



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL 504 OF 2010

PAUL KINYANJUI MUNGAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of D Mulekyo PM in Criminal Case No. Cap 6 of 2007 delivered on 1st September 2010 in the Principal Magistrate's Court at Kikuyu)

JUDGMENT

The Appellant 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 10th day of April 2007 at Kamaguga village in Kiambu District of the Central Province, jointly with others not before the court and while armed with dangerous weapons, namely an AK 47 rifle and a pistol, robbed off Rose Wanjiru Mugwanja one motor vehicle Reg. No. KAK 272Z make Subaru Leone station wagon, two Motorola mobile phones and cash Kshs 8,400/= all valued at Kshs 428,400, and at or immediately before or immediately after the time of such robbery shot dead John Ndungu Mugwanja.

The Appellant was arraigned in the trial court on 2nd May 2007 and he pleaded not guilty to the charge against him. He was tried, convicted of the offence of robbery with violence and sentenced to death. The Appellant being aggrieved by the judgment of the trial magistrate appealed both his conviction and sentence. He relied on written submissions availed to the court. His main grounds of appeal were firstly that there was no evidence of his positive identification, and he submitted in this respect that the intensity of the light, the period of time that the witnesses had the assailants under observation, and their state of shock were not conducive for a positive identification. He also submitted that the identification parade that was carried out was not conducted according to law as there was no description given by PW1, and one of the witnesses identified him at the dock. His second ground of appeal was that the prosecution did not prove their case beyond reasonable doubt as he was not properly identified and that the prosecution failed to prove the ingredients of the offence he was charged with particularly as no description of the stolen goods was given, and there was no post-mortem report produced in court.

Mr Karuri for the State opposed the appeal and noted that the complainant was shot dead during the incident of robbery, and that PW1 who was the deceased's wife testified that it is the Appellant who held a gun to her head and received money from her. Further, that there was electricity on in the house during the robbery, and PW1 later identified the Appellant at an identification parade. Mr. Karuri also submitted that PW1's evidence was corroborated by that of PW2 and PW3, who were workers in her house. He argued that the lack of a post mortem report was not fatal as the complainant died immediately after he was shot.

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called seven witnesses. PW1 was Rose Wanjiru Muthoni who testified that she lives in Kamuguga and is a businesswoman, and that on 10/4/2007 at about 7.25pm she arrived home from work, and was in the kitchen when she heard some noises outside. Her husband, daughter and grandchild were in the house and when she went to check what was wrong she found them rushing to the bedroom, where her husband told them to stay and went out armed with a sword. PW1 stated that she then heard a loud bang and saw smoke, before assailants then came to the bedroom, hit her, put a gun on her back, and demanded for money.

PW1 testified that the electricity light was on and she was able to see the Appellant from the side since he was the one with the gun, and he is the one who was asking for, and received the money. She later identified him in an identification parade. She further testified that they were robbed of the money which in total was Kshs 8,600/=, a DVD, her two mobile phones, her daughter's mobile phone and that they took two mobile phones from her husband. The robbers also asked for the keys to a motor vehicle owned by her husband which she also used, whose registration number was KAK 272Z, which they drove away with. Further, that the motor vehicle was recovered the next day and she identified it in court where it was produced as an exhibit. PW1 also stated that they later found her husband on the bathroom floor bleeding, and that he died from the injuries he sustained during the robbery.

PW2 was Benson Maina who testified that he used to work for the deceased as a shamba boy, and he stated that he was in his house on 10th April 2007 at 7.30 pm when 2 people entered and asked him to open the main house. Further, that when one of the other employees called Nyambura brought him tea he managed to run out, and knocked on the back door of the main house three times to alert them of danger. He then jumped over the fence and went to a neighbour's house who raised the alarm. PW2 stated that one of the assailants who came to his house was the Appellant and that he had a gun, and that the electricity was on. PW2 described the Appellant as being short and brown, and later identified the Appellant at an identification parade .

PW3 was Anne Nyambura Maina, who at the material time was working as a housegirl for PW1 and the deceased, and she testified that on 10//4/2007 after PW1 came home from work and as she was working two people held her and took her to PW2's house, where they locked her in. She stated that she forced open the door and found PW1 outside the house bleeding, and the deceased lying bleeding in the bathroom. She testified that she was able to see one of the assailants who pointed a gun at her and hit her, as the electricity was on in the house, and she described him as short and brown and with a big head and protruding ears. She later identified the Appellant in an identification parade.

PW4 was Dr. George Kungu of Kinoo Medical Clinic who stated that he examined PW1 and PW2 three weeks after the robbery incident and also examined the case summaries from Kikuyu PCEA hospital where they were treated after the robbery. He classified their injuries as harm and produced their P3 forms as exhibits. PW5 was Jaqueline Wangui Wanja the daughter of PW1 who gave similar evidence to that of PW1 and identified the 1st accused person in the trial court as one of the assailants she had seen in the house on the night of 10/4/07.

