REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL 173 OF 2006

DANIEL MWANIA KISILU ……..……... APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate Mr S.A. Okato delivered on 6/12/2006 in Machakos Criminal Case No. 51 of 2005)

JUDGMENT

1. The Appellant herein, **Daniel Mwania Kisilu** was charged with the offence of **robbery with violence** contrary to **section 296 (2)** of the **Penal Code**. It was alleged that:

"**On the 29th day of December 2004 at Makutano village, Katangi Location, Machakos District within the Eastern Province jointly with others not before court robbed Dorcas Mueni Mutunga of cash kshs. 36,000/= and a one mobile (sic) all to the total value Ksh. 40,900/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Dorcas Mueni Mutunga."**

2. He also faced a second count of handling stolen goods contrary to section 322 (2) of the Penal Code. The particulars were that:-

"**On the 29th day of December at Kaini village, Wamunyu Location of the Machakos District within the Eastern Province, otherwise than in the cause of stealing, dishonestly received or retained one mobile phone make Siemens A-35 S/No. 350019721433940 knowing or having reasons to believe it to be stolen property."**

3. On 6/12/2006, the learned trial magistrate, S.A. Okato, SRM, convicted the Appellant and having done so, sentenced him to death. The Appeal before us is both against the conviction and sentence aforesaid. In the Petition of Appeal, the following are listed as the grounds to be advanced at the hearing:

i. "That the learned trial magistrate erred in points of law and facts in basing his conviction on the evidence of a single identifying witness in unfavourable conditions and difficult surroundings.

ii. That he erred in law and facts in acting upon inconsistent and contradictory evidence of the prosecution.

iii. That he erred in points of law and facts in conviction him upon insufficient

evidence without considering that essential witnesses especially the investigating officer was not availed to shed light on the origin of the exhibsd mobile and pair of shoes.(sic)

iv. That he erred in points of law and facts in failing to consider that the appellants had no nexus to the exhibited mobile phone due to the non-availability of an inventory form or search warrant (sic)

v. That he erred in points of law and facts in rejecting his defence without stating reasons thereof as the law stipulated.(sic)

vi. ……"

4. The duty of this court is now well established; as the first appellate court, we should not merely scrutinize the trial court's judgment and see whether the decision was proper or not but we must do the following:-

i. make our own assessment of the recorded word;

ii. subject the evidence as a whole to an exhaustive examination;

iii. weigh the evidence and reach our decision and conclusion.

(See **Pandya vs R (1957) E.A. 336, Shantilal M Ruwala vs R (1957) E.A 570 and Okeno vs R (1972) E.A 32).**

5. For us to meet the challenge set out above, we deem it proper to summarise the evidence tendered which was as follows:-

On the night of 29/12/2004, PW1, Dorcas Mueni Mutunga and her husband PW2, Joseph Mutunga Munee were asleep in their house within Makutano Location, Katangi Division of Machakos District when robbers struck at about 1.00 a.m. PW1 initially heard her dogs barking and when she peeped through a window, she saw two men standing in the dark and one flashed a torch at her and ordered her to open up. She started screaming and when they started breaking the window grill, she decided to open the door and they entered the house. She ran back to her bedroom and the robbers followed. One slapped her and demanded that she gives them money. She pointed them to her purse which had Kshs.36,000/= in cash and as one took the money, another hit her with a panga. When they demanded her mobile phone, she pointed it to them and the same was taken away. It was of the Siemens make. The robbers left and neighbours came to her rescue and tried to follow the robbers. The following day, PW1 was informed that one of the robbers had been arrested. Regarding the issue of identification, PW1 stated as follows:-

"**Next day I heard that they had arrested one of the thieves. I have never seen the accused in my life. I did not recognize any of the robbers…"**

6. PW2 on his part woke up when the dogs started barking and when PW1 opened the door for the robbers to enter, jumped out through a window, fell down, got up and started running. After 100 metres, a robber who was pursuing him caught up with him, hit him with a metal bar, forced him back to the house and on the way in, he met part of the gang going away from his house. Later neighbours came to his aid and on checking, he found that Kshs.36,000/= had been taken away together with a mobile phone make Siemens. PW2 reported the incident at Ikeson Police Post and he returned home with police officers. When he received information that the Appellant had been arrested, he went to Wamunyu Police Station where he identified his Siemens mobile phone allegedly recovered from the Appellant. His further evidence was as follows:-

"**I followed them (his neighbours) to Wamunyu and found the accused and when I saw him I realized he was the one who had ran after me and hit me with a metal bar on the neck. I had clearly seen him after he hit me and started leading me back to the house; my mobile phone was**

recovered from the accused's home.

