



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
(CORAM: OJWANG & DULU, JJ.)
CRIMINAL APPEAL NO. 525 OF 2005

BETWEEN

FREDRICK KIVISU LUMESI..... APPELLANT

-AND-

REPUBLIC.....RESPONDENT

***(An appeal from the Judgement of Senior Resident Magistrate Ms. Muchira dated 7th November, 2005
in Criminal Case No. 5725 of 2004 at Kibera Law Courts)***

JUDGEMENT OF THE COURT

The appellant, ***Fredrick Kivisu Lumesi***, was charged together with one ***Samson Odongo Achieng***, with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63). The particulars were that the accused persons in the matter, on 17th July, 2004 at Kibera Mashimoni, in Nairobi, jointly with others not before the Court and while armed with dangerous or offensive weapons, namely *pangas*, robbed ***Maurice Alulu Alulu*** of one T.V. set, *Phillips* by make, one cellphone, *Sony Ericsson* by make, a sim card, speakers, make *Simidon*, one DVD, make *Miyota*, and cash in the sum of Kshs.2000/=, and at, or immediately before, or immediately after the time of such robbery, used personal violence on the said ***Maurice Alulu Alulu***.

In a vital part of her judgement, the learned Senior Resident Magistrate found as follows:

“...I find [PW1’s] testimony on accused 1...corroborated by so many other material facts that leave no doubts in my mind...that accused 1 was indeed [the one who robbed] PW1 on the night of 17th July, 2004. I find accused 1 guilty as charged on count 1, and I convict him.”

The trial Court sentenced the appellant herein to death, in accordance with the law.

In his petition of appeal, the appellant contented that the trial Court had erred in fact and in law, by convicting him, whereas he had not been properly identified as the culprit; that he had wrongly been convicted on the basis of exhibits which were not recovered from his house; that the trial Court had not resolved contradictions in the evidence, in his favour; that proof beyond reasonable doubt had not been achieved; and that the trial Court had wrongly rejected his evidence.

Learned State Counsel **Ms. Gakobo** contested the appeal, and urged that the Court do uphold the conviction, and affirm sentence.

Ms. Gakobo submitted that, even though the offence took place at 1.00 a.m., there had been moonlight. When the robbers attacked the complainant, he chased three of them, and cut one in the back; and this forced the particular robber to turn, enabling PW1 to recognise him as the appellant. PW1 had said he was familiar with the appellant; and his evidence of recognition had not been challenged by the appellant. PW1 had reported to the Police that he did recognise the appellant, and he led Police officers to the house of the appellant, where the appellant was arrested. While in the appellant's house, the Police officers recovered PW1's speaker which had been stolen; they also recovered a blood-stained *panga* which the appellant had used to cut PW1.

Learned counsel submitted that, apart from the evidence of recognition which was given against the appellant, the recovered speaker was evidence of recently-stolen property – recovered barely hours after the offence took place. This evidence of recovery, even on its own, counsel urged, was sufficient proof, for a conviction for robbery with violence, under s.296(2) of the Penal Code (Cap.63).

During the hearing in the trial Court, the learned Magistrate noted the scars on the appellant's back; PW1 had testified that during the robbery, he had fought the robbers, and had inflicted cuts on the appellant's back.

The appellant had also challenged the trial Court's decision in relation to the manner in which Court language was recorded in the proceedings. It was contended that the record did not show whether or not PW1 had been sworn when he testified, and that the language used at the time of PW1's testimony was not shown.

Learned counsel made reference to the original hand-written proceedings; and these showed clearly that PW1 had been sworn; had spoken in Kiswahili, and it was equally clear that the appellant had followed the testimonies and was not prejudiced.

On the confirmed evidence that the complainant had been attacked by three robbers who, besides, were armed with dangerous weapons, learned counsel submitted that the terms of s.296(2) of the Penal Code, for aptness for conviction on a charge of robbery with violence, were satisfied.

But, in addition, the prosecution had produced medical evidence, which showed that the complainant had been subjected to physical harm, during the robbery.

Ms. Gakobo submitted that the defence case had been duly considered by the trial Court, but found to be of no merit.

Consequently, learned counsel urged that the prosecution had established their case beyond reasonable doubt, and thus the appeal should be dismissed.

We have carefully considered the appellant's case, especially as contained in his written submissions, together with the entire evidence adduced before the trial Court, as well as the submissions of the respondent's counsel. We find such concrete proof of the appellant's participation in the robbery case, as cannot be wished away, and as goes a-begging, notwithstanding the appellant's defences. The complainant says he had confronted the robbers, and cut the back of the appellant; and the scars are there in the appellant's back. The complainant's effects were stolen; and they were found, within a most-recent time-frame, in the possession of the appellant herein. Such evidence, already, is valid proof in law, that the appellant was one of the thieves. But, still more to the point, the complainant recognised the appellant as one of the robbers. There is, we do hold, proof beyond reasonable doubt, that the appellant was the thief and robber, on the material occasion.

We dismiss the appellant's appeal, uphold his conviction, and affirm sentence.

Orders accordingly.

DATED and DELIVERED at Nairobi this 1st day of November, 2007.

J.B. OJWANG

G. A. DULU

JUDGE

JUDGE

Coram: Ojwang & Dulu, JJ.

Court Clerks: Tabitha Wanjiku & Erick

For the Respondent: Ms. Gakobo

Appellant in person