REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KITALE

Criminal Appeal 63 of 2005

JOHN MULINGE MUTISO.....1ST APPELLANT

BARNABAS SHOKOLO.....2ND APPELLANT

ELIUD ERAGAI LOCHODO.....3RD APPELLANT

PETER EWOI LOSIKE.....4TH APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal from the original conviction and sentence of H.M. Wandere – AG. SRM. in Criminal Case No. 5643/04 delivered on 1/7/2005 at Kitale.)

J U D G M E N T.

The appellants, JOHN MULINGE MUTISO, BARNABAS SHOKOLO, ELIUD ERAGAI LOCHODO and PETER EWOI LOSIKE, were all convicted for robbery contrary to section 296 (1) of the Penal Code, and then sentenced to imprisonment for five years each.

Following their convictions and sentence, the appellants lodged separate appeals, challenging their convictions. At the hearing as the said four appeals, the same were consolidated for hearing and determination.

In summary, the issues raised by the appellants touched on the following;

(i) Inconsistencies regarding the date and time of the alleged robbery;

(ii) Contradictions and inconsistencies in the testimony of the prosecution witnesses;

(iii) Identification;

(iv) Lack of corroboration;

(v) Failure to call essential witnesses; and

(vi) The fact that the evidence did not support the charge.

Being a first appellate court, I am obliged to re-evaluate all the evidence on record, and to derive therefrom my own conclusions whilst bearing in mind that I did not have the opportunity of observing the witnesses and the appellants as they testified.

I will now undertake the task of re-evaluating the evidence and the judgment of the trial court, while bearing in mind the submissions of each of the four appellants.

The particulars set out in the charge sheet were to the effect that the robbery in issue took place on 29th August, 2004, when the appellants jointly robbed PETER NAMENYAN of Ksh. 2,000/= and a "Sony" music system valued at Ksh. 25,000/=. The appellants are said to have threatened to use actual violence of Peter Namenyan at or immediately before or immediately after the robbery.

PW1, JULIUS KIPROTICH, testified that he was at the bar counter selling. PW1 was the manager of the bar called "Small Joint". It was PW1's evidence that the time was about midnight when one customer called him to go outside the counter for the payment for a soda. He said that the customer was the 1st appellant herein. However, the said customer later refused to pay for the soda.

The witness testified that he locked up the bar and went to sleep some 50 meters from the bar. Later, at about 2.00 a.m. PW2, Gladys Nanjala Misiko, who lives within the compound wherein the bar is located, noticed that the main gate was open.

According to the evidence of PW2, the watchman was not at the scene at that moment. However, within a short period of time, the watchman called out her name and told her that things had been stolen. After the watchman, PETER NAMENYAN, who was PW3, had told PW2 about the theft, PW3 ran away.

PW2 then called a person named "Kuka" who was sleeping in a room within the compound. Using a torch Kuka was able to see that the front door lock was broken. Kuka then called the manager, JULIUS KIPROTICH, (who was PW1).

After PW1 arrived, he together with PW2 and Kuka entered the bar, where they found that the counter lock had been broken, and a radio and speakers were missing.

Pausing there for a moment, I find that there was no inconsistency about the date of the robbery. I say so because PW1 had told the court about incidents which happened on the night of 28th August, 2004. Those incidents included the refusal of the 1st appellant to pay for a soda which he had consumed. That testimony served to place the 1st appellant at the scene of crime as at between 11.00 p.m. and midnight. Thereafter, PW1 went to sleep.

He was only awoken at about 2.00 a.m. on the morning of 29th August, 2004, when the robbery had taken place. Clearly, therefore, both PW1 and PW3 are in agreement that the robbery happened after midnight of 28th august, 2004, which would place the incident on 29th August, 2004.

The only witness who actually saw the robbers was PW3, and he said that that was at 2.00 a.m. on 29th August, 2004. In the circumstances, there are no inconsistencies about either the date or the time of the incident.

According to both PW1 and PW2, the only role played by Kuka was to call PW1, after Kuka was woken up by PW2. In the circumstances, I find that the said Kuka was not an essential witness, as asserted by the appellants. I fail to see how the failure to have him testify could have lessened the prosecution case. I also did not find any kind of adverse inference that could be drawn against the prosecution, for having not called Kuka as a witness.

PW1 testified that the watchman (PW3) had told him that he had identified one of the attackers. In particular, PW3 said that he had identified the 1st appellant. That information was given to PW1 at 2.00

p.m. By that hour, the 1st appellant had already been in police custody for about two hours, as PW1 said that the said appellant was arrested at 12.00 noon. That therefore bags the question as to what had led the police to arrest the 1st appellant.

The answer to that question is to be found in PW3's answer when he was being cross-examined by the 2nd appellant herein. PW3 said that he had made a report to the police in the morning. And during cross examination by the 3rd appellant, PW3 said that he had given to the police, the names of the robbers.

