REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL 225 OF 2009

EPHANTUS MUTHEE WANJIKU…….…… APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(From the conviction and sentence by S.N. MBUNGI Principal Magistrate at Kerugoya in Criminal Case No. 460 of 2009 on 8th December 2009)

J U D G M E N T

The Appellant EPHANTUS MUTHEE WANJIKU was charged with one count of **robbery with violence** contrary to section 296(2) of the Penal Code. The particulars of the charge were:

"On the 23rd April 2009 at Kutus township in Kirinyaga district of the Central Province the accused jointly with another not before court while armed with offensive weapons to wit a knife and metal bar robbed James Kariuki Mburia 10,000/= and also immediately before or immediately after the time of such robbery used actual violence to the said James Kariuki Mburia."

The appellant was convicted of the charge and sentenced to death. He was aggrieved by the conviction and sentence and therefore filed this appeal. He relies on five grounds of appeal in his amended ground and written submissions. These are:-

1.That the learned trial Magistrate made an error in both law and facts and materially prejudiced the appellant by not according him a fair and impartial trial as enshrined by Section 77(1) of the repealed constitution as read with Article 50(2) (c)(j) and (k) of the Constitution, thus prosecution conducted an ambush trial. He prays this honourable court to order for a new trial.

2.That the learned trial Magistrate made an error in both law and facts by holding that the circumstances obtaining of the crime scene was favourable to a positive identification to eye witness PW2 whereas evidence adduced was too apparent that the Prosecution left a lot to be desired.

3.That the learned trial Magistrate made an error in both law and facts by failing to sufficiently scrutinize the evidence of the complainant (PW1) in the light of the evidence of the Examination Reports (P3 form) and find that his evidence was mere fabrications of an afterthought NB: was not arrested at 9.30 p.m. but at 11.53 p.m. on 23/4/2009.

4.That the proceedings in criminal case number 460 of 2009 were illegal, null and void as his fundamental constitutional rights as enshrined by Section 72(3)(b) of the repealed Constitution was

violated by being detained in police custody for eighteen (18) days with no explanation forthcoming from the prosecution as enshrined by Section 86 of the same repealed constitution. He contends the prosecution was manufacturing its evidence against him the appellant during this period.

5.That his arrest was not satisfactory and the entire case for the prosecution was not proved beyond reasonable doubt.

The appeal is opposed. The State was represented by Ms. Esther Macharia learned State Counsel. The learned state counsel submitted that the appellant was with another who was armed with a knife while appellant was armed with a metal bar. Ms. Macharia urged that the two attacked the complainant, the appellant hitting him with the metal bar while his accomplice cut off the complainant's pocket and ran away with his wallet with 10,000/=. The complainant held on to the appellant and PW2 and others helped overpower him. PW3 arrested him at the scene of robbery.

The learned State Counsel's submissions sums up the Prosecution case and we need not repeat the same again. The appellant's defence was that on 23rd May 2009 he went for supper at about 9 p.m. He said he worked as a tout. That on the way a group of people met with him and he heard them say he was the one. That he was beaten until police went and rescued him.

We are the first appellate Court. As a first appellate Court we have considered afresh the entire evidence adduced before the lower Court, and have done our own evaluation and analysis and have come to our own conclusions. We have borne in mind that we neither saw nor heard any of the witnesses and have given due consideration. The duty of the first Appellate court was elaborated in the case of **Okeno Vrs. Republic 1972 EA 32** where the Court of Appeal stated in that case as follows:-

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."

The appellant was convicted on the basis of the evidence of PW1 and 2. The learned trial Magistrate put it as follows in his judgment:-

"PW2 was an eye witness. He found the accused struggling with the complainant. He was attracted to the scene by screams. He was not knowing the accused there before such that he could frame him. PW1 and PW2 evidence shows that there was electricity at the scene. So the conditions were conducive toenablePW2 identify the accused".

Ms. Macharia in her submissions urged that the complainant held the appellant after he hit him, and that he struggled with him until PW2 helped to subdue him. Counsel argued that the evidence of PW2 was clear that there was sufficient electricity light from nearby homes at the scene.

We have considered that aspect of the Prosecution case. PW1 the complainant said that he met 2 men as he walked to meet his brother. However the two men attacked him. One identified as the appellant hit him with a metal rod. The other cut his pocket and left with his wallet and cash. The most important matter is the fact the complainant held onto the appellant together with his metal bar. Among those who were the first to answer to his calls for help was PW2. PW2 corroborated the complainant's evidence that the complainant was still holding onto the complainant when they assisted to subdue him.

We have subjected the evidence to a fresh consideration. We find that the appellant was apprehended by the complainant in the very act of robbing him. He had no opportunity to leave the scene or escape

from PW1's hold up until the point when PW2 and other members of pubic assisted him. The appellant was subjected to mob justice before the police rescued him.

It is our view that the appellant was arrested by the complainant in the very act of robbery. The appellant was arrested at the scene of robbery. He had no chance to escape from the scene. He hit the complainant on the head. The weapon he used was an exhibit. We do agree with the learned trial magistrate that there was no doubt in this case that the appellant and an accomplice attacked and robbed the complainant of his money and wallet.

In regard to the ingredients for the offence charged, other issues arise. The prosecution proved that the complainant was hit on the head with a metal bar. The metal bar was an exhibit. PW4, a clinical officer who examined the complainant confirmed the injuries.

The prosecution case was that the appellant was with another who is also the one who took away the wallet and cash from the complainant. The prosecution had to prove that the two were acting in concert. **Section 21** of the Penal Code defines what common purpose is in the following words.

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

The prosecution has shown that the appellant and his accomplice robbed the complainant together. We found that the prosecution established that the appellant acted in concert with his accomplice to rob the complainant of his property the act of his property. The act of one was as good as the act of the other.

The appellant was much as thief as his colleague as they were executing the same common purpose to steal from the complainant and to injure him in the process. The appellant said he was a victim of circumstances having walked around the area at the time of the robbery. We do not find any evidence to create any doubt in our minds that the appellant was not one of two people who robbed the complainant. We find he was one of the two robbers. His accomplice escaped. The appellant's defence that he was innocent is not tenable and we agree with the learned trial Magistrate's finding that he was guilty of this offence.

We do find the appellant's appeal without merit and dismiss it. Accordingly we uphold the conviction and confirm the sentence.

These are our orders.

DATED, SIGNED AND DELIVERED AT EMBU THIS 27TH DAY OF JULY 2012.

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J. LESIIT

JUDGE

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H.I. ONG'UDI

JUDGE

In the presence of:-

……for State

……Appellant

……..Court Clerk