



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 231 of 2002

(From Original conviction (s) and Sentence (s) in Criminal Case No. 36 of 2002 of the Senior Resident Magistrate's Court at Machakos (S.M. Kibunja S R M)

JACKSON MUSYOKI MALITI APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

Criminal Appeal 232 of 2002

FESTUS KAKUNGU KATUMO APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G E M E N T

The appellant was jointly charged with another not before the court, with one count of Robbery with Violence Contrary to Section 296 (2) of the Penal Code and a second count of attempted robbery with violence Contrary to Section 297 (2) of the Penal Code. The two were acquitted of the first count of robbery with violence but convicted of the attempted robbery. They both appeal against the conviction and sentence. The record shows that the other appellant who had appealed to this court under Criminal Appeal No. 232 of 2002, died in prison and his appeal was abated.

The facts of the case as we understand them, are that the complainants in the lower court, were separately, walking home from Mlolongo market on the evening of 29/12/2001 at about 8.00 p.m. The first complainant, Mwini Muange who testified as PW1, was attacked by three people who removed his two wrist watches he was wearing and Kshs.150/= from his pocket. They then tied him with a rope and left him under the guard of one of the attackers. After 10 minutes the first complainant heard a scream in another area nearby. The assailant guarding the complainant then ran away. The complainant claimed that he had recognized two of the attackers and that the appellant in this case was one of them. He claimed to have recognized them through moonlight, and saw that one of the attackers had a panga. The complainant was soon rescued by one Baba Ciru who was not called to testify. The two of them soon met Cockson Mutua, PW2 who reported to them that he had himself been stabbed by some people he knew. The complainants further testified that they went to where the appellants used to stand and found them there before they informed the village elder, and later the Assistant Chief, who arrested them. The 2nd complainant who testified as PW2, Cockson Kisilu Mutua, also stated that on 29/12/2001, he was walking

to Kwa Mbemba at 8.00 p.m when he met two people whom he knew, before as the two appellants. That the appellant cut the complainant with a panga on the head as a result of which the complainant screamed, thereby attracting villagers who came to his rescue. That the complainant in company of others, went to the house of the appellant but did not find him there. That appellant soon arrived as they waited for him. Thereafter the appellant and his co-appellant (now deceased) were arrested and later charged with the two offences. On cross-examination the complainant had asserted that he went to hospital for treatment but was not admitted. No P3 was produced in evidence by him either. The complainant also admitted that he was not robbed by the attackers of anything nor did he suggest that his attackers attempted to rob him during the attack.

On being placed in his own defence, the appellant had denied the offence. He narrated how that evening when the attack occurred, he had left his wife in the house to go and buy paraffin oil for her and had returned home with it. He had not left the house until the Assistant Chief arrested him after 9.00 p.m that evening. He called his wife to support his alibi defence.

The honourable trial magistrate after considering all the evidence on the record, had come to the conclusion that the complainant had positively identified the appellant through the moonlight and electricity light which was showing at the place of attack. Effectively therefore, the honourable trial magistrate believed the evidence of the complainant in respect to the second count of attempted robbery.

When this appeal came up for hearing, the State Counsel could not support the conviction and the sentence. Mr O'Mirera, believed that there was no evidence to show that the appellant was in anyway linked with the offence in the first count which took place almost at the same time with the second offence. He also said that there was no evidence to prove the offence of attempted robbery. He noted that the complainant's original complaint was robbery but that he later denied having been robbed at all. He also pointed out that the conditions for identification of the attackers by the complainant were not favourable as he raised the issue of electricity only during re-examination when the appellant could not respond to it. Mr O'Mirera, also stated that the relevant complainant did not at any stage give out the names of his attackers despite the fact that he claimed he knew them well before the incident. And finally, Mr O'Mirera, argued that the honourable magistrate failed to properly consider the appellant's alibi.

We have carefully considered the evidence on the record independently. There is no doubt that the conviction depended mainly on the identification of the appellant by the complainant. The complainant's testimony was that he saw and identified the appellant using moonlight and electricity light. There is no evidence as to the brightness or intensity of the moonlight used for identification nor did the trial court investigate the issue. It was important for the complainant, in our view, to remove any uncertainty as to whether or not the moonlight was sufficiently bright to enable him to properly identify the appellant. That he attempted to clear the uncertainty by introducing electricity light to the scene, did not really help the situation. He did not explain where the electricity originated, whether it was far or near from the spot of attack. The doubt arising from this omission in our view, cannot but be read in favour of the appellant. At the same time we find that even if such identification were positive, it would still be subjected to the now established test that the trial magistrate was under legal obligation to warn himself about the danger of relying on the evidence of a single identifying witness's evidence to convict. From the record, no such warning was applied since it must be expressly or impliedly made. It is our view therefore, that failure to apply this principle by the trial magistrate cannot be stated to have not prejudiced the appellant.

In addition to what we have stated above, we do agree with Mr O'Mirera, that there is no sufficient evidence on the record to prove the offence of attempted robbery. The complainant does not anywhere claim that those who attacked him demanded any property from him. All he said is that the person he believed to be the appellant cut him with a panga on the head. Indeed he added that the attackers did not rob him. Where then did trial court get the evidence of attempted robbery? The charge even erroneously stated that the appellant immediately after the time of such robbery used personal violence to the complainant when there was no robbery. The charge as well cannot in our view have been properly constructed in view of the fact that the violence meted out on the appellant did not come after any robbery or attempted robbery had been committed.

For the above reasons, we are in agreement with both counsels that the charge against the appellant was not proved. The conviction cannot be left to stand. It is quashed and the sentence of death is set aside. We order that the appellant be forthwith set at liberty from prison unless otherwise therein lawfully detained.

Dated and delivered at Machakos this 24th day of November 2005.

D.A ONYANCHA

JUDGE

J. LESIIT

JUDGE