



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 155 of 2006

JOEL MBILU NDAMBUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(From the original conviction and sentence in Criminal Case No. 586 of 2005 of the
Senior Resident Magistrate's Court at Kangundo by Mrs D. Mochache –
Principal Magistrate)**

J U D G M E N T

The appellant, JOSEPH MBILU NDAMBUKI, was convicted for robbery with violence contrary to section 296(2) of the Penal Code. He was then sentenced to suffer death as by law prescribed.

In his appeal to this court, he raised five grounds of appeal, which can be summarized as follows;

- (i) *There was no proper identification or recognition.*
- (ii) *The appellant was not in possession of any of the stolen items.*
- (iii) *The prosecution adduced evidence that was both inconsistent and full of discrepancies.*
- (iv) *The offence was not proved against the appellant.*
- (v) *The defence was rejected even though it was not displaced by the prosecution case.*

When canvassing the appeal, the appellant filed written submissions.

On the issue of recognition, the appellant submitted that it was not free from doubt. His reason for so saying was that the alleged recognition was made in difficult circumstances, as the offence was committed at 8.00p.m. Furthermore, the attack on the complainant was said to have been sudden; and the victim was drunk.

In any event, the complainant is faulted for not telling the trial court about the length of time he took to observe the robbers. He is also said to have failed to indicate whether there was a full-moon or a half-moon.

As for the torch which he was using, the complainant is faulted for not stating the number of batteries in

it.

Those factors are said to be significant because there was no light at the scene of crime.

After the complainant was attacked, he became unconscious, by his own admission. Therefore the appellant submitted that the complainant could not have fought with his attacker, when he was in that state.

It was also the appellant's contention that the complainant ought to have indicated to the trial court about how regularly he had been seeing the appellant, if his evidence was to be deemed worthy.

The appellant further submitted that the prosecution erred by charging him with a multiplicity of charges.

His further submission is that the arresting officer did not testify in court, with a view to telling the court what he was arrested for.

The appellant also asserted that the testimony of PW 2 was inconsistent with that of PW 4. In particular, he drew attention to the fact that PW 4 told the court that PW 2 had identified the appellant physically, whilst PW2 said that he identified the appellant by name.

Another issue which was raised by the appellant was that both PW 1 and PW 5 had testified in English, but the appellant did not have the benefit of an interpreter. He therefore submitted that section 198(1) of the Criminal Procedure Code was violated.

It is also his contention that on 22nd November 2006, there was an unqualified prosecutor who handled the case.

Finally, the appellant submitted that the defence which he put forward, was not considered. As far as he was concerned, he did explain how he got into the circumstances, and the prosecution failed to shake his said explanation.

Being the first appellate court, we have carefully perused the evidence on record.

PW 1, JOSEPH WAMBUA, is a clinical officer, who was attached to the Kangundo Sub-district hospital as the material time. He testified that on 29th September 2005, he treated PW 2.

It was the testimony of PW 1 that the complainant (PW 2) told him that he had been attacked with an iron bar.

PW 1's assessment of the injuries verified that the same were caused by a blunt weapon.

PW 2, DANIEL MUTINDA MUTUKU, was the complainant. He testified that the appellant was well known to him, as they were neighbours. He had known the appellant since childhood.

PW 2 was riding a bicycle from Tala, at about 8.00p.m, on 28th September 2005.

On the bicycle he had five iron-sheets and some items which he had purchased. He was going home.

But when he reached the gate of Kwa-Tombe Primary School, PW 2 was attacked by five people, who robbed him of his bicycle, the iron-sheets, KShs.2,000/- and a wallet in which his Identification Card was kept. During the attack, PW 1 says that he got hold of the appellant, and fought him.

Meanwhile, two of the assailants went away with the bicycle and the iron-sheets. But the appellant shouted for help, and his friends went back to rescue him.

When PW 2 reported the incident to the Assistant Chief (PW 4), it is his evidence that he mentioned the names of three of his assailants, including the appellant.

PW 2 also said that in his first report at the Tala Police Post, he gave the names of his assailants.

Three days after the robbery, PW 2 went back to PW 4, and together they went to the appellant's house. Whilst at the appellant's house, PW 2 and PW 4 recovered the five iron-sheets and PW 2's wallet, which contained the Identification Card of PW 2.

The appellant also told PW 2 and PW 4 that his co-accused, Mutua, had the complainant's bicycle.

