



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Appeal 157 & 156 of 2007

KINUTHIA MUCHINA1ST APPELLANT

MULINGE MUTINDA2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 1059 of 2074 of the Chief Magistrate's Court at Machakos by H. A. Omondi – Chief Magistrate)

JUDGEMENT

The two appellants were jointly charged with robbery with violence contrary to section 296(2) of the Penal code. that on the 6th day of December 2006 jointly with others not before the court while being armed with offensive weapons namely stones robbed Francis Kimathi Ndele of cash Kshs.2,850/= and at or immediately before or immediately after the time of such robbery used personal violence to the said Francis Kimathi Ndele.

After full trial they were convicted and sentenced to suffer death hence this appeal. The evidence of PW1 Francis Kimathi Ndele is that on 6th December 2006 at about 11.00 p.m. while at JB's bar within Kaumoni market , the two appellants herein jointly requested that he buys beer for them but he informed that he had insufficient money to buy them beer. He however, volunteered to buy them sodas which they were served and after a short while PW1 decided to leave the counter as he felt the two appellants were disturbing him. At about 11.30 p.m. the bar was closed and he decided to go to his house but the watchman advised him he sleeps on a chair inside the bar so that he does not walk to his house during the night in fear of being attacked. While inside the bar he was confronted by the two appellants herein who demanded money from him. He says that the two appellants got hold of him and knocked him and removed Kshs.2,850/= from his pocket. It is the evidence of PW1 that the two appellants were not armed but later one of them

picked a stone and hit the complainant on the right cheek. PW1 then walked to Kaumoni APs camp and reported that he had been attacked by the two appellants. The AP who was on duty informed him that he was alone and the complainant was directed to stay within the AP camp until the following. On the following morning he made a report at Wote Police Station and was issued with a note to go for treatment. He went to Makueni District Hospital where he was treated and discharged. He was issued with a P3 form which was duly filled and produced as exhibit 1. PW1 later pointed out the two appellants herein as his attackers leading to their arrest and subsequent charge.

PW2 Mwova Mwangi was a watchman at Kaumoni market and stated that on the material day at about 10 p.m. the complainant was joined by the two appellants herein who requested for a soda from him. They then left together after the bar was closed to unknown destination. Shortly after he heard noise coming from Makuti bar and realized that it was PW1 who was being attacked by a group of people. He proceeded to the scene and found the appellant on the ground and when he asked him what had happened he was told that he had been attacked by the 2nd appellant and another man. He offered the complainant a place to sleep but he declined and the following day he found the complainant coming from hospital.

PW3 was also a watchman at Makuti bar in Kaumoni and stated that on the material day while at his place of work he heard a heavy sound from a distance of 40 metres. When he approached he found 3 people standing and one lying down. When he flashed his torch at them, one of them started to run from the scene and he moved closer he states that he recognized the two appellants as the ones who were standing while the complainant was lying down. He however, said that he did not know what had transpired as the two were just standing over the complainant. He stated that the two left carrying the complainant who was lying down but he did not know what happened after that.

PW4 PC Patrick Matheka stated that on 7th December 2006 while at Makueni Police Station he received a report that the complainant had been attacked at JB's bar in Kaumoni. He says that the complainant informed him that he was assaulted by the appellants herein and in the process lost Kshs.2,850/= . He then booked the report and referred the complainant to hospital. On 28th December 2006 he was directed by the DCIO to arrest and charge the two appellants with robbery with violence which he did.

PW5 a Clinical Officer at Makueni District hospital filled the P3 form in respect of the complainant and confirmed that he had been assaulted by persons known to him.

After the close of the prosecution case the two appellants gave sworn testimonies and denied attacking the complainant.

After considering the evidence by the prosecution and the defence by the two appellants the trial court was of the view that there was sufficient evidence linking the two appellants to the commission of robbery with violence. We have on our part considered the evidence on record in order to satisfy ourselves whether there is sufficient evidence to sustain the conviction of the two appellants. On our part we disagree that the evidence on record is sufficient enough to

sustain the conviction of the appellants. It is clear that PW1 and the two appellants were together in a bar till some time at about 11.30 pm. when the bar was closed. They were ordered out and the complainant who was drunk picked up a fight with the two appellants and other patrons. They were then directed to leave the bar in peace but they started to continue with their quarrels. It is clear that PW2 advised the complainant to sleep inside the bar which is an indication that he was not sober enough to go to his house in safe and orderly manner. PW3 also confirmed that he found the complainant lying on the ground while the two appellants were trying to assist him. It is clear that the two appellants never tried to run away from the complainant even when they were approached by PW3. It means that a person who may have robbed the complainant in such circumstances would not stay with his victim and to be confronted by witnesses who may give evidence against him. We think the conduct of the two appellants do not fit as the ones who may have attacked and robbed the complainant herein. We agree that the two appellants and the complainant were persons known to each other but we think the evidence on record is insufficient to show that they were the ones who attacked and robbed the complainant on the material night. In short it is our position that the prosecution did not prove the charge of robbery with violence against the appellants beyond reasonable doubt. We think the appeals have considerable merit which we must sustain. In the premises we allow the appeal of each appellant, quash their conviction and set aside the sentence. We order the immediate release of the appellants unless lawfully held.

Dated, signed and delivered at Machakos this 21st day of October 2009.

ISAAC LENAOLA

JUDGE

M. WARSAME

JUDGE