PW6, PC GEORGE WAMAI, made it clear that he arrested the 1st and 4th appellants because the two of them had been mentioned by PW3. This is what he said;

"I knew the first and second accused prior to the incident. So when they were mentioned by the watchman I was able to pursue and arrest them."

The 4th appellant was right to have submitted that PW1 did not see the robbers, as it was only PW3 who saw the robbers.

As PW3 was later arrested by police, the appellants submitted that PW3 must have been a suspect. Indeed, the appellants said that PW3 should have been charged with the offence, as he ran away after reporting the robbery to PW2.

PW3 confirms having run away to Suwerwa. He attributes his action to the shock and confusion that befell him due to the robbery. His said shock and confusion was due to the fear he had, that he was going to die. The robbers had sharp knives, and they said that they would kill him.

First, the robbers put him inside a drum which had cold water. The 1st appellant wanted to push his head inside the water, but the others told him not to do so.

After about 10 minutes, PW3 was removed from the drum, and taken some 200 meters away, to a place called "Kwa Namanda". Whilst there, the robbers covered PW3's head.

As the witness had recognized the robbers, even earlier that evening, as they stood talking near the toilet, I believe that he had every reason to fear for his life, hence the shock. But then, the robbers did not kill him. In those circumstances, PW3's confusion and shock was understandable.

However, as the learned trial magistrate held, the witness had already recognized the robbers before the onset of the shock and confusion. He had seen them and talked to them earlier that evening. He also saw them when they held him and forced him into the water drum. His face was only covered with a hat thereafter. But by that time, PW3 had already identified the robbers.

Which of the robbers did PW3 identify?

According to PW1, the only robber whom PW3 identified was the 1st appellant. But PW6 said that PW3 had mentioned the 1st and 4th appellants. As PW6 arrested those two appellants after they were mentioned by PW3, there is a rational explanation for their arrest. However, as there was no explanation for the arrest of the 2nd and 3rd appellants, the court is unable to ascertain who arrested them and why. That is not to say that the said appellants were not identified by PW3.

From the testimony of PW3, whom the learned trial magistrate assessed as being stable and firm, there is no doubt that he did identify the said appellants. The only missing link in the chain is Sgt. Barasa, the investigating officer and the Occurrence Book. I so hold, not because it is imperative for investigating officers to always testify before an accused person can be convicted, but because in this case, it is not known who arrested the 2nd and 3rd appellants, nor the reasons which led to their arrest. Perhaps if the Occurrence Book had been adduced in evidence, and if it showed that PW3 had given the names of those

two appellants, the appropriate nexus between the witness and the arrest of the two would have been established.

The appellants submitted that the evidence adduced did not support the charge, as the said evidence showed that there had been a break-in into the bar, and a theft therefrom. Such an act is said not to constitute robbery.

Robbery is defined as follows at section 295 of the Penal Code;

"***Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."***

In this case, the robbers used actual violence to the padlocks on the main door to the bar and to the counter. PW1 had locked both the door and the counter before he went off to sleep. After the robbery, both the door and the counter locks had been cut.

Secondly, the robbers had threatened to use actual violence on PW3, using the sharp knives which they were carrying.

Thirdly, the said robbers tied up the watchman and forced him into a water drum.

By doing all those things, the robbers were using or threatening to use actual violence to property and to the watchman at and immediately before and immediately after stealing the music system, speakers and cash. That constituted the offence of robbery.

As regards the recovery of the music system, the money container and the two speakers, the appellants submitted that the same were not found in their possession. The said items were recovered in a maize plantation, which did not belong to any of the appellants.

Whilst that may be factually accurate, it is important to bear in mind the fact that there is no legal requirement for an accused person to be found in possession of stolen items before he can be convicted.

In fact, even if no recovery is made, an accused could still be convicted provided there was sufficient evidence to prove the case against him beyond any reasonable doubt. It is for that reason that the appellants were found guilty of robbery of, inter alia, Ksh. 2,000/= in cash, notwithstanding the non-recovery of the cash.

The second appellant submitted that he could not have been talking in the Turkana language, as he is a Kikuyu, who did not speak nor understand the Turkana language. However, the appellant did not take up that issue when he was cross-examining PW3, so that the court could have made a finding thereon. This court cannot therefore take the 2nd appellant's word in that respect, as constituting the gospel truth.

In the final analysis, I uphold the conviction and sentence against the 1st and 4th appellants. However, the conviction against the 2nd and 3rd appellants is quashed and the sentences against them set aside. In doing so, I wish to emphasize that the two appellants need to consider themselves to be very lucky, only because there was no explanation for their arrest.

Dated and Delivered at Kitale, this 25th day of September, 2007.

FRED A. OCHIENG.

JUDGE.