1 on allegations of a land dispute between her and the appellant's family but she was not shaken. She stood by her evidence that she saw the appellant inside her house on the night of 23<sup>rd</sup> August 2011. We have noted that she testified in chief that she was attacked by Muthengi Kitemange. She stated as follows:

**“I saw the aggressor. There was light from a lantern. I saw his face. It was Kitemange's son. I knew him previously since childhood. He is Muthengi Kitemange. There was another person I did not see.”**

On cross examination she insisted that she had seen the appellant in her house. We note that in her evidence in chief she did not mention the injuries she had sustained but she stated on re-examination that she was injured on the left thigh where the appellant pressed her with the metal rod.

PW2 did not know the appellant. He testified that he was attacked by another person he named as Musyoka who injured his left eye and left shoulder. The injuries sustained by both PW1 and PW2 are confirmed by PW3 although he stated that the injuries on PW1 were on the left leg without specifying that it was on the left thigh.

We have compared this evidence with the defence of alibi. We note as a fact that the appellant was arrested at Kanyariri in Siakago Embu. He claims to have had relocated to Kanyariri in 2008. We have taken into account that PW1 knew the appellant before and that on the night of the attack there was light from the lantern that aided her to see the face of the appellant and recognize him. We find we have no doubt that PW1 saw the appellant in her house and recognized him on the night of the attack. It therefore cannot be true that the appellant was away at Kanyariri on that date. He must have crossed to Kanyariri after the robbery. We have cautioned ourselves on relying on the evidence of a single witness on identification but have taken into account that the appellant was a person known to PW1 as a neighbour prior to the robbery. We are guided on this issue by the case of **Abdalla Bin Wendo & Another [1953] 20 EACA 166** where the Court stated as follows:

**“Subject to certain well-known exceptions it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”**

That other evidence in our view is the evidence that the appellant was known to PW1 prior to this offence. He has been her neighbour some time and she knew him even as “Kitemange’s son.”

On relying on the defence of alibi the appellant does not assume the burden of proof. It is trite law that where an accused person raises the defence of alibi, the burden of proof does not shift to him. It still remains with the prosecution to prove that the accused was at the scene of the crime and did commit the crime. The prosecution must adduce credible and admissible evidence to displace the defence of alibi raised by an accused. This principle has been discussed in various cases including **Criminal Appeal No. 116 of 1999 R v. David Ruo Nyambura & 3 Others; R. v. Johnson 46 CR. App. R. 365** and **Ssentale v. Uganda [1968] E.A 365**. We hold the view that the appellant was at the scene of the crime and that his defence of alibi has been displaced by that of PW1.

The ingredients of robbery with violence are specified under Section 296 (2) Penal Code. The robbers must be more than one; they must be armed with dangerous or offensive weapon or instrument and there must be use of actual violence on the victim. Courts have held that proof of any of the ingredients is enough to base a conviction on (**see Johanna Ndung’u v. Republic Criminal Appeal No 116 of 1998**).

We have considered the claim that the proceedings were conducted in a language that the appellant did not understand. We note that on 4<sup>th</sup> January 2012 when the plea was taken the language of the court is indicated as Kamba, Kiswahili and English. We have no reason to doubt that this was used throughout the trial. The record shows that the appellant cross examined each witness in a manner suggesting that he understood and followed their evidence. We find this ground has not merit.

We have also considered the allegation that the appellant indicated that he would give unsworn defence and did give unsworn defence but was cross examined which was un procedural. This is not true. The record is clear that the appellant indicated he would give a sworn defence and after he did so he was cross examined. The record shows that the trial court considered the appellant’s defence.

The evidence of the Clinical Officer is being challenged. We find the P3 form is properly completed and signed and therefore there is nothing wrong with it (**see Francis Nyanchama Nyaribo v Republic [2013] eKLR (Criminal Appeal No 565 of 2010)**).

On the harshness and severity of the sentence, we state that the penalty for robbery with violence under Section 296 (2) Penal Code is death. The section does not give the courts discretion. We fault the trial magistrate on imposing a life sentence which is not what is provided for. It is misdirection on his part to state that life imprisonment is provided by law. Section 296 (2) Penal Code does not provide life imprisonment and there is no other sentence under our law for robbery with violence. The Court of **Appeal in Criminal Appeal No 5 of 2008 Joseph Njuguna Mwaura & two Others v Republic** made it clear that death sentence shall remain in our statutes in specific offences until Parliament amends the law. We also fault the trial magistrate for not analyzing the issues in this case. He summarized the evidence without evaluating the same.

In conclusion of this matter, we find that the appeal has no merit. We proceed to dismiss the same and uphold the conviction. We however find that the appeal succeeds only as far as the sentence is concerned to the extent that we hereby set the sentence of life sentence aside and substitute it with death sentence. The appellant shall suffer death as provided by law. We make orders accordingly.

Dated and signed this 22<sup>nd</sup> November 2013.

**S. N. MUTUKU**

**W. KORIR**

**JUDGE**

**JUDGE**

Dated and delivered this 9<sup>th</sup> day of December 2013.

**S.N. MUTUKU**

**JUDGE**