



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CR. APPEAL NO. 12 OF 2013

MATHIAS MWENDWA MULEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the conviction and sentence in Criminal Case No. 14/2012 in the Principal Magistrate's Court at Makueni (Hon. J. Karanja, PM))

Judgment

1. Mathias Mwendwa Mulei (“Appellant”) appeals from the judgment of the Learned Principal Magistrate J. Karanja dated 31st January, 2013 at which the Learned Magistrate convicted the Appellant of the offence of robbery with violence contrary to section 296 of the Penal Code. The Learned Magistrate also sentenced the Appellant to death. The Appellant appeals against both conviction and sentence.
2. The plot behind the story of this appeal is a family conflict. Esther Mulei (“Esther”) is an elderly widow. She testified that on 7th January, 2012, she was at her home in Mutwaa Village, Makueni County in the evening. A certain Benson Mbaka Kioko (“Kioko”) visited her at the home. Esther says that the purpose of Kioko’s visit was to pay her Kshs. 100,000 which was part of the purchase price for land she had sold to him.
3. According to Esther, Kioko and his verifying witness to the transaction left shortly after the transaction. One of her sons, Raymond Mulei (“Raymond”) saw them off. However, shortly after the three of them left, Esther testified that the Appellant burst into her house and violently pushed the door open, demanding for money. The Appellant is Esther’s son and had, apparently, witnessed the transaction. His mission, said Esther under oath, was to violently steal the money handed over to Esther, his mother.
4. At trial, Esther gave a moving testimony of how the Appellant violently grabbed her by the neck and demanded for the money. She sobbingly testified about being thrown against the wall; grabbed by the hair and dragged across her house while receiving constant threats about more dire consequences. At one point, Esther testified that the Appellant threw a metal bar at her with the aim of hitting her but she ducked and it hit the wall. Eventually, she gave in and handed over the cash, Kshs. 100,000, to the Appellant. This, apparently, did not fully appease the Appellant who then demanded for the title deed to his father’s farm. The ordeal ended when Esther slowly moved out of the house and went to her other son’s house which is, presumably, in the same compound.
5. Raymond is the Appellant’s younger brother. He corroborated his mother’s testimony. He spoke of how he heard screams coming from his mother’s house when he was seeing off Kioko and his colleague. He went back home only to find the Appellant in a full rage demanding for money from their mother. Raymond remembers the Appellant banging the table violently. When the Appellant saw Raymond, Raymond says he picked a piece of metal and started rushing towards

him forcing him to move outside the door. Raymond says he heard further commotion inside and then the Appellant came out holding money. Their mother eventually came out slowly and went to Raymond's house where she spent the night. They reported the matter to the Police the following morning.

6. The Appellant's sister testified too, but her testimony was more of hearsay – what she heard about the incident and what she did to report the matter to the Police. The Police witnesses only confirmed visiting the scene and arresting the Appellant.
7. Against this backdrop, the Police charged the Appellant with robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge read thus:

On the 7th day of January, 2012, at Matwaa Village, Mukuyuni Sub-location in Makeni District within Eastern Province, while armed with a dangerous weapon namely sharp iron bar, robbed Esther Mulei of her Kshs. 100,000 and at the time of such robbery threatened to use actual violence to Esther Mulei.

8. After a fully-fledged trial in which the evidence adumbrated above was told by five Prosecution witnesses, and the Appellant gave a sworn testimony, the Learned Trial Magistrate found the Appellant guilty. In doing so, the Learned Trial Magistrate believed the narrative of Esther and Raymond and disbelieved the Appellant's narrative. The Appellant had claimed that the purchase money was, in fact, paid to him and not to his mother. He testified that what was being sold was family land that previously belonged to his father. He conceded that Kioko had paid some money but that the payment was done to him and that he had, in fact, distributed some of the money including to his mother. He believed that his mother and siblings had conspired to frame him with the charges so that they could sell the whole farm – something he was opposed to.
9. The Learned Trial Magistrate was persuaded about the credibility and reliability of Esther and the other Prosecution witnesses. By the same token, he found the Appellant's narrative incredulous:

Why should the accused's elderly mother frame him over such a serious charge that could earn him the death penalty?

