REPUBLIC OF KENYA

High Court at Eldoret

Criminal Appeal 38 of 2010

MORGAN MUSA …..... APPLICANT

VERSUS

REPUBLIC …..... RESPONDENT

JUDGMENT

The Appellant Morgan Musa was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

Particulars of the charge are that on the 4th day of October, 2008 at King'ong'o Estate in Uasin Gishu Distirct within the Rift Valley Province, robbed Albert Wanyama of cash Ksh. 100/= and mobile phone make Motorolla T3 all valued at Kshs. 3,600/= and at or immediately before or immediately after the time of such robbery used or threatened to use actual violence to the said Albert Wanyama.

The prosecution called a total of four (4) witnesses. At the close of the prosecution's case the learned trial Magistrate found that the prosecution had proved its case against the accused beyond all reasonable doubts and convicted and sentenced him to death. The Appellant being dissatisfied with the decision of the Magistrate has appealed to this court against both the conviction and sentence of the learned Magistrate.

He has listed the following grounds of appeal:-

1. That the trial Magistrate erred in both law and facts by convicting me without considering the variance between the charge and evidence adduced by prosecution witnesses.

2. That the trial Magistrate erred in law upholding that the prosecution proved its case beyond reasonable doubt without observing that no credible ingredients of presence of elements of robbery demonstrated by the evidence in record.

3. That the trial Magistrate erred in both law and facts by convicting me while relying on the exhibits which were taken to the police by a civilian which creates doubt to the source of its origin.

4. That the trial Magistrate erred both in law and facts by convicting me without observing that I was denied the witness statements despite requesting for the same which was in contravention of section 50 (2) (i) of the Constitution of Kenya.

The learned State Counsel, Ms. Chirchir conceded to this appeal on three main grounds. First, that the Appellant was not properly identified. Second, it was questionable how the stolen property, being a

mobile phone was recovered. Third, there was contradiction on evidence adduced about the dates the Appellant was arrested and offence was committed.

It is the duty of the court to determine whether the grounds for appeal raised are meritorious and whether indeed the Appellant committed the offence.

As held in **OKENO V. REPUBLIC (1972) E.A., 32** it is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the Judgment of the trial Court should be upheld. This is reiterated in a more recent case of **STANLEY MAORE -VS-GEOFREY MWENDA – NYERI CIVIL APPEAL NO. 147 OF 2002** that the duty of a first appellate court is to re-evaluate the evidence, assess it and make its own conclusion as if it has not seen or heard the witnesses.

The evidence of PW1, the complainant was that he was attacked as he walked from a place called King'ong'o by someone from behind. That after the attack he fell down and the attacker told him not to say anything as he threatened him with a knife. That it was after he fell down that the attacker ransacked his pocket and took away his mobile phone make Motorolla and cash Ksh. 100/= and took off. He said he reported the matter to the community policing officer but that later the suspect (Appellant) was arrested together with the knife that he threatened him with and his mobile phone.

PW2 Francis Ingabo, involved with community policing said that the complainant reported to him that the Appellant had stolen from him a mobile phone and cash Ksh. 100/=. That he thereafter recovered the mobile phone and the knife that was used to threaten the complainant from the Appellant.

PW3 David Kenyatta Oyalo testified that on 3rd October, 2008 he received a call from PW2 who informed him that a suspect was wanted for the offence of robbery. He said that he knew the suspect whom he followed to a shop as the latter wanted to sell a mobile phone. He said he posed as a prospective buyer. That later PW2 arrived while accompanied by the complainant. That together with PW2 conducted a search on the Appellant and recovered the mobile phone and knife. He testified that he was known to the Appellant for a long time.

PW4, Police Constable Bishar Aden testified that he was brought a suspect (Appellant) by members of community policing. That both the knife and the mobile phone recovered from the suspect were handed over to him.

It is worthy to note that PW1 said that he was attacked from behind before he fell down. When he fell down, he did not state in which position he landed so that the court can evaluate whether or not he was able to identify the attacker. His testimony was that he reported to PW2 that he had been attacked. He never gave either the identity or the description of his attacker to PW2, yet PW2 said that he knew the person who had attacked PW1. Indeed PW2 said that PW1 had reported to him that the Appellant had attacked him and stolen from him a mobile phone and cash Ksh. 100/=. It begs questions how PW1 would have reported to PW2 that it is the Appellant who had attacked him yet in his (PW1) evidence in chief he failed to disclose who had attacked him.

It is only PW2 and PW3 who testified with certainty that PW1 was attacked by the Appellant. Our view is that court cannot be convinced that PW1 was clearly able to identify the Appellant when it is on record that he did not describe the person who attacked him when he first reported the matter to PW2. In any case, PW2 did not state that PW1 described to him, either by name or appearance the person who had attacked him.

PW3 as well did not mention the name of the suspect, yet he said he knew him very well. The conclusion of this court is that the Appellant was arrested on mere suspicions. This is vindicated by PW2's evidence on cross-examination as he stated that he knew the Appellant very well as a thief. In such instance, it is possible that he went for the Appellant as he was a well-known thief. Suffice it to say, suspicion can never found a ground for either arrest or conviction of a person. Appellant submits that the ingredients of the offence of robbery with violence were not proved. They include any of the following:-

- the offender must be armed with a dangerous weapon, or
- is in company of one or more persons, or
- at or immediately before or immediately after the time of such robbery uses actual violence against the victim.

