



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Appeal 75 of 2003

1. PHILIP MUSYIMI NDETI
2. MAINGI KIETI.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. Philip Musyimi Ndeti and Maingi Kieti were the accused persons in Machakos C.M's Court Criminal Case Number 25/2003. They jointly faced the charge of attempted robbery contrary to section 297(2) of the Penal Code and the particulars of the charge were that on the night of 29th December 2002 at Mamiloki Village, Masii Division of Machakos District, they jointly with others not before the court, while armed with offensive weapons namely pangas attempted to rob Muthusi Muendo of money and household goods and immediately at or immediately after the time of such attempted robbery used actual violence to the said Muthusi Mboni.

2. The evidence tendered before the trial court was as follows:-

PW2, Muthusi Muendo stated that on the material night he and his wife were having supper when two men entered their house armed with pangas and soon thereafter others joined them. His wife started screaming and PW1 engaged the attackers with the result that he was injured but was able to use electric and solar lighting in his house to identify four of the robbers including the Appellants. He stated as follows regards the two of them;

“Neighbours arrived at the scene and apprehended the first accused;

The second accused was apprehended the following day ...

I had previously known the second accused. He was my employee...

The second accused was wearing this woolen scarf (MFI-3) which fell down as I put up as struggle.”

3. In cross – examination he stated as follows regarding the second Appellant;

“I was very hurt to realize that you attacked me and yet you are my neighbour and former employee.”

4. PW3, Beatrice Muthusi, wife of PW2 recalled the incident as narrated by her husband and added that during the attack, she grabbed the 1st Appellant and held onto him while screaming until neighbours came and apprehended him at the scene. That the 2nd Appellant struggled with PW2 and she identified both of the Appellants from the electric light in the house. She confirmed that the 2nd Appellant was their neighbour and former employee and that the incident lasted approximately 15 minutes.

5. Both PW2 and PW3 said that they were injured during the incident and PW1, Marietta Ndila, Clinical Officer at

Masii Health Centre examined PW2 on 31.1.2003 and produced the P3 from (P.Exhibit 1) showing that indeed PW1 was assaulted with a sharp object.

6. PW4, Joseph Kyalo Muthusi, son of PW2 and PW3 recalled that on the material night, he was at his house when he heard screams from his father's house. He rushed there and found his mother, PW3 struggling with a man who was unknown to him. He assisted his mother and held onto the man until neighbours arrived and in the meantime the other robbers had fled the scene. He further stated that the 2nd Appellant who was known to him as a neighbour and former employee of PW2 was arrested the next day.

7. PW5, Cpl George Wanambisi received a report on the night of 29.12.2002 that a robbery suspect had been apprehended and was about to be lynched by members of the public. He proceeded to the scene, rescued the 1st Appellant from further beating by the mob and took him to hospital. He also took possession of the robbery weapons and a woolen cap and the next day, he re-arrested the 2nd Appellant who had been apprehended by members of the public as he had been mentioned as one of the offenders. Later, he had the Appellants charged in court.

8. When the Appellants were put on their defences, the 1st Appellant stated as follows:-

That he did not commit the offence he was charged with and that he was on his way home on the material night when five men confronted him and alleged that he had committed an offence. That he was then taken to hospital and later charged.

9. The 2nd Appellant denied committing the offence and stated that on 30.12.2002 he was called by a group of people while herding his cattle, taken to the police station, pointed to a stranger and then he was locked up in the cells. On 5.1.2003 he was released and on 4.2.2003 he was re-arrested and charged.

10. In his judgments the learned trial magistrate found that the charge had been proved beyond reasonable doubt and he convicted both appellants before sentencing each one of them to death.

11. Our duty as the first appellate court was set out in Dinkarrahi Pandya vs Republic [1957] E.A. 336 where the court stated that such a court must treat the evidence as a whole ***“to that fresh and exhaustive security which the appellants were entitled to expect.”***

12. Having set out that duty, we note the submissions made by the Appellants and learned State Counsel and from the evidence that we have set out above, there is no doubt that when PW2 and PW3 were attacked on the material night, the offence of attempted robbery with violence was committed. Section 297(2) of the Penal Code provides 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.”

13. In this case all the ingredients were in place. The question that we must answer is whether the Appellants were part of the gang of robbers and whether there was sufficient evidence to prove the charge against them beyond reasonable doubt.

14. Regarding the case against the 1st Appellant two matters quickly come to mind;

- i. that he was apprehended at the scene and
- ii. that both PW2, PW3 and PW4 were categorical that he was at the scene.

15. It is difficult to fault his conviction because as the trial magistrate noted, ***“although the 1st accused denied the offence and implied that he was apprehended by a group of people while innocently walking to his home the evidence of identification against him is not only overwhelming but also credible and corroborative. This is forfeited by the single fact that he was caught in the act. His defence is thus unsustainable. He was indeed positively identified as having been part of the invaders.”***

16. We agree and this was the same situation in Patrick Macharia vs Republic H.C.Cr. Appeal No. 144/2005(Meru) where a robber was tightly held by one of his victims until other witnesses came to her rescue. The court stated that identification could not be contested in such a situation and the question of the intensity of lighting was a non-issue. In this case, the defence by the 1st Appellant was a mere afterthought and denial and cannot be upheld.

17. Learned Senior Principal State Counsel has conceded the Appeal on the part of the 2nd Appellant but we take a difference view. We have elsewhere above reproduced the evidence of PW2 and PW3. Each of them had known the 2nd Appellant before because he was their former employee and also a neighbour. This was a case of recognition and not mere identification. PW2 and PW3 were eating supper in a house lit with electric light. A neighbour and former employee well known to them walks in and engages PW2 in an attack. Both PW2 and PW3 gave evidence that the said person had a woolen cap which fell down during the attack and it was later found and given to PW5. Although he fled the scene, the next day he was apprehended and taken to the Police Station. Although he denied that he was involved in the incident, we are convinced that the recognition by the two witnesses cannot be faulted and all conditions were favourable for such recognition. PW2's evidence that he was hurt by his former employee attacking him is telling of the fact that he clearly knew him. It has been said time and time again that recognition is more satisfactory more assuring and more reliable than the identification of a stranger- see Anjononi & others vs Republic [1980] KLR 59.

18. The above being our holding, we have no choice but to find that the case against each of the Appellants was proved beyond reasonable doubt and their defences cannot change that fact.

19. The Appeals are each dismissed in their entirety.

20. Orders accordingly.

Dated and delivered at Machakos this 19th day of August 2009

ISAAC LENAOLA

JUDGE

M. WARSAME

JUDGE