I had not known him before…"

When PW2 was cross-examined he stated inter-alia that:

"**I saw the accused when he held me from the back. When I was hit I lost consciousness for about 5 minutes in a maize plantation.**

I did not state in my statement that I had recognized the person because I did not know his family."

7. PW3, Kitolo Mbae and PW4, Japheth Kilonzo were the neighbours who reacted to PW1's screams and when they approached the home, they found footmarks which led away from the home. They tracked them and the trail led them to the accused's home. According to PW3, the shoe tracks matched the shoe marks on the accused's shoes which were wet, according to PW4.

8. When PW4 was cross-examined, he stated as follows in part:

"**The shoe prints that we followed were very clear. There were many houses at the home of the accused."**

9. PW5, No. 50405 P.C. Jamhuri Katana, stated that on 29/12/2004 at 11.00 a.m. he was at Masii Police Station and he was asked to go and collect "**some suspects"** from Katangi Police Station and one of them was the Appellant. He said that the Appellant had an injured right hand and he was with another suspect who was later released. PW5 and one Cpl. Kimathi went to the scene of the robbery, noted the cut window grills and then proceeded to the Appellant's home where a search was conducted.

10. Regarding the alleged recovery of the mobile phone and shoes, PW5 stated as follows:-

"**The other police officers searched the house and recovered a mobile phone Siemen. This is the mobile phone (MFI P1 identified). These Safari boots were recovered from the accused because there were shoe marks of Safari boots. This is the pair of shoes (MFI P2)".**

11. PW 5 in cross-examination stated as follows:-

"**I did not search the accused's house. I only saw these pair of boots being brought to the vehicle. I saw the officers emerge from the house with these Safari boots. The accused has his own homestead."**

12. When the Appellant was put on his defence, he said that on 28/12/2004, he went to Wamunyu Market to sell a cow belonging to one Kyalo Mukeku. He failed to get a buyer and so he returned home at 5 p.m. He then proceeded to a bar within Kaiani market and drunk beer until 10.00 p.m together with one Mutiso, Musyoka and one Mwololo. He then went home and slept but was woken up at 1.00 a.m by some noise in the compound and when he went out, he met his father who told him that same cattle had bolted. He rounded them up and went back to sleep only to be woken up at 6.00 a.m. and attacked by a crowd of people. He was cut with a panga and fell unconscious. Later, he was escorted to Wamunyu Police Station and then to Wamunyu Dispensary for treatment and thereafter he was locked up at Katangi Police Post. Later, he was taken to his house where a search was conducted and his evidence was that the police "**never recovered anything."**

13. The Appellant denied knowing PW1, PW2 or their home and he denied knowledge of the incident that led to his arrest.

14. DW2, Benedict Ngei Mutiso, a neighbour of the Appellant confirmed that he was with the Appellant much of the day until 10.30 p.m. when they parted ways on the material day and night. The next day at 7.30 a.m, he heard screams and when he went out he found the Appellant bleeding and tied on

the head and hand. He escorted him to Wamunyu Police Station.

15. DW3, Kivongo Kisilu, father of the Appellant stated that the latter returned home on the material night at 10 p.m. Someone released his cows from their tethers and DW3 woke up the Appellant and together they returned the cattle to their pen and went to sleep. In the morning, he said, some people came looking for the Appellant and he pointed his house to them. When they happened upon him, they attacked him and DW3 had to intervene. When one of the attackers said that the Appellant had killed someone, DW3 lost consciousness and only came to at 2 p.m. He was present, he added, when police officers came to search the Appellant's house and according to him, nothing was recovered.

16. At the end of the trial the learned trial magistrate found the Appellant guilty on the main count of robbery with violence and sentenced him to death hence this Appeal.

17. Our analysis of the evidence and our decision thereafter is as follows:-

There cannot be any doubt that PW1 and PW2 were attacked by robbers on the material night and that kshs.36,000/= and a mobile phone was stolen by the robbers who were certainly more than one from the evidence of the two witnesses. The husband and wife victims were also hit with pangas and although no medical evidence was tendered, the fact remains that the circumstances of the incident put together would show that the offence of robbery with violence was committed. We say so because in **Muthike vs R (2002) 1 KLR 745** and as correctly pointed out by the trial court, where a robbery is committed by more than one person, even without the element of violence being strictly proved, the ingredients of the offence in general would still have been satisfied.

