



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

Criminal Appeal 84 of 2009

MORRIS GITONGA IRERIAPPELLANT

VERSUS

REPUBLICPROSECUTOR

(From original conviction and sentence in Cr. case No. 68 of 2008 at the Senior Principal Magistrate’s Court at Runyenjes)

J U D G M E N T

The appellant was charged with one count of Attempted Robbery with Violence contrary to section 297 (2) of the penal code. The particulars of the charge were:

MORRIS GITONGA IRERI: *On the 14th day of February 2008 at Kiangungi village, Kiangungi sub-location, Kyeni North location in Embu District within Eastern Province, while armed with dangerous weapons namely a pen knife and a rungu, attempted to rob MARY MUTUA of cash money Ksh.5000/= and at or immediately before or immediately after the time of such attempted robbery wounded the said MARY MUTUA.*

The appellant was convicted of this offence and sentenced to death. Being aggrieved by the conviction and sentence he filed this appeal.

The appellant relied on the five grounds of appeal in his amended grounds. These are;

- 1.That the learned trial magistrate erred in law and facts by accepting and putting more reliance on identification evidence which was inconsistent and shaken by contradictions and (sic) uncorroborations.**
- 2.That the learned trial magistrate erred in law and facts by accepting evidence from one family and a worker without putting into consideration that there was an existing grudge between the two families.**
- 3.That the trial court failed to note that the case wasn’t reported in a proper way so as to support their allegations leaving the fact that it was just an afterthought.**
- 4.That the trial court failed to notice that the whole of prosecution case wasn’t properly investigated as required by law.**

5. That the learned trial magistrate erred in law and facts by rejecting the defence given by the accused without adequate and reasonable grounds.

The facts of the prosecution case were that the complainant, P.W.1 was sleeping at the house on 14/2/2008 when at 11.00pm she heard movements. A man broke into her bedroom window and entered. He demanded ksh.5000/= from her which she said she did not have. He cut her on the neck. The complainant said she hit the man and his knife fell down. She then reached for a torch with which she flashed him and he turned to face her just at the right moment. She said that she was able to identify the intruder. P.W.2, her granddaughter heard the commotion in P.W.1's room. She started screaming. As the man left, she flashed with a torch and saw his face and recognized him. Both P.W.1 and 2 said they recognized the appellant, a neighbour from the same village.

P.W.3 went to complainant's compound to answer her calls for help. He said that he saw a man leaving her compound. He said he flashed him and recognized him as the appellant. He said that he chased him but did not catch him.

P.W.6 P.C. Rono visited the scene two days after the incident. He recovered a knife and club exhibit 1 and 2, from the complainant's house.

The appellant denied the charges in his defence. He stated that on 10th February 2008, P.W.2 pleaded with him to continue buying goods from their shop. He said that he bought cigarettes from that shop on 14th and was not given change. He said that he was arrested on the 16th and informed much later what the charge was.

The appellant called his mother as his defence witness. The mother's testimony was that the whole case was a frame-up against her son due to a land dispute between her and the family of step wife. D.W.2 claimed that her stepson wanted to sell the family land to the complainant thus the frame-up.

We have analyzed and evaluated afresh all the evidence adduced against and for the appellant while bearing in mind that we neither saw nor heard any of them and giving due allowance. We have complied with the principles applicable to first appeals as set out in the case **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Criminal Appeal No. 272 of 2005**. It was stated as follows:

“In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of Okeno vs. Republic [1972] EA 32 will suffice. In this case, the predecessor of this court stated:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). 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 findings and conclusions; 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 that fact that the trial court has had the advantage of hearing and seeing the witnesses.”

The learned trial magistrate set out the issues for consideration at page 3 of the judgment as follows;

I) Whether the accused on the 14/2/2008 while armed with dangerous weapons namely knife and rungu attempted to rob P.W.1. of ksh.5,000/=.

II) Whether immediately after or immediately before the time of said attempted robbery the accused wounded P.W.1.

The offence under section 297(2) of the Penal Code is defined as follows:

If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

The ingredients for the offence are three fold.

One the person must have been armed with a dangerous or offensive weapon or instrument; or,

Two the person must have had an intention to steal; or,

Three the person was in company of one or more persons; or

If immediately before during or after the time of the assault he strikes, wounds, beats or uses other personal violence to any person.

The facts of the prosecution case are very clear. The appellant entered the complainant's bedroom after breaking in. He cut the complainant on the neck in the dark, and the complainant did not know what was used. She later found a knife in her bedroom which the police collected two days later. We have issues with the late surrender of the knife to the police. The more important point is that after the complainant hit the appellant, he panicked and left her room. There was no evidence that immediately after assaulting the complainant he struck, wounded, beat or used other personal violence on any person. It is our view that the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code was not proved on this ground.

The facts of this case establishes a different charge all together which is the charge of assault with intent to steal contrary to section 298 of the Penal Code. We accordingly substitute the charge against the appellant from attempted robbery with violence contrary to section 297(2) to assault with intent to steal contrary to section 298 of the Penal Code.

Regarding sentence the appellant had been sentenced to death. The maximum sentence for the substituted charge is five years imprisonment. We have considered the fact the sentenced passed against the appellant was given on 29th April, 2009. He has served a period of three years and three months. We think that the appellant has served sufficient punishment for the substituted charge. Accordingly we order that the sentence of death is set aside and in substitution therefore the appellant is sentenced to the period already served.

Those are our orders.

DATED AT EMBU THIS 27th DAY OF JULY 2012.

LESIIT J.

J U D G E

H.I. ONG'UDI

J U D G E

In the presence of:

.....for State

.....Appellant
.....Court Clerk