



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Appeal 37 & 38 of 201

1. MUNYIKA BEJA

2. MUTENZI NYAWA..... APPELLANTS

-AND-

REPUBLICRESPONDENT

(Being an appeal from the Judgment of Principal Magistrate

D.O. Ogembo dated 22nd January, 2010 in Criminal Case

No.1875 of 2008 at Kwale Law Courts)

JUDGMENT

The appellants herein were charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). It was alleged that the appellants had, on **9th December, 2008** at Maendeleo Village, Vigurungani Location in Kinango District, jointly robbed **Komu Mbithi** of Kshs.3000/= and, at or immediately before or immediately after the time of

such robbery, beaten the said **Komu Mbithi**.

The prosecution called five witnesses, and the trial Court heard the unsworn evidence of 1st appellant herein, and the sworn evidence of 2nd appellant herein, coming to the conclusion that the defence cases had no merits, and dismissing the same.

The appellants, upon being convicted and sentenced, lodged appeals with substantially similar (amended) grounds, as follows:

- (i) that the trial Court erred, in convicting on the basis of the evidence of a single identifying witness;**
- (ii) that the complainant, who was attacked at night, “was a very elderly man and could not see properly”;**
- (iii) that the complainant though averring he had seen his attacker with the aid of moonlight, “did not disclose the size of the moon on that day”;**

(iv) **that the Court had not found any connection between the arrest of the appellants and the criminal incident in question;**

(v) **that proper investigations had not been conducted.**

The appellants had pre-written submissions, which they presented as their exclusive argument on appeal. But learned counsel **Mr. Onserio** who represented the respondent, made submissions contesting the appeals.

Mr. Onserio urged that the prosecution case was founded on the evidence of the complainant (PW1): that at 7.00 p.m. on the material day, he was walking home, when the appellants attacked him from behind, and stole Kshs.3,000/=, the proceeds of a goat-sale at that day's goat market. The complainant said that the appellants were his neighbours; he personally knew them; on that very day he had twice seen them: they had first passed through the complainant's home; and thereafter, the complainant found them in PW2's home – very shortly before the material attack.

Learned counsel submitted that the appellants, who were PW1's neighbours, **did know** that PW1 had just sold his goats, and was in possession of money at the material time. Counsel urged that it was not yet dark, at the material time, quite apart from the fact that there was illumination by the moon; and further, the appellants had been talking as they proceeded with the attack, additionally enabling the complainant to identify them by **voice**. Counsel submitted that PW1's evidence was clear enough: 1st appellant held him by the shirt, and grabbed his money. It was PW1's evidence that the appellants fled, after the robbery attack; he screamed, attracting PW3 who came to give assistance.

Counsel urged that this case entailed no issue of identification which stood in favour of the appellants: PW2 had testified that the complainant had come into his house, and found the appellants there; and as soon as PW1 left PW2's house, the appellants quickly followed him; only the appellants followed PW1 at the material time, and along one and the same road; "there were no other persons going in the same direction as PW1." Counsel urged that there was corroboration in the evidence of PW3: he had followed the two appellants, and he had heard screams; he found PW1 on the ground; PW1 told him immediately that the appellants were the attackers; PW3 actually saw the appellants fleeing the **locus in quo**; it was not deep into the night, and there was some lighting enabling PW3 to see the appellants.

Mr. Onserio submitted that the appellants had known that the complainant, an old man supporting himself on a walking-stick, had cash on him; when they had passed by the complainant's house, they observed him selling a goat; they took advantage of his frailty. The complainant was injured in the incident, and the medical-reporting (P3) forms confirmed this. Counsel submitted that such evidence had not been challenged by the appellants, who merely dwelt on the manner in which they had been arrested. Counsel submitted that the appellants had no valid alibi defence, and the trial Court had rightly found their case to be devoid of merits.

Learned counsel, while urging that the appeal case had no valid basis, however, submitted that: **"The Court may consider the proportionality of the sentence."** The learned Principal Magistrate had thus dealt with sentence, after regarding the appellants herein as first offenders, and taking their pleas-in-mitigation:

"I have noted the [statements in mitigation by both accused persons]. However, there is only [one] sentence prescribed for this offence. Having convicted both [accused], I sentence [them] to death. Right of appeal, 14 days."

But first, what is the state of fact, emerging from the evidence?

