



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 45 OF 2013

AHMED KASSIM ABDIWELIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 362 of 2012 in the Principal Magistrate's Court at Mwingi - Linus Kassan (PM) on 19th March, 2013)

JUDGMENT

Ahmed Kassim Abdiweli who is the Appellant herein was charged, convicted and sentenced to life imprisonment for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence alleged that on the night of 24th February, 2012 and 25th February, 2012 in Wajir Township within Wajir County, the Appellant, jointly with others not before court robbed Edward Ngari Mucheru of two mobile phones, optical glasses, a leather wallet and cash Kshs.6,000/= all valued at Kshs.30,300/= and immediately before or immediately after such robbery used actual violence to the said Edward Ngari Mucheru. Yusuf Gabo, who was the 2nd accused person in that case was acquitted.

The Appellant being dissatisfied by both conviction and sentence now appeals to this court.

The Appellant filed an amended petition on 15th October, 2013 which has eleven grounds of appeal. In our view we can summarise the grounds of appeal as follows:-

- a. The charge was incurably defective;
- b. The evidence was contradictory;
- c. There was no proper identification of the Appellant;
- d. The arresting officer did not testify;
- e. No recovery was made from the Appellant at the time of his arrest; and
- f. The trial magistrate failed to consider the defence case.

Counsel for the state opposed the appeal.

This being a first appeal, our duty is to reconsider the evidence adduced before the trial court, evaluate the same and draw our own conclusions. In doing so, we must give due allowance to the fact that we neither saw nor heard the witnesses – see **OGETO v. REPUBLIC [2004] 2 KLR 14**.

Three witnesses testified before the trial court. The complainant testified as PW1 and told the court that on the material night he was going home from Ngamia club in Wajir Township when he was attacked by two men of Somali origin near the Post Office. Using moonlight he identified one of his attackers as the

Appellant.

He told the court that the Appellant was at the club and he had bought him sodas and cigars. During the attack he was robbed of his Nokia C-3 phone valued at kshs.9,000/=, an Ideos phone valued at Kshs.8,000/=, spectacles valued at Kshs.6,000/=, cash Kshs.7000/= and a wallet. He was left unconscious and was taken to his house by one Mr. Mugo. He later reported the matter to the police. Two days later he was informed that the Appellant had been arrested while trying to sell his phone to one Kareithi. He went to the police station where he identified his Ideos phone.

PW2 Patrick told the court that he was the investigating officer. After the robbery was reported to the police he alerted his informants to be on the lookout for the stolen property. On 28th February, 2012 at about 7.00 p.m. he received a call from an informant telling him that there was a person who was looking for an expert to unblock a phone. Together with fellow police officers they went and arrested one Simon Kariithi with an Ideos phone. He informed them that he had bought the phone from somebody for Kshs.4,000/= but the phone could not open. He further informed them that he had paid a deposit of Kshs.2,000/= and was yet to pay the balance of Kshs.2,000/=.

Simon Kariithi offered to call the seller so that he could be arrested. He then made a call and the seller agreed with him that they meet at Basabra shop. When they reached there Simon Kariithi pointed the Appellant to them and they arrested him. The Appellant then informed them that the Nokia phone was with Yussuf whom he had left at Ngamia club. Yussuf was also arrested. The two were then charged.

PW3 Mohamed Jimale, a medical officer produced a P3 form which confirmed that the complainant had sustained injuries.

We will start by considering whether the prosecution proved its case beyond reasonable doubt.

On identification, the complainant told the court that he knew the Appellant prior to the incident and had known him for two years. In fact the Appellant used to call him “daktari”. He told the court that on the night of the attack the Appellant was at Ngamia club. He however did not know the name of the Appellant but later learned that he was called Kassim. The complainant insisted that he identified the Appellant using moonlight. The complainant testified that he told the police that one of his attackers was tall and the other one was short.

Our overall review of the evidence of identification at the scene of crime reveals some shortcomings. The complainant was not sure of his evidence as can be seen in the following lines:-

“They attacked me under a minute. They spent less than a minute. Accused 1 must have taken 2 phones and accused 2 took wallet. That is my guess. There was moonlight. It was bright enough but not very sure.”

From the evidence adduced, it is clear that the intensity of the moonlight is not certain. The robbery happened in a flash and there was no time for identification. The complainant told the court that his attackers did not talk to him. That means there was no voice identification. We are therefore not convinced that the complainant identified his attackers at the scene. Our conclusion is strengthened by the fact that when the complainant reported the matter to the police he only told them that he was attacked by men of Somali origin; one being tall and the other being short. If indeed he knew the Appellant he would have gone ahead to state so.

The only other nexus between the crime and the Appellant is the evidence of PW2. He stated that one Simon Kariithi led him to the Appellant. Simon Kariithi did not testify and this leaves the evidence of PW2 in limbo. It is agreed that nothing was recovered from the Appellant. We must bear in mind the fact that Simon Kariithi had been found with stolen property and he could have done everything possible to ensure that he did not go to jail. The evidence of Simon Kariithi needed to be tested by way of cross-examination so that its veracity could be gauged by the trial court.

We find that the evidence adduced by the prosecution was very shaky. In the circumstances we need not consider the other grounds of appeal raised by the Appellant.

We allow the appeal and set aside both the conviction and sentence. The Appellant will therefore be set at liberty unless otherwise lawfully held. We make orders accordingly.

Signed and dated this 22nd November 2013

S. N. MUTUKU,

W. KORIR,

JUDGE

JUDGE

Dated and delivered this 9th December 2013

S. N. MUTUKU,

JUDGE