



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL 158 OF 2002
(Arising from Original Bungoma S.P.M. Criminal case no. 1695 of 2001)

JAMES MAINA NDOMBI.....APPELLANT

VS

REPUBLIC.....RESPONDENT

J U D G M E N T

James Maina Ndombi, the appellant herein and one Asman Mohamed Vigere were jointly tried for the offence of robbery contrary to Section 296(1) of the Penal Code. The particulars whereof were that on the 7th day of August 2001 at Mjini Estate of Bungoma township, Bungoma District within the Western Province jointly with others not before court robbed Benard Ouma of one T.V set make Lanka Model L.C 828 B/W valued at Ksh.9,000/= and at or immediately before or after the time of such robbery threatened to use actual violence to the said Bernard Ouma. The duo were convicted and each sentenced to serve 7 years imprisonment. This provoked the filing of this appeal.

On appeal the appellant put forward two main grounds of appeal. Firstly, that the evidence tendered by the prosecution could not sustain a conviction. Secondly, that he was not properly identified. Before considering each of these grounds in detail I will set out first a brief summary of the case before the trial court.

The facts leading to this appeal are that on the 7th day of August 2001 at about 8.00 p.m., Bernard Ouma Juma (PW 1) a mechanic cum electrician was at his house with Salim Ramadhan Zakayo (P.W.2) and P.W.1's wife watching T.V. when 4 people dressed in black clothes entered the house. The four strangers were said to be armed with pangas and rungu. One of them took away the T.V. after a brief struggle with the P.W. 1 and his companions. P.W 1 managed to cut Asman Mohammed Vigere on the left chick. He was arrested while undergoing treatment at Bungoma District Hospital on 8/8/2001. The appellant was arrested at a bus park as he attempted to board a bus. The trial magistrate came to the conclusion that the prosecution had proved its case to the standard of beyond reasonable doubt and proceeded to convict and sentence the appellant.

The first ground of appeal raised by the appellant is to the effect that the learned Senior Resident magistrate erred when he convicted him on the basis of evidence which were insufficient to sustain a conviction. The learned principal state counsel opposed the appeal on the basis that the evidence tendered sufficiently proved the case beyond reasonable doubt. It is trite law that this court being the first Appellate Court is entitled to reconsider and reevaluate the case before the trial court bearing in mind that it has no benefit of observing the demeanor of the witnesses. I have considered the submissions of the learned Principal State counsel on the ground put forward by the appellant. It is clear from the Judgment of the learned Senior Resident Magistrate that the appellant was convicted basically on the evidence of the complainant (P.W. 1) and P.W.2. These two witnesses, P.W. 1 and P.W2 were present in the house when the appellant and 3 other others allegedly robbed P.W1 of his T.V. he was watching. According to the evidence of Bernard Ouma Juma (P.W 1), the appellant and his accomplices were people whom he

knew very well. He said they lived in Mjini, Estate where he also resided. He said he was able to recognize them with the assistance of a lamp. P.W 1, further said he managed to cut Asman Mohammed Vigere being one of the robbers on the left chick. On his part, P.W 2 Salim Ramadhan Zakayo claimed he is the one who cut Asman Mohammed Vigere. P.W 2 said the appellant and his accomplices had covered their faces. P.W2 gave two versions of his story in relation to the appellant. He first claimed that he only knew Asman Mohammed Vigere as among the four people who entered P.W 1's house. Later he changed the story and said he knew the appellant before the robbery.

From the evidence of P.C Morris Osuru, it is clear that P.W 1 reported the robbery on 8th August 2001 at about 11.00 A.M. at Bungoma Police Station.

After a careful analysis and consideration of the evidence tendered in support of the charge, some questions have emerged unanswered. First, who between P.W 1 and P.W 2 inflicted a cut wound on Asman Mohammed Vigere? Why should the two key witnesses contradict each other over this issue? Even assuming that each of the duo inflicted the cut wound on Asman Mohammed Vigere, then what is the nexus between the wound and the offence the appellant was convicted for? The prosecution did not submit a medical report which could have given the age of the wound so as to establish when the injury was inflicted. This has left some doubt in my mind.

Secondly, were there favourable conditions for identification? The answer to this question will obviously determine the second ground of appeal. There was consensus in the evidence of P.W 1 and P.W 2 that the available light at the time of the robbery was that of a lantern lamp. The evidence tendered did not attempt to describe the intensity and proximity of that light vis-à-vis the position of the appellant. Further more, the evidence of P.W 2, shows that the appellant and his accomplices covered their faces to avoid being recognized. If the appellant indeed wore a musk over his face then how did P.W 1 and P.W 2 manage to recognize the appellant?

Thirdly, if indeed the appellant and his accomplices were persons known to reside within Mjini Estate why did the complainant wait for 15 hours to report to the police yet the robbery is said to have taken only 10 minutes?

In the final analysis I have come to the conclusion that there are too many questions which remained unanswered by the evidence received by the trial court. It means that the prosecution did not prove its case to the required standard of beyond reasonable doubt. I have also formed the opinion that the evidence of P.W 1 and P.W. 2 contradicted each other in material respects which renders their evidence untrustworthy. Finally I am not satisfied that the appellant was properly identified.

The upshot therefore is that the appeal is allowed with the result that the conviction is quashed and the sentence set aside. The appellant is set free forthwith unless lawfully held.

DATED AND DELIVERED THIS 28th DAY OF October 2005

J.K. SERGON

JUDGE

In the presence of Mr. Onderi for the state.

NA for the appellant.