



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO.131 OF 2011

EVANS MUSASIA EZEKIEL 1ST APPELLANT

GEOFFREY JEREMIAH MWANJE2ND APPELLANT

V E R S U S

REPUBLIC RESPONDENT

J U D G M E N T

The two appellants were charged with the offence of robbery contrary to **section 296(1)** of the **Penal Code**. The particulars of the offence are that the appellant, on the 4.5.2006 at Lubao market in Kakamega District within Western Province, jointly with others not before court robbed **NOAH MUSAMALI** of KShs.20,000/= and at the time of such robbery used actual violence to the said **NOAH MUSAMALI**.

Both appellant were convicted and sentenced to serve four years imprisonment. The grounds of appeal for the first appellant, Evans Musasia Ezekiel are that:-

1. Whereas PW2 gave the date of the offence as 4.5.2006, PW1 indicated it was 5.5.2006.
2. The appellant's defence was not put into consideration.
3. The investigating officer did not testify.

The second appellant, Geoffrey Jeremiah Mwanje listed 14 grounds of

Appeal. A summary of those grounds are that:-

1. He did not plead guilty to the charge.
2. The conviction is based on the evidence of one single eye witness.
3. No exhibits were found with him.
4. The alleged crime was committed at a market where there were many people but they were not called to testify.
5. The case was never investigated.
6. His alibi defence was rejected
7. One of the suspects was discharged in unclear circumstances.
8. The prosecution evidence is unreliable and uncorroborated.

During the hearing of the appeal, both appellants relied on their respective grounds of appeal and had nothing to add. On his part, Mr. Oroni, State Counsel, relied on the record of the trial court and opposed the appeals.

The trial court record shows that only two witnesses testified. **PW1, NOAH MUSAMALI**, was the complainant. His evidence is that on the 4th of May 2006 at about 1.00 p.m., he was at Lubao market with his father (PW2) where they had gone to sell a cow. His father was called for a meeting at West Kenya Sugar Company and he left the cow with PW1 together with one **KAKA MUSISI** and **MUSA KARANJA**. The two people sold the cow for KShs.20,000/= and gave the money to PW1. As PW1 headed to the bus stage, one Kaitano Ambani who was the 3rd accused asked him to go for gambling but PW1 refused. While on his way he was attacked by a group of 10 people who stole the money.

PW1 reported the matter at the Lubao AP Camp. He was given two policemen and went back to the market but the attackers had run away. Later at about 4.00 p.m. he saw the appellants at Lubao and P1 notified the police. The two appellants were arrested and charged with the offence.

PW2, CHRISTOPHER MUSAMALI is PW1's father. On the material day he left his cow with his son at Lubao market and went for a meeting at West Kenya Sugar Company for a meeting of board of directors. He was later called and informed that his son had been robbed of the sale proceeds of the cow.

The accused were placed on their defence. The first appellant, in his unsworn testimony informed the court that he is a shoe maker. On 4.5.2006 he was at Lubao where he had gone to buy a jembe and he was arrested. He was later charged with the offence. The second appellant also gave unsworn evidence. His testimony is that he is a bicycle repairer. On the material day he went to Lubao market to buy a jembe and he was arrested together with the 1st appellant. He was searched and nothing was found. He was later charged with the offence.

The main issues for consideration are whether PW1 was robbed of KShs.20,000/= and whether it was the appellants who robbed him. The evidence of PW1 and PW2 is that they went to sell a cow at Lubao market on 4.5.2010. Although the typed proceeding indicates that PW1 mentioned 5.5.2010, the handwritten record shows that it was 4.5.2010. PW1 was given the money and he was robbed while heading to the bus stage. He reported the matter to the police. From the evidence on record, it is established that PW1 was indeed robbed of KShs.20,000/= on the 4.5.2010 at Lubao area.

The next issue is whether it was the appellants who robbed him. According to PW1, the incident occurred during the day. He was able to identify some of the robbers including the two appellant. On the same day at about 4.00 p.m. he was at Lubao area and saw the appellants whom he recognized and notified the police. The appellants were arrested. In their defence, the appellants testified that they had gone to Lubao to purchase Jembes when they were arrested.

From the prosecution evidence it is clear that the incident occurred during the day between 1.00 p.m. and 4.00 p.m. The appellants contend that the case was not investigated. It is true that the investigating officer did not testify. Further, the manner in which the prosecution withdrew the case against the 3rd accused person leaves a lot to be desired in relation to the behavior of both the investigation and prosecution of the case. The 3rd accused was mentioned by PW1 as the one who had confronted him earlier and asked him to go for gambling. PW1 also identified him as one of the robbers. How his case was withdrawn is a mystery.

The fact that the appellants were arrested and charged with the offence sows that investigation was carried out. The two witnesses who testified must have given their statements to the police. I do find that the police were reluctant to prosecute this case as it was closed before the investigating officer was called. The prosecution had informed the court that he had two other witnesses apart from the investigating officer but they were not called to testify.

The most important consideration is whether the evidence on record proved the prosecution case. Given the evidence of PW1, I am satisfied that the accused persons participated in the robbery. The incident occurred during the day and PW1 was able to identify the appellants. The item stolen was money that could be disposed off immediately and the fact that nothing was recovered does not disprove the robbery.

The charge sheet gives particulars of the offence that are in line with robbery with violence contrary to section 296(2) of the Penal Code. The appellants were charged under section 296(1). The particulars of the charge indicate that the appellants used actual violence on the complainant. This goes on to strengthen the fact that there was reluctance on the part of the police to prosecute this case. It took almost four years to complete the prosecution. The same prosecutor, chief inspector Mwangi prosecuted the case all along and he casually closed the prosecution case on 23.6.2010 indicating that the investigating officer had not turned up that day.

I do find that although the investigating officer did not testify and although one of the accused persons had his case withdrawn under section 87(a) of the Criminal Procedure Code, that does not absolve the appellants from guilt. The complainant did not control the prosecution and members of public expect justice from the courts. The trial court properly convicted the appellants. I do find that the case was proved beyond reasonable doubt.

In the end, I find that the appeals lack merit and the same are disallowed.

Delivered, dated and signed at Kakamega this 14th day of November 2013

SAID J. CHITEMBWE

J U D G E