I took the testimony of the complainant, the [Appellant's] mother and saw her demeanour. I heard the pain in her voice and saw it on her face as she narrated how the accused had attacked her. She even cried on the witness stand and shed tears for such an elderly person, a mother testifying about her own son, that was surely and certainly no act and I find her evidence believable and true.

10. And so the judgment turned: the credibility of the Prosecution witnesses. On appeal, we must begin by extolling the deference with which we treat findings of fact especially on credibility related to demeanour of witnesses by the trial court. Yet, as a first appellate Court, we have a duty to re-evaluate the evidence afresh and determine for ourselves whether the evidence taken at the trial can be sustained. We draw our guiding orders in this regard from the case of ***Okeno v Republic [1973] E.A. 32*** where the predecessor to the Court of Appeal instructed:

An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] E.A. 386 and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions. It must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's Court's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses.

11. After combing through the evidence in this case, we are not persuaded that what happened on that fateful night at Mutwaa Village at the home of Esther was robbery with violence. It was certainly ugly; grotesque; unfortunate – but no conclusive evidence was adduced at trial to prove the

- elements of robbery with violence beyond reasonable doubt. A few tell-tale signs of inconsistencies and incredulities join to form a river of reasonable doubt; one that automatically entitles the Appellant to an acquittal.
12. First, as the Learned Trial Magistrate correctly points out, it was “of great significance” that Kioko was not called to testify. Only Kioko would have been able to confirm one way or the other whose narrative about the sale of the land was correct. Each of the sides claimed that Kioko paid the purchase price to them; and it is that purchase price that was the object of the robbery hence the need to establish the veracity of the position. This never happened.
 13. Second, it was also quite a significant omission that the transaction documents were not produced in court to substantiate Esther’s claim that she was the sole seller of the land. Indeed, it is an inconvenient truth to her story that the land was still registered in her late husband’s name which gave the Appellant a possible customary claim entitling him to sell as well. At the very least, this should have raised reasonable doubt to be dispelled only by factual evidence. Again, this never happened.
 14. Third, the reported behaviour of Raymond and Kioko seems odd to fit a theory of robbery. Raymond testified that he and Kioko and his companion heard Esther screaming shortly after they left the house where Kioko had paid Kshs. 100,000. Rather than rush back, apparently, after a rational conversation, Kioko and his companion went back to their respective homes and Raymond trooped back home. Raymond did not even describe any sense of urgency or panic. Again, his description of the alleged scene of the robbery is incredulously clinical: he saw the Appellant roughing up his own mother and all he could do was watch apparently cowed by a metal bar. He did not raise alarm; he did not call the neighbours. He simply called his brother “cruel” and patiently waited outside for the ordeal to end. This behaviour seems inconsistent with one from a person whose mother is being violently attacked.
 15. Lastly, as the Appellant points out, there is something curious about the charge sheet in its variance with the facts adduced at trial. The charge sheet alleges that the Appellant “threatened” to use violence on Esther; yet the evidence adduced talks of actual violence. This in itself might be overcome in an appropriate case but here, it adds to the mountain of reasonable doubts.
 16. Before we end, we also note that it was a violation of the rights of fair trial of the Appellant for the Court to fail to make available the six witnesses he had requested for his defence. In our view, the request for the six witnesses was reasonable. The Learned Trial Magistrate ought not to have put the Appellant in a situation where he was forced to close his defence case without calling the witnesses to the stand yet it was the State’s duty to ensure that the witnesses came to Court to testify since the Appellant was in custody. In our view, this in itself would have been a reason to set aside the judgment, conviction and sentence.
 17. Accordingly, we allow the appeal, quash the conviction, and set aside the sentence. We order the Appellant to be released from custody forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED this 3rd day of December 2013.

JOEL M. NGUGI, Judge

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B. T. JADEN, Judge

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