The complainant testified that he very well knew both appellants herein; he lives in the same village with them, in Vigurungani Location; the homes of the appellants are near that of the complainant (PW1); he had been with both appellants at the home of PW2, and, as soon as he left, there were footsteps following him from behind, at about 7.00 p.m. on the material day; when he left the road, one of those

following held him by the shirt, and pulled him back, all the shirt-buttons falling off; another man held PW1's walking-stick, and PW1 fell down; when PW1 turned to observe who it was, the man with his walking-stick hit him twice on the back, kicked his left leg, and hit him on the right area of the waist; as he pleaded for his life to be spared, the attackers hit PW1 on the head, and threatened to kill him; but they ran away, as a neighbour, one **Mwatela** (PW3), came along; and he informed this neighbour that **the appellants** herein had attacked him. PW1 lost Kshs.3000/=, being the proceeds of goat-sale, during the attack. PW1 said he was able to identify the attackers of the material evening; he said: **"I identified both [accused], as they were very close to me, and they spoke to me and I heard their voices well. It is accused No.2 who held my shirt as accused No.1 kept hitting me. They even went with my identity card. I cannot walk without this walking-stick.**

It is what he used in hitting me. There was bright moonlight."

Responding to cross-examination, PW1 had said: just before the incident, he had met 1st appellant at the home of **David** (PW2) and they indeed talked to each other; on his way out, the appellants herein followed and attacked him; in his words: **"As one was hitting me, another was frisking my pockets, as I had fallen."**

When 1st appellant cross-examined on the theme of **identification**, PW1 said:

"You spoke to me both in [the] Duruma language and [in] Kiswahili. I clearly identified you."

Responding to cross-examination by 2nd appellant, PW1 said:

"You took off when Mwatela came and I told him it is the [two] of you who had attacked me. You would have killed me, had he not come at that time. He is a witness."

PW2, **David Siala**, testified that the complainant and both appellants resided in the **same neighbourhood**, and that on the material day at 7.00 p.m., the complainant entered PW2's home, and found there both appellants. Just after the complainant left to go to his home, the appellants also left, going in the same direction. It was on the following morning, that PW2 saw the complainant again; and the complainant, who was injured, told him "the [two] young men he left at my home had attacked him."

On cross-examination by 1st appellant, PW2 said:

"My evidence is that I [witnessed] you and Mutenzi leave and follow Mzee Komu. Komu had left alone. You [followed the same road Mzee Komu had followed] and there is no road branching [from it]. If Mwatela [PW3] found Mzee Komu on the road, then even you two must have encountered him on the road."

Responding to cross-examination by 2nd appellant, PW2 said:

"You are now admitting I found you in my home. Komu left alone, and you followed him shortly [afterwards]. Mwatela then followed you. There is only one road you would have used, same as Mzee Komu. Nobody else [went along that] road ahead of you."

PW3, **Mwatela Guni** said he lives in the same neighbourhood with the complainant and both appellants, and that on the material day at 7.00 p.m. he had found the appellants at the home of PW2; PW1 thereafter came, stayed for a short time, and left; and **immediately thereafter**, the appellants rose, and followed in the direction taken by PW1; and PW3 followed some five minutes later. PW3 very soon heard screams, PW1 pleading **"Msiniue vijana!"** (**Kis:** Young men, don't kill me!"). PW3 approached the scene, running; the attackers heard his footsteps, and ran away. PW3 took PW1, who was injured in the eyes and ribs, and with a torn shirt, to his home. PW1 told PW3 at that time that it was **the two young men** who had been at PW2's house, who had attacked him, and robbed him of Kshs.3000/=; and PW3 too believed this, as he had followed the appellants closely, and there had been **no other person on the road.**

Responding to cross-examination by 1st appellant, PW3 said (of the material evening):

“Before I could catch you, you saw me and ran away. I then went to help the victim. I saw you.... You had even passed through my home on your way to David’s [home] and I later found you there before you left. There was nobody else on the way. You went ahead of me and I could even hear you speak ahead of me. You ran away when you saw me.”

PW3 when cross-examined by 2nd appellant (on the subject of identification) said:

“It is accused No.1 who dropped [the] complainant’s walking stick, as you were running away. You were both in vests, as you are in now, and black trousers. I saw you both at David’s [home] and at the scene of the attack.”

The 1st appellant’s evidence had more to do with the occasion of his arrest, than with the events of the material date; and this was the case, too, with 2nd appellant’s evidence: the effect is that, for the events of the material day, the Court has to assess the prosecution evidence on its own merits.

