REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 214 of 2008

[From Original Conviction and Sentence in Criminal Case No.708 of 2007 of the Chief Magistrate's Court at Mombasa]

SILUS MURIUKI………....……………………………….. APPELLANT

VERSUS

REPUBLIC………………………………..…………….RESPONDENT

JUDGMENT

The appellant, Silus Muriuki, was charged in the Chief Magistrate's Court at Mombasa with the offence of Robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that the appellant, on 25th January 2007 at 8.00 p.m., at Kisimani Location in Mombasa District within Coast Province, jointly with another not before court, while armed with a dangerous weapon namely a knife robbed Jacob Mugambi of cash, Kshs. 6,000/=, a pair of shoes, one wrist watch and a wallet containing an identity card all valued at Kshs. 7,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Jacob Mugambi. The appellant appeared before B. T. Jaden (Ag. SPM) at Mombasa on 22nd February 2007 and pleaded not guilty to the charge. The trial was however conducted by B. Olao, a Chief Magistrate. The prosecution called four witnesses and after hearing their evidence, the court found that the appellant had a case to answer and put him to his defence. The appellant made an unsworn statement in which he narrated how he disagreed

over a market stall with PW 2, Peter Kirema, who then, on 24th February 2007, went to his place of work with a police officer and arrested him for an offence he knows nothing about.

Upon analyzing the evidence of both the prosecution and that of the appellant, the Learned Chief Magistrate found the appellant guilty as charged and sentenced him to death.

The appellant was not satisfied and has appealed to this court against both conviction and sentence. When the appeal came up for hearing on 17th November 2009, the appellant appeared in person and Mr. Onserio appeared for the Republic. Having previously filed written submissions, the appellant relied upon the same. His main complaints are that he was convicted on a defective charge and inconsistent testimony; that his identification was not positive; that his defence was not considered and that his arrest cast doubt on the bona fides of the entire prosecution.

Mr. Onserio on his part supported the appellant's conviction and sentence. He contended that the purported defect in the charge relates to the failure to use the plural of knife since the evidence tendered was about knives. Mr. Onserio applied that the defect be cured by section 382 of the Penal Code. With regard to the alleged contradictions, he argued that the same are not material and on the appellant's arrest, counsel submitted that the same cannot be the basis of any challenge. In the end counsel argued that the appellant was recognized by PW 1 and PW 2 under conditions which were conducive to a positive identification. In the premises, the defence put forward by the appellant was properly rejected.

Briefly, the facts were as follows: - The complainant, Jacob Mugambi, (PW 1), was on 25th January 2007 at about 8.00 p.m., walking to his Kisimani home in Mombasa when he met the appellant with one Mureithi. He knew the appellant as Julius Muriuki and not as Silus. The appellant stabbed the complainant near the eye while his mate bit him on the chest. The duo then robbed him of Kshs. 6,000/=, a pair of shorts, one wrist watch and an identity card all worth Kshs. 7,500/=. The duo then disappeared. The complainant testified that he had known the appellant six months prior to the incident and was able to recognize him even before the attack using moonlight and electric light. His screams attracted PW 2, Peter Kirema to the scene.

Indeed PW 2 watched the attack on PW 1 from his house which was near the

road. When he heard the screams he looked through his window and recognized the appellant and his mate struggling with PW 1. He saw the appellant holding the complainant by the neck while his mate was removing items from his pocket. He asked the appellant why they were attacking the complainant and they then ran away. He escorted the complainant to hospital and later to the police station where a P3 form was issued which was filled and signed by Dr. Bajaber Abdalla, a Medical Officer of Health at Coast General Hospital. The doctor found that the complainant had suffered an injury on the left niche of his eye, chest and right elbow.

The appellant was arrested by PW 3, PC Richardson Nyaoga on 24th February 2007, after being pointed out by the complainant. The appellant was thereafter charged as stated and on being put on his defence he testified as already stated above.

On the above facts, the Learned Chief Magistrate found that the offence of robbery with violence had been proved against the appellant as required in Law and convicted him as already stated. In convicting the appellant, the Learned Chief Magistrate found that the complainant had been attacked at an area well lit by moonlight and electric light and that he recognized the appellant who was well known to him as they come from the same rural home. The Learned Chief Magistrate further found that PW 2 had also recognized the appellant and his testimony buttressed the complainant's testimony. Given that testimony, the Learned Chief Magistrate found the defence put forward by the appellant as untrue.

