REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 42 of 2006

MUSEMBI KULI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant, MUSEMBI KULI, was convicted for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He was then sentenced to death, as by law prescribed.

He lodged an appeal to challenge both the conviction and the sentence.

In his petition of appeal, the appellant asserts that the trial court erred when it held that he had been positively identified. In his view, there was no positive identification as the prevailing circumstances were hectic.

In any event, by the time of his arrest, some three days after the incident, he was not in possession of anything which had been robbed from the complainants. The length of time taken before he was arrested is said to be an indication that the complainant had not identified him positively, because otherwise he should have been arrested soon after the incident. The prosecution is faulted by the appellant for failing to have the Investigating Officer testify at the trial. His said absence is said to have resulted in the prosecution's failure to prove the case beyond any reasonable doubt.

In any event, the defence which he put forward is said to have been wrongly rejected. His reason for so saying was that the learned trial magistrate did not give any cogent reasons for rejecting the appellant's defence.

Finally, the appellant reiterated his innocence, whilst also asserting that his constitutional rights, under Section 72 (3) (b) of the Constitution, had been violated. In particular, the appellant pointed out that he was held in custody for 27 days before he was first taken to a court of law.

This being the first appellate court, we are enjoined by law to re-evaluate all the evidence adduced. We shall therefore proceed to do so, whilst bearing in mind that, unlike the learned trial magistrate, we did not have the benefit of observing the witnesses as they testified.

The charge against the appellant was that on 4th October 2005, at Makutano Market, Mwala Division, in Machakos District, whilst armed with a dangerous weapon, namely an axe, jointly with others who were not before the court, they robbed CAROLINE MWIKALI KIMULI (PW 1) of her handbag containing KShs. 2000/= together with other items specified in the charge sheet. It was also stated that

violence was used on the complainant.

At the trial, the prosecution called four witnesses.

PW 1 was a business-lady. She operated a bar, boutique and salon. She had closed the bar and was asleep on the night of 3rd October 2005.

However, at about 2.00 a.m., on 4th October 2005, she heard whispers outside her house. She woke up and walked to the window. The windows were made of glass.

PW 1 peeped out through the window, and she saw 2 people at the gate, which was about 3 metres away. According to PW 1, she was able to see the two people clearly, because her electric fluorescent bulbs were on. But PW 1 did not see the faces of the 2 people clearly.

Although PW 1 yelled for help, one of the intruders said that it did not matter, as they had arrived. One of the intruders then opened a window, and thereafter hit the wire-mesh.

In order to avoid further damage to the house PW 1 offered to open the door.

PW 1 said that her door has two shutters. First, there is a wooden shutter, which opens inwards,; secondly, there is a metal door, which opens outwards.

After opening the wooden door, PW 1 opened the metal one. As she was doing so, PW 1 came face to face with one of the intruders. It was her evidence that she and the said intruder almost collided head to head.

One robber hit her on the forehead, with an axe. Next, the security light was hit, and it went off. However, PW 1 says that she had already been able, by that time, to have positively identified the intruder who was armed with an axe. She said that she had known the said person since “the early nineties”.

The person whom she recognized was MUSEMBI KULA, the appellant. It is he who hit PW 1.

Later, PW 1 was taken to the hospital, with the help of police officers.

It was the evidence of PW 1 that she did give to the police the names of the appellant, when she made her report.

She also testified that she did help in the arrest of the appellant. She did so by mentioning his name to several people. And when the appellant was spotted, PW 1’s husband accompanied the police to arrest him.

During cross-examination by the appellant, PW 1 said that although the appellant was wearing a hat and a great coat, he did not cover his face.

She also explained that immediately after the incident, the appellant went into hiding, hence the delay of 3 days before he was arrested.

PW 1 also said that three weeks before the robbery, the appellant was drinking at her bar, when he got into a fight. The appellant said that he had lost his I.D, at the said bar. When PW 1 told him to look for the said I.D. quietly, the appellant threatened PW 1.

However, as PW 1 said, she disregarded the said threat as being that of a person who was drunk at the time.

PW2, EVERLYN WAYUA ULI, was the house-help employed by PW 1. At about 2.00 a.m, on the

morning of 4th October 2005, PW 2 heard people whispering outside PW 1's house. She saw three people outside the house. She saw them clearly as there was bright light from the fluorescent tube which provided security lighting.