18. The question that we must address is this; was the Appellant one of the robbers and was the charge against him proved beyond reasonable doubt? We note that the only evidence that connected the Appellant to the robbery was made up of three distinct facts;

i. the purported identification by PW2;

ii. the footmarks that led PW3 and PW4 to the Appellant's home;

iii. the recovery of the stolen mobile phone at the Appellant's home.

19. Regarding the purported identification of the Appellant, our considered view is that PW1's evidence in that regard was not conclusive. We say so because he was the sole identifying witness and it is noted that he had not seen the Appellant before and only said that when he saw him after arrest, he realized that it was he that attacked him and forced him back to the house. However, a close look at the circumstances of identification would create doubts in our minds. If the Appellant was chasing PW2 in the dark, hit him on the neck with a panga and PW2 lost consciousness for 5 minutes, how could PW2 see the Appellant? Further, when he came to and he was forced to go back to the house, how and in what light did he see the Appellant? PW1 said that there was moonlight but the robbers were using torches. Did it mean that the moonlight was not bright enough and that the torch light was necessary? All these questions would show that we cannot in all fairness admit the evidence of identification as being certain and beyond doubt. As was said in **Roria vs R (1967) EA 583;**

"**A conviction resting entirely on identity invariably causes a degree of uneasiness, ……..**

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification. In Abdala Bin Wendo and Another v. R. (1) this court reversed the finding of the trial judge on a question of identification and said this (20 E.A.C.A. at p. 168)

"***Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a***

single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

20. Having been appropriately guided was there other evidence? To answer the question we should now turn to the evidence of footmarks leading to the Appellant's home. That evidence may well have been useful had the Appellant's shoes been properly produced in evidence and the trackers were otherwise consistent. However, the shoes were marked for identification and when the Investigating Officer failed to testify, the evidence became worthless. We say this because PW3 and PW4 accepted that the homestead where the Appellant was found had many houses. They never said that the footmarks led them to only one house in the homestead. How did they pick on the Appellant and no other person? Safari boots are in any event common shoes. Were the Appellant's shoes the only one of the kind in the homestead? No evidence to exclude other suspects was called and the Investigating Officer failed to tie up that loose end in the evidence. Our view therefore is that the evidence of the footmarks and that of the shoes ended up being purely speculative and PW5 who said he was present when the shoes were recovered had little help to give because he was not sure from where and how the shoes were recovered. Further, PW3 and PW4 were unable to say conclusive that the footmarks led them directly to the Appellant. DW3 in fact said that the said persons only asked for the Appellant and therefore the issue of footmarks being the pointer to him ends up being a doubtful piece of evidence.

21. On the recovery of the mobile phone, again the evidence would have been useful had the person who recovered it, testified. He did not and neither PW3, PW4 nor PW5 had useful evidence to give on the subject. Worse of all, the mobile phone was not produced in evidence to authenticate its recovery. Again the evidence ended up being wholly unhelpful.

22. We should say something about the Appellant's defence as contrasted with the evidence against him. He raised a strong alibi defence that he could not have been at the scene at the material time. His evidence about his whereabouts throughout the day and the night was amply corroborated by DW2 and DW3. We think that the defence was neither an afterthought nor a mere denial of the offence. That evidence was unshaken when the prosecutor cross-examined all three witnesses for the defence. Although as was said in **Karanja vs R (1983) KLR 501,** an alibi defence must be raised in the earliest, in this case, we think that it was generally well raised at the appropriate time noting that the Appellant offered all his witnesses for cross-examination. The State failed to dislodge his alibi defence and we uphold it.

23. On the whole therefore, we do not have any hesitation in holding that the charge of robbery with violence was not proved beyond reasonable doubt in this case. Mr Wang'ondu for the Republic conceded the Appeal and we have shown why. The Appeal is therefore allowed.

24. The conviction is quashed, the sentence set aside and the Appellant shall be set at liberty unless he is otherwise lawfully held.

25. Orders accordingly.

Dated and delivered at Machakos this 21st day of April 2008.

J.B OJWANG'

JUDGE

ISAAC LENAOLA

JUDGE