Having independently analysed the evidence and re-evaluated it afresh as we were duty bound to do (see **Okeno – v – Republic [1972] EA 32)**, we do not find any merit in the complaint made by the appellant against the charge. Failure to use the word "knives" in the charge was not fatal to the charge and even if it were, the same would be curable under the provisions of section 382 of the Criminal Procedure Code as the omission did not and could not have occasioned a failure of justice. For the same reason the failure to carry all the items robbed from the complainant would not vitiate the charge.

On the issue of contradictory testimony, the appellant identified PW 2's failure to mention moonlight in his testimony which PW 1 testified of as material inconsistency. With respect, we do not find the failure to mention moonlight as a contradiction. PW 2 did not testify that there was no moonlight. He merely did not mention it. The appellant in any event, did not challenge him on that aspect of his testimony during cross examination.

With regard to the identification of the appellant, the evidence of PW 1 and PW 2 was of identification by recognition. Both of them testified that they knew the appellant before the incident. They stated that the appellant hailed from their rural home. PW 1 testified that there was moonlight and electric light which enabled him see the appellant. PW 2's testimony was more vivid. He had known the appellant for over two years and they operated vegetable business at the same market. He testified that he saw the appellant with one Murithi struggling with PW 1. He asked the appellant why they were attacking PW 1 and instead of responding they ran away. It is significant that PW 1 gave the appellant's name to PC Richarson Nyaoga, (PW 3) who was the investigating officer before the appellant's arrest. PW 2 did the same and they both identified the appellant to PW 3 when the appellant was arrested. The Learned Chief Magistrate believed the evidence of PW 1 and PW 2. He saw and heard them testify and specifically recorded that their demeanor was reliable. He was in a better position to make that observation. PW 1 knew the appellant as Julius Muriuki and not as Silus Muriuki. Nothing much turns on the discrepancy in the first name of the appellant because, PW 1 was in no doubt as to the person he recognized. He is the same person whom PW 2 recognized during the attack and pointed out to PW 3 during the appellant's arrest. In the premises, we have come to the conclusion that the identification of the appellant was positive.

With regard to the arrest of the appellant, we have noted some inconsistency in the testimony of the complainant, (PW 1) and that of PW 2 and PW 3. PW 1 testified that he saw the appellant on 24th February 2007, at Likoni and alerted the police who arrested him threat. PW 2 on the other hand testified that he saw the appellant at Kongowea on 24th February 2007, and informed the complainant who in turn called the police who arrested the appellant. PW 3, PC Richardson Nyaoga confirmed the testimony of PW 2 that on 24th February 2007, the complainant led him to the appellant at Kongowea market where he arrested him. We have anxiously considered that discrepancy and note that the appellant himself testified that he was arrested on 24th February 2007 at Kongowea market. So, the arrest of the appellant is not in dispute. It is where he was arrested which is not agreed. Does that discrepancy suggest a fabrication of the charge against the appellant? We do not think so. It could have been a failure on recall by PW 1 whom the Learned Chief Magistrate otherwise found credible. Notwithstanding the discrepancy, the Chief Magistrate was entitled to, nevertheless, believe the testimony of witnesses

presented by the prosecution. We are alive to the settled principle that findings of a trial court based on the credibility of witnesses should not be interfered with unless no reasonable tribunal could have made such findings (see Republic – v – Oyier [1985] KLR 353). We have considered the evidence of PW 1 and PW 2 and we are satisfied that both were credible witnesses. In any event the appellant did not at any time suggest any grudge between him and the complainant (PW 1). In the end we have come to the conclusion that the inconsistency regarding where the appellant was arrested did not weaken the prosecution case.

On the issue of failure to consider the defence put forward by the appellant, we set out below the Chief Magistrate's own words:-

> "The accused's reaction to all this evidence is to claim that the witnesses have lied against him and that he knows nothing about this charge. No reasons are given by him as to why the witnesses would all want to gang up and give false evidence against him and from my examination of their demeanor, I was satisfied that the prosecution gave evidence that was cogent and truthful and I dismiss the suggestion by the accused they have lied against him."

And later on in his judgment, the Learned Chief Magistrate continued as follows:-

> "The accused's defence that all the prosecution evidence is made up has been considered in the light of evidence against him and found to be untrue and is accordingly dismissed."

It is clear from the above that the appellant's defence was adequately considered and rejected. We have found no reason to fault the Learned Chief Magistrate's consideration of the appellant's defence.

For the above reasons, we are satisfied that the appellant was properly convicted on sound evidence and we dismiss his appeal in its entirety.

Judgment accordingly.

DATED AND DELIVERED AT MOMBASA THIS………DAY OF FEBRUARY 2010.

F. AZANGALALA

JUDGE

M. ODERO

JUDGE

Read in the presence of:-

Mr. Monda for State

Appellant in person

M. ODERO

JUDGE

23RD FEBRUARY 2010