When PW 2 was asked about the source of light, on the material night, he said that there was sufficient light from the torch he had, and also from moonlight.

He said that he saw the appellant before the gang of five robbed him.

PW 3, NGUMBAO BONIFACE NDAMBUKI, is a businessman. He knows both the appellant and the complainant.

On the material night, he was drinking at a local bar, when PW 2 went and informed him (and his drinking mates) that he had been robbed.

PW 3 went with his friends, together with PW 2 to the scene of the attack, but they did not recover anything. Later, one of his friends escorted PW 2 home.

Significantly, PW 2 did not tell PW 3 about the identities of those who had robbed him.

PW 4, BENEDICT MUINDI MUTINDA, was a Senior Assistant Chief of Kalandini Sub-location. He knew the two accused, as well as the complainant.

He told the trial court that on the morning of 29th September 2005, PW 2 reported to him that he had been robbed on the previous night.

According to PW 4, the complainant knew his assailants physically, but he did not know their names. Therefore, when PW 4 was given the descriptions of the assailants, he commenced investigations.

After three days, the complainant told PW 4 that iron sheets had been seen at appellant's home. PW 4 went with PW 2 and members of the assistant chief's vigilante group, to the appellant's house.

The house was searched and five iron-sheets recovered. Also recovered was the complainant's wallet, which had his Identification Card in it.

PW 5, PC WILSON MUTAHI, was a police officer who was attached to the Tala Police Post, at the material time. He testified that PW 2 did report at the police post, on 29th September 2005, that he had been assaulted and robbed on the previous day.

According to PW 5, the complainant told him that he knew three of his assailants physically.

Three days later, the appellant was taken to the police post by PW 4, who also gave to PW 5 some five iron-sheets, a wallet containing PW 2's Identification Card, and an iron bar which the appellant had threatened to hit PW 4 with.

In his defence, the appellant said that on 28th September 2005, he reached his home at about 7.00p.m. He went straight to bed, as he was exhausted.

When asked about the five iron-sheets, the appellant said that the same were recovered at the gate to their home. However, he denied that the same were in his house. He also denied that the wallet containing the complainant's Identification Card was recovered from his house.

He concluded his evidence by saying that he was framed by PW 4 because of a grudge running back a few years. The grudge arose from a disagreement at a club.

However, the appellant had not raised the issue of the alleged grudge when he was cross-examining PW 4. He also had not raised any issue concerning the recovery of the wallet from his house.

It does therefore appear that the line of defence was a mere afterthought.

That notwithstanding, we note that when the complainant talked to PW 3, who was in the group of persons who were the first persons that PW 2 talked to after the robbery, he did not name his attackers.

Secondly, whereas PW 2 says that he knew the names of his assailants, and that he gave the said names to both the Assistant Chief and the police; both PW 4 and PW 5 said that PW 2 only told them that he knew the assailants physically. Given that the Assistant chief knew the appellant and the appellant's co-accused well, we have come to the conclusion that had PW 2 given the assailants names to the Assistant Chief, the latter would not have had need to commence investigations. He could have caused the arrest of the two accused persons immediately.

Thirdly, there is no indication at all whether the description of the assailants, as given by the complainant, played any role in the arrest of the appellant. It only appears that some unknown person had seen iron-sheets at the appellant's house. In the circumstances, it is clear to us PW 2 did not positively identify the appellant. Had he done so, he would have led to the arrest of the appellant on the said grounds of identification, rather than because someone had seen iron-sheets at the appellant's house.

It is on record that the plea was taken in the Kiswahili language. However, PW 1 and PW 5 testified in English. And, there is nothing on record to show that the evidence of those two witnesses was translated into Kiswahili. In the event, we find that the provisions of section 198 of the Criminal Procedure Code were violated.

On that ground alone, the appeal must succeed.

But, as we have stated herein, it does not appear that the complainant had positively identified the appellant. Although we must also say that had the appeal rested solely on the issue of identification, it may have not succeeded, as two of the stolen items were recovered from the house of the appellant.

The appeal is allowed. The conviction is quashed and the sentence set aside.

We now order that the appellant be set at liberty forthwith, unless he is otherwise lawfully held.

Dated, Signed and Delivered at Machakos, this 24th day of September, 2009.

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ISAAC LENAOLA

FRED A. OCHIENG

JUDGE

JUDGE