Upon reading the record of evidence, we find no concerns in the mind of the trial Court, regarding the demeanour of witnesses; and our perception is that the prosecution witnesses gave clear and straightforward evidence. The burden of this evidence is set out hereinafter.

Taking into account all the evidence, we have come to the conclusion, firstly, that the complainant’s evidence was clear, and stood firm, even when subjected to cross-examination; secondly, that, on the matter of identification, the complainant’s evidence is well corroborated by the consistent and cogent evidence of both PW2 and PW3, none of which evidence was shaken at all by the cross-examination.

The inevitable conclusion is that the prosecution was able to prove the offence as charged, and that, therefore, the conviction entered against both appellants was right. The only question left is that as to **sentence**, in respect of which **Mr. Onserio** called for the special attention of this Court.

For many years, it has been taken as a matter of course that a finding of guilt, such as is the case herein, will lead to the **death sentence**, by virtue of **s.296(2) of the Penal Code**. That provision was introduced by the **Criminal Law Amendment Act, 1971 (Act No. 25 of 1971)** and the **Penal Code (Amendment) Act, 1973 (Act No.1 of 1973)**. Although it is arguable that, by the plain meaning of words, there is a basis in law for imposing the sentence of death, in circumstances such as obtain in the instant case, the course of subsequent interpretive jurisprudence has stood in favour of an **open discretion** to the Courts, to determine whether the accused must come to terms with the death penalty.

Already, there is a line of decisions laying the outlines of judicial discretion, in cases in which the death penalty **could** have been imposed; but, of first significance is the terms of the **Constitution of Kenya, 2010**. This Constitution carries a Bill of Rights (Chapter 4) which makes provisions for, **inter alia, the right to life**; and **Article 20(3)** reposes in a Court such as this one a specific obligation, in that regard:

“(3) In applying a provision of the Bill of Rights, a court shall –

- (a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and**
 - (b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”**
- Article 159(2)(e)** of the Constitution reposes an important mandate in the Judiciary:

“(2) in exercising judicial authority, the courts and tribunals shall be guided by the following principles –

.....
(e) the purpose and principles of this Constitution shall be protected and promoted.”

The said principles are set out (**Art.10**) as “national values and principles of governance”, and they include (**Art.10(b)**):

“human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.”

The spirit of the Constitution is clearly expressed, in relation to the judicial function; and in our opinion, this dictates that the death penalty, in the **facts and circumstances of the instant appeal**, must be viewed in fresh light.

There are already emerging trends in the exercise of judicial discretion, in relation to the death penalty. It is clear to us that the Court of Appeal, in **John Njuguna Wainaina v. Republic**, Crim. App. No. 141 of 2006 (Nakuru), was concerned by the fact that an accused person who committed an offence in circumstances far from endangering the life of the complainant, would be subjected to the death penalty. The Court’s concern in that case was, to this very Court, a legitimate concern when we heard the appeal in **Hamisi Abdul Faraj vs. Republic**, Mombasa H.C. Crim. Appeal No. 129 of 2007, and pronounced ourselves as follows:

“The two decisions are a clear signal that the Judiciary should exercise its larger interpretive competence to make essential departures from the conventional perception of jurisdiction in criminal justice.”

In the **Hamisi Abdul Faraj** case, which, like the instant one, fell within the robbery-with-violence category, we imposed a term of imprisonment, in place of the death penalty.

Although, in the instant case, there is clear evidence that a plurality of offenders were involved, and that they indeed, subjected the complainant to physical violence, we have considered the specific **details of such violence**. The Court should address itself to the **precise nature and scope of such violence**, insofar as this may have constituted a danger to life and limb, as a basis for a fair determination of a case such as the instant one: for the letter and spirit of the Constitution requires **proportionality in the dispensing of sentence**.

Although the suspects in this instance were **two** persons, the evidence shows that they had, as their instrument of violence, only the complainant’s **walking-stick**; and besides, the violence took the form of **verbal threats**. Our sense is that the circumstances of the commission of the offence did not constitute an invasion so threatening to life-and-limb, as to warrant the death penalty.

Therefore, while upholding the findings on evidence, we hereby substitute in place of the penalty under s.296(2) of the Penal Code, a conviction for **simple robbery** under s.296(1) of the Penal Code; and we sentence each of the appellants to a prison term of eight years, as from the date when they were originally convicted and sentenced by the Court of first instance.

Orders accordingly.

SIGNED:

J.B. OJWANG
JUDGE

.....

M.A. ODERO
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 26th day of August, 2011.

M.A. ODERO

JUDGE