Undoubtedly PW1 was pushed to the ground by an assailant who

was armed with a knife. However as we have observed herein above, doubts abound as to whether the Appellant was properly identified yet identification is a key factor in proving a case or robbery with violence. Hence, it is difficult to conclude that indeed the Appellant was the attacker. These doubts must then be resolved in favour of the Appellant.

There is also material contradiction both on the dates the offence was committed and the dates that the Appellant was arrested and exhibits recovered. The charge sheet states that the offence was committed on 4th October, 2008 which is corroborated by the evidence of PW1. To the contrary PW2 and 3 all stated that it was reported to them about the robbery on 3rd October 2008 which is a day before PW1 was attacked. They did also testify that the exhibits comprising the knife and mobile phone were also recovered on 3rd October, 2008. This automatically raises doubts as to whether it is the Appellant who had attacked PW1 and also whether the exhibits recovered from the Appellant were those stolen from PW1. The court has already poked holes on the manner in which the Appellant was identified. Added to further contradictions of facts material to his conviction, we are of the view that we must resolve such contradictions and doubts in his favour.

We do however differ with the learned State Counsel that there is material contradiction on how the exhibits were recovered. This is in view of the fact that PW2 said he is the one who conducted the search on the Appellant. PW3 said

that PW2 accompanied by PW1 found him (PW3) at the shop where the Appellant was to dispose of the mobile phone and it is then that PW2 conducted the search and the knife and mobile phone were recovered from the Appellant. The only discrepancy noted is on dates of the recovery, which is a day before the offence was committed which we have already dealt with. It did not matter who recovered the exhibits as long as that recovery is consistent with other evidence tendered before the court.

The appellant also submitted that he was not accorded a fair trial in that the learned Magistrate allowed the trial to proceed even when the Appellant had not been furnished with prosecution's witness statements as provided by Article 50 (2) (j) of the Constitution. The said Article reads:-

“50. (2) Every accused person has the right to a fair trial, which includes the right -

(j) to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence”

Proceedings do show that the Appellant notified the court that he had not received the prosecution's witness statements on 13th March 2009 after PW1 and 2 had testified. On this day the prosecution had lined four (4) witnesses to testify. The Prosecutor vehemently opposed the application to adjourn citing reason that the Appellant had failed to bring to the attention of the court that he did not have the witness statements before any witness testified who the Appellant had cross-examined without a hitch. The learned Magistrate ruled in the following manner:-

“The accused is faced with a capital offence and he seeks to be furnished with copies of witness statements. He has a Constitutional right to be accorded, reasonable time to prepare for his defence. I am inclined to grant the accused the last adjournment. The prosecution to supply him with the copies of witness statements and the charge sheet.”

The trial was subsequently fixed for hearing on 25th September, 2009 and 15th December 2009 on which dates the prosecution was accorded adjournment as they did not have the police file. On these two dates, the Appellant was ready to proceed. The hearing proceeded again on 5th January, 2010 when PW3 and PW4 testified. On this date the Appellant did not complain that he had not been furnished with prosecution's witness statements, and we conclude that the prosecution had complied with the order of 13th March, 2009 to so furnish the Appellant with the witness statements.

On 13th March, 2009 when the Appellant made the request for the witness statements, he did not submit that he did not have the statements of PW1 and PW2 before they testified. He neither intimated that he would wish that the two witnesses be recalled as by the time they testified, he did not have their statements. He also raised no objection to proceeding with PW3 and 4 as he had no witness statements. The only inference to be drawn given the scenario is that as at 13th March, 2009, only the witness statements of PW3 and 4 had not been furnished to him. The trial Court, in its considered ruling, ruled that no more witnesses would be called until witness statements had been furnished to the Appellant, as failure to do so would breach his fundamental rights to a fair trial. In this regard we find that no fundamental rights of the accused to a fair trial were violated and his contention in this regard is baseless.

In the result we find that the learned Magistrate arrived at an erroneous conclusion that the Appellant was properly identified. The trial Court also failed to weigh the prosecution's evidence against material contradictions thus leading to the conclusion that the exhibits recovered from the Appellant must have been stolen from PW1. The court also failed to evaluate the contradiction of the date that the offence was committed as stated in the charge sheet and as per evidence of PW1 on the one hand and the dates given in the same respect by PW2 and 3 on the other.

In the premises we find that the prosecution's case was not proved beyond all reasonable doubts as required by the law – **OKETHI OKALE & OTHERS -VS- REPUBLIC (1965) E.A., 555.**

We conclude that this appeal has merit. We allow the same, quash conviction and set aside the sentence imposed upon the Appellant. The Appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

DATED and **DELIVERED** at **ELDORET** this 20th day of December, 2012.

A. MSHILA
JUDGE

G. W. NGENYE - MACHARIA
JUDGE

In the presence of:

Appellant in person

Mr. Wainaina for the State