However, PW 2 did not make out the faces of any of the attackers. But she was told by PW 1 that the latter had seen one of the attackers. PW 1 told PW 2 that it was the appellant whom she had recognized as one of the robbers.

PW3, DR. RUTH MUTHAMA, filled the P3 form for PW 1. She said that PW 1 had deep cut wounds on the face and left cheek.

PW 4, PC FRANCIS MATHENGE, was the Investigating Officer in this case. He was on patrol duties on the night of 3rd/4th October 2005, when CPL Erick Karui, the base commander called him on his mobile phone. He was told of robbers who were at PW 1's house.

PW 4 proceeded to PW 1's house immediately, and found PW1 bleeding profusely from the forehead. PW 4 arranged to take PW1 to hospital.

PW 4 said that PW 1 told him that the appellant was one of the persons who had attacked and robbed her.

Although PW 1 had given to PW 4 the appellant's name, PW 4 explained that they were only able to arrest the appellant on 7th October 2005, because the appellant had gone underground immediately after the incident.

After the appellant was arrested, PW 1 visited the police station and confirmed to the police that the appellant was indeed one of those who had robbed her.

When the trial court put the appellant on his defence, he confirmed that he and PW 1 knew one another. He said that PW 1 had disagreed with him because he was demanding for his ID card.

His evidence was that he was only arrested because PW 1 had said that he (the appellant) had insulted her customer.

He was then told that he knew the attackers of PW 1, although PW 1 did not say what property of hers was stolen by the appellant.

From our analysis of the evidence on record, there is no doubt at all that PW 1 (the complainant) and the appellant knew each other from before the date of the incident in issue. At the very least, the two had known each other for three weeks.

They had come to know each other at the bar, which was operated by PW 1; and at which the appellant was a customer.

Secondly, we find that the complainant was attacked, injured and robbed on the night of 3rd/4th October 2005. The robbery took place at about 2.00 a.m. on 4th October 2005.

Although it was late at night, there was bright light outside the complainant's house. The source of the said security light was a fluorescent tube.

As PW 1 opened the two shutters; and in particular the metal door, which opens outwards, the security light was still on. As she opened the said metal door, she and the appellant almost collided head to head. Indeed, the appellant had to briefly step backwards, to avoid the collision.

To our minds, PW 1 and the appellant were, at that particular moment, at very close proximity to each

other. However, we also find that that position was sustained for a very limited duration of time, as the intruder had to move one step backwards, in order to avoid the collision.

As PW 1 was able to observe not only the backwards step taken by the intruder, but also the clothing the intruder was wearing, and the fact that he was armed with an axe; and because the said intruder then struck the complainant with the axe, we find and hold that the complainant had the clarity of thought and sight, to ascertain exactly what was happening.

We are satisfied that PW 1 did positively identify the appellant before he attacked her with the axe.

PW 1 was so clear in her mind about the identity of the attacker that she did not hesitate to tell both PW 2 and PW 4 about that fact, at the first opportunity.

Thereafter, the appellant went underground for 3 days. That explains why he was not arrested immediately.

In the result, we find that the conviction of the appellant was well founded, on the evidence which the prosecution adduced.

And as the evidence was simply overwhelming, we find that the defence put forward by the appellant did not cast any shadow of doubt over the case made out by the prosecution.

Finally, on the issue of the delay in bringing the appellant to court, we can only say that it has been raised too late. We say so because it was only raised, for the first time, at the hearing of the appeal.

In those circumstances, the state did not have any opportunity of putting forward any explanation for the delay in bringing the appellant to court.

Given the fact that by virtue of the provisions of Section 72 (3) (b) of the Constitution, the State is accorded a window of opportunity to demonstrate to the court that an accused person was brought to court as soon as reasonably practicable, even though it was after the 24 hours or the 14 days, from the time of his arrest, it would be wrong to enable the appellant to benefit from his failure to accord to the State the opportunity to utilize that window of opportunity.

Accordingly, the appeal is dismissed in the entirety.

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

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ISAAC LENAOLA **FRED A. OCHIENG**

JUDGE **JUDGE**