PW6 was Reuben Langat who was attached to the CID Kikuyu and produced the identification form in which the Appellant was identified by four witnesses as an exhibit. He stated that the identification form was prepared by Stephen Wambua the deputy OCS of Kikuyu Police Station who was since deceased.

PW7, Corporal Reuben Tenai was the last witness. He testified that he was attached to CID Nyandarua and that on 10/4/07 he was on duty in Kikuyu with other officers when they received the report of a robbery in Kamuguga area. When they reached the scene of crime they found many people and PW1 hurt. PW1 told them that there were more than 4 robbers, and described the items that had been stolen. Further, that they were also informed that PW1's husband had been taken to PCEA Kikuyu hospital. When they went to the hospital they were informed he had been pronounced dead on arrival.

PW7 testified that after launching investigations several suspects were later arrested including the Appellant, and that he requested for an identification parade which was conducted by I. Wambua since

deceased. He stated that the motor vehicle which was stolen during the robbery was later recovered in Nairobi and he produced it as an exhibit. He also stated that none of the other stolen items were recovered.

After the close of the prosecution case, the trial magistrate found that a *prima facie* case had been established against the Appellant and he was placed on his defence. The Appellant gave sworn evidence and did not call any witnesses. He stated that he was working at Dagoretti at a café on 10/4/2007 and that he reported to work as usual and left at 6.30 pm, went home and did not leave his residence until the next morning. He testified that he was later arrested on 16/4/2007 on his way to work and taken to Kikuyu Police Station where he was kept in custody for 14 days. He also stated that he was identified by three people in an identification parade. He stated that he was then taken to Limuru Court and charged. The Appellant claimed he was framed by the witnesses.

We have considered the arguments made by the Appellant and the State. Our duty as the first appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, we are alive to the fact that we do not have the advantages enjoyed by the trial court of seeing and hearing the witnesses as was observed in **Soki v Republic (2004) 2 KLR 21** and **Kimeu v/s Republic (2003) 1 KLR 756**.

We accordingly find that the issues for determination in this appeal are whether from the evidence adduced in the trial court there was a positive identification of the Appellant; and whether there was sufficient evidence to convict the Appellant for the offence of robbery with violence.

On the issue raised of the positive identification of the Appellant, we have reminded ourselves of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, *inter alia*, that:

“In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light”.

We are also reminded of the procedure for identification parades as laid out in case of **R V. Mwangi s/o Manaa (1936) 3 EACA 3939** and **Ssentale v Uganda (1968) E.A.L.R 365**.

In the present appeal the robbery took place at night, and PW1, PW2 and PW3 stated that they were able to see the Appellant using the electricity light that was on in the main house and in PW2’S house. All the witnesses were consistent in their evidence that the Appellant was the one with a gun. PW2 and PW3 gave the same descriptions of the Appellant which was that he was short and brown. In addition PW3 stated that he had protruding ears which feature the trial court also noted in the record of the proceedings.

PW1 was also able to also recognize the Appellant using voice identification during the identification parade. The Court of Appeal in **In Mbelle v. R [1984] KLR 626** laid down guidelines as regards the evidence of voice identification as follows: -

“In dealing with evidence of identification by voice the court should ensure that –

(a) The voice was that of the Accused.

(b) The witness was familiar with the voice and recognized it.

(c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it.”

In this appeal, the PW2 was emphatic that she saw and heard the Appellant speak, as he was the one who was pointing the gun at her, asking for and received the money that was stolen during the robbery. PW1 also asked him to speak during the identification parade. We therefore find that there was a positive

identification of the Appellant, as the circumstances of his identification were not in any way difficult, as there was sufficient light, he was seen and heard speaking for a sufficient period of time and as he was identified by three witnesses.

On the issue of whether there was sufficient evidence to convict the Appellant for the offence of robbery with violence, we are alive to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction of robbery with violence under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**. We are in this respect also guided by the decision in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** which sets out what constitutes robbery with violence under section 296(2) of the Penal Code as follows:

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

We have already found that the Appellant was positively identified as having participated in the robbery attack by PW1 ,PW2, and PW3, who also testified that he was in the company of other persons during the robbery. PW1, PW2 and PW3 all saw him with a gun, and PW4 gave evidence of the injuries suffered by PW1 and PW2 during the robbery. The fact of the injuries suffered by and death of PW1'S husband as a result of the robbery was also given in evidence by PW1, PW3, PW5 and PW7. It is thus our finding that from the evidence adduced in the trial court the ingredients of the offence of robbery with violence were proved with respect to the Appellant, and there was sufficient evidence to convict him of the offence.

We accordingly uphold the conviction of the Appellant for the charge of robbery with violence contrary to section 296(2) of the Penal Code, and the sentence for this conviction is found to be legal.

It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF DECEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE