



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 630 OF 2010

(From original conviction and sentence in Nairobi Chief Magistrate's Court Criminal Case No. 2171 of 2009, K A Bidali, PM on 2nd November, 2010)

BONIFACE MUISYA KATEIAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

The appellant, **Boniface Muisya Katei**, was charged in the Chief Magistrate's Court at Nairobi in Criminal Case No. 2171 of 2009 with two counts. The first count was that of Robbery with Violence contrary to section 296(2) of the *Penal Code* and the facts of the count were that the appellant on the 28th day of November 2009 at about 06.30 a.m. at **[particulars withheld]** along Uhuru Highway in Central Division within Nairobi Area being armed with a dangerous weapon namely knife with another not before court, robbed one H W N of her mobile phone make Motorola valued Kshs.3,000/= and at or immediately before or immediately after the time of such robbery used personal violence to the said H W N.

The second count was Attempted Rape contrary to section 4 of The *Sexual Offences Act* No. 3 of 2006 and the particulars were that the appellant on the 28th day of November, 2009 at 06.30 a.m. at **[particulars withheld]** along Uhuru Highway in Central Division within Nairobi Area, intentionally and unlawfully attempted to cause his penis to penetrate and the vagina of H W N without her consent.

The appellant was convicted in count one and sentenced to death while in count 2 he was acquitted under section 210 of the *Criminal Procedure Code*.

Being dissatisfied with the conviction and sentence, the appellant has appealed against the same on the following grounds:

1. **THAT, the pundit trial magistrate erred in law and fact when he convicted and sentenced me in the instant case failing to find that the conduct of the trial was unfair.**
2. **THAT, the learned trial magistrate erred in law and fact when he convicted me in the instant case yet failed to find that crucial witnesses were not called to testify.**
3. **THAT, the learned trial Magistrate erred in law and fact when he relied on contradictory testimonies to convict.**
4. **THAT, the learned trial Magistrate erred in law and fact when he accepted my mode of arrest and purported identification by a single witness to convict.**
5. **THAT, my plausible defence was not given adequate consideration before rejection.**

The brief facts as can be gleaned from the record are as follows: **H W N**, PW1, was on 28th November 2009 coming from CFF Church towards Town along Bunyala Road at 6.30am with a friend when as she approached the fly over along Uhuru Highway she saw two men approaching from the tunnel side. One of the men snatched her bag and entered the tunnel while the appellant came from behind and pushed her and they fell down towards the tunnel. The appellant then lied on top of her and she and her friend who was on the main road started screaming. When some pedestrians came to the scene the appellant started running away but the members of the public pursued them and both of both were caught. According to PW1 she never lost site of the appellant and as he was being beaten traffic police came to the scene and recovered her handbag and identity card. During the said struggle she got hurt on the right side of the face and she was also bitten on the ribs and she went for treatment, and was later issued with a P3 form.

PW2, **PC Dismas Ojiambo**, was on 28th November 2009 dispatched together with PW3, **PC Munyalo**, to Uhuru Highway Flyover where they found two people who had been arrested and were being beaten by members of the public one of whom was the appellant in the presence of the complainants. According to him they recovered a handbag containing identity card and they were informed by PW1 that the accused had tried to rape her and she was bleeding in the face and the bag was by the road side. According to him the complainant informed him that the appellant dropped the bag as he was being chased. PW3 confirmed that on the said day he was asked to visit a scene where a suspect was being assaulted by a mob where they found 2 suspects whom they rescued from the mob in the presence of the complainant and they brought the two suspects to the station. He confirmed that the complainant was hurt.

In his evidence on oath, the appellant testified that on 28th November 2009 he work up to go to work via Haile Selassie Roundabout and was walking towards Nyayo Stadium when he found a group of people who enquired from him whether he had met someone else on the road. His notebook and when he refused to be searched they roughed him up and robbed him. The police came and took him to Parliament Police where he was arrested and charged.

In his judgement the learned trial magistrate found that indeed the appellant had used violence on the complainant. Although the Court warned itself of the dangers of relying on the testimony of a single identifying witness, it found that the conditions prevalent at the time of the incident were conducive for positive identification as the incident occurred at 6.30am when the quality of the light was good and the complainant was in close proximity with the appellant and that the appellant was arrested a short distance away hence there was no chance of a mistaken identity. The learned trial magistrate hence found that the case against the appellant had been proved to the required standards hence the conviction.

The appellant case is that he was denied a fair trial since he was denied the right to be represented by counsel. The appellant's case is that although an application was made by his advocate for the supply of the proceedings, the Court instead construed the same as an application for witness statements and refused the application. It is true that on 13th May 2010, Mr. Mobisa who was holding brief for Mr Ombasa applied for proceedings. It is also true that the prosecutor objected to the same on the ground that statements were supplied a long time ago and the Court upheld the objection. There however was no application for adjournment made by the said advocate and the record does not show that there was any further participation in the proceedings by the said advocate. From the record, it is clear that without seeking an adjournment of the matter, no useful purpose would have been served by the grant of the order sought since mere application for typed proceedings does not necessarily translate into an application for adjournment. Accordingly, we are not satisfied that in the circumstances of the case, the court's decision occasioned a miscarriage of justice.

It was contended by the appellant that the failure to call the person who was in the company of PW1, the Investigating Officer and the people who arrested the appellant left only PW1 as the sole witness. To the appellant PW1's purported visual identification of total strangers under sudden attack makes it difficult to make a positive identification. However it was PW1's evidence that the appellant was arrested at the locus in quo. In her evidence, PW1 testified that she never lost site of the appellant and that the appellant was arrested at the scene of the incident. From her evidence the appellant was arrested when he was attempting to flee from the scene. With respect to the failure to call some witnesses, we can do no more than reiterate what the Court of Appeal stated in Benjamin Mbugua Gitau vs. Republic [2011] eKLR that:

“It would have been clinical to call the two boys who first made the arrests to give evidence, but the two courts below accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see *section 143 Evidence Act*. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys.”

The appellant was arrested at the place of the attack. His evidence that he was just passing by was disbelieved by the trial magistrate and we on our part have no reason to arrive at a different finding. In **Aloise Onyango Odhiambo vs. Republic [2006] eKLR**, the Court expressed itself as follows:

“There can be no dock identification where an accused person was arrested at the scene of crime by persons who subsequently testify in court and also identify him. In the instant case, there is overwhelming evidence that the Appellant, who sat at the rear seat of the ‘hijacked’ public service vehicle at the time, was apprehended inside the vehicle and prevented from escaping. The vehicle had been driven by his co-accomplice from Dagoretti corner to Chiromo quite a long distance. During the diversion, the Appellant and another accomplice harassed passengers injuring some and robbing others of personal properties including cash money and mobile phones. Also robbed was PW3, the Complainant in Count 3, of personal property including a metal piece referred to as a caliper. PW1, PW2 and PW3 identified the Appellant to PW5, the Traffic Police Officer who was at the scene of accident between the Public Service Vehicle in this case and the vehicle of PW4. Subsequently the three witnesses identified the Complainant in court as the person not only who had robbed them but also whom they had restrained inside the vehicle in order to prevent him from escaping. That identification cannot be referred to as dock identification by any stretch of definition. The Appellant was arrested at the scene of crime in the course of the robbery itself. He did not leave the scene at any one time so that there was no need for a subsequent identification in an identification parade. The evidence of identification was watertight and could not be faulted. We do not agree....that it was necessary to mount identification parades for the identification of the Appellant in this case.”

The appellant has further raised the issue of the failure to charge the person with whom he was. In **Masaku vs. Republic [2008] KLR 604**, the Court reiterated that:

“It is now well settled that any one of the following need be proved to establish the offence:

- 1. If the offender is armed with any dangerous or offensive weapon or instrument or**
- 2. If the offender is in the company of one or more offenders or**
- 3. If at or immediately before or immediately after the time of the robbery he wounds, strikes or uses any other violence to any person.**

In this case the evidence on record is that the appellant and another person were arrested at the scene. However no explanation was forthcoming with respect to what happened to the other person. As rightly submitted by the appellant only the Investigation Officer could have explained what happened to the said person. However the investigations officer was never called to offer such explanation. Accordingly, it is not possible to state that the prosecution proved beyond reasonable doubt that the appellant was in the company of another person. With respect to the failure to call the arresting officer, the Court of Appeal in **Francis Mwaura Mwangi vs. Republic [2010] eKLR** expressed itself *inter alia* as follows:

“In this appeal, the witnesses said they knew the appellant well and immediately gave his nickname “Blackie” to the police. Yet it took the police nearly four months to arrest him and no explanation at all was forthcoming as to why that was so. The officer who arrested him did not come to explain how he had connected him with the name “Blackie” and why it had taken him so long to arrest him. We are not to be understood to be saying that in each and every case, the arresting officer must come and testify. Each situation must be considered and determined on its own circumstances. The appellant said he was merely arrested in a police swoop and he did not know

why he had been arrested. He denied being involved in the robberies and the prosecution was under a duty to leave no loose ends which can lead to reasonable doubt being raised. Neither the trial Magistrate in his brief judgment, nor the two learned Judges on first appeal, dealt with any of these issues.”

In the circumstances of this case we are not satisfied that the first two ingredients of the offence of robbery with violence were proved to the required standards. With respect to the third ingredient of whether at or immediately before or immediately after the time of the robbery he wounds, strikes or uses any other violence to any person, the learned trial magistrate found in acquitting the appellant under section 210 of the *Criminal Procedure Code* in respect count 2 found that in the absence of either a p3 form or medical reports there was no proof that the complainant sustained the injuries complained of.

It is therefore our view and we so hold that the offence of robbery with violence was not proved beyond reasonable doubt. We find that the conviction of the appellant on the said offence was unsafe and we allow the appellant's appeal, set aside the same and quash the sentence and order that the appellant be set free forthwith unless otherwise lawfully held.

Judgement accordingly

Judgement read, signed and delivered in open court this 10th day of December 2013.

F N MUCHEMI

JUDGE

G V ODUNGA

JUDGE

In the presence of:

The appellant

Ms Mwaniki for the State