REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO.163 OF 2002

REPUBLIC ……..PROSECUTOR

VERSUS

JAMES MWANZIA MBEVI

JOSEPH NDUA MOSES…… APPELLANTS

CONSOLIDATED WITH

CRIMINAL APPEAL NO.162 OF 2002-09-12

REPUBLIC ……..PROSECUTOR

VERSUS

JOSEPH NDUA MOSES……APPELLANT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.53 OF 2002

REPUBLIC…….PRPSECUTPR

VERSUS

JAMES MWANZIA MBEVI……APPLICANT

JUDGEMENT

The appellants herein James Mwanzia Mbevi appellant in Criminal Appeal No.163/2002 and Joseph Nduva Moses appellant in Criminal Appeal No. 162/2002 were jointly charged in the lower court with the offence of Robbery contrary to section 296(1) of the Penal Code. They were tried by the lower court found guilty , convicted and sentenced to serve three years imprisonment, two strokes of the cane and to be subject to police supervision for a period of five years police supervision.

The appellants were aggrieved by those orders and they have appealed separately to this court through one counsel. The grounds of appeal are similar in all material particulars and these are that the learned magistrate erred both in law and fact in convicting and sentencing the appellants when the evidence before him was contradictory doubtful inadequate and therefore incapable of supporting a conviction, erred in both law and fact in failing to note that the alleged offence was alleged to have been committed at

7.30 p.m. and that evidence adduced by the prosecution on identification and or recognition was contradictory and free from doubt, erred in both law and fact in convicting and sentencing the appellant on the basis of a defective charge sheet, erred in both law and fact in failing to note that the case before him had not been investigated by either officer of the police or by any officer by law authorized to do so, that evidence of crucial importance had not been adduced in court by the prosecution and to acquit the appellant, erred in both law and fact in ignoring the defence evidence and proceeding to convict and sentence the appellant, that the sentence meted out is both excessive and unlawful. On that basis counsel urged the court to allow the appeals, quash the convictions and set aside the sentences and then set the appellants at liberty forthwith. The appeals were consolidated and heard together.

In her oral submissions in court counsel for the appellants submitted that the evidence before the lower court is contradictory, doubtful and inadequate to support the convictions, evidence of identification or recognition which was pivotal in the case was not satisfactory, the victim did not say at what stage he was grabbed whether he was on the bicycle cycling and if cycling at what speed he was going or if he was attacked while on the ground, the complainant did not say if the bicycle had any light or if he used any other light to see his attackers neither did he tell the court the state of the sky, that if it is true that as soon as he was grabbed from the bicycle he fell down unconscious then he did not explain how he came to identify which appellant hit him and who tore the pocket and stole the money there- from. An unconscious person cannot see who is doing what, the witness said that after he had been felled down, shirt torn and money removed the attackers fled and yet at the same time he says that when the vehicle came he was able to see the attackers with the help of the vehicle lights.

PW2 also said that he heard screams ran to the scene and then met two people fleeing and when he torched them and he recognized Mwanzia. This evidence was contradicted by PW2 himself when he also said that he was able to identify the attackers with the help of motor vehicle lights. PW2 did not say whether the attackers were facing him or facing away as they were fleeing, although a shirt was alleged to have been torn, it was not availed in court as an exhibit, there was contradiction from the evidence of PW1 and 2 as PW1 said there were passers by when PW2 said there were no passers by and if there were passers by why didn't they come to assist the complainant or come to court to testify, no reason was given as to why the driver of the vehicle whose lights were used to identify the assailants was not called to testify, further it was alleged that the robbery took place where there were kiosks on either side of the road and that there were always people around and yet none of these people came to the aid of the complainant when he screamed for help only to attract his own brothers to come to his help, it is their contention that the case was not investigated and the trial magistrate should have taken note of that, that the prosecution's case was not proved and so the appellants should have been acquitted at no case to answer stage and by calling them to defend themselves, it was tantamount to calling upon them to prove their innocence, the defence was ignored and lastly that the charge sheet did not state whether the offence was committed at night or during the day and this was fatal, lastly that the sentence was excessive, that they have made out a case to warrant the appeal being allowed in its entirety.

The state on the other hand supports the conviction because there was proper identification and recognition of the attackers. PW1 identified them because it was not very dark, he had known them for long as they were his neighbours at the time the incident took place, one could see and recognize a familiar face as it was not very dark, that further a motor vehicle came and he was able to see further with the help of the vehicle lights and this was further support of recognition, that PW3 was the arresting officer who arrested the appellants after they had been pointed out by the complainant to him, that the evidence of PW2 and 4 corroborate the evidence of PW1 and there is no contradiction, and there was no doubt, that the time of the offence is stated by the witnesses to have been 7.30 p.m. and omission to state so in the charge sheet is not fatal, that the defences had no probative value and they were rightly rejected by the learned trial magistrate and this court is urged to reject the same, that there was allegation by one of the appellants that he was attacked but he never reported and that was an afterthought.

In reply counsel for the appellant reiterated that they still maintain that the charge was not proved and the evidence of the witnesses cannot cure the fatal defects, they still maintain that since the case is cemented on recognition and identification then the time is of the essence and the same should have been stated, that PW3 said that the complainant pointed out the appellants as persons who had assaulted him and not

robbed him. The charge mentions violence to have been used on the complainant and yet no evidence was adduced to this effect, They still maintain that the appeal has high chances of success and the same should be allowed as prayed.

The findings of the learned trial magistrate are that the point for determination is whether the accused persons committed the offence or not. After assessing the evidence on the record, the learned trial magistrate was of the view that the prosecution had proved its case beyond reasonable doubt because on the evidence as it stood he was satisfied that the complainant was robbed of some amount of money and a wrist watch on the material day and time, that the witnesses gave credible evidence and they were not shaken, both accused and PW4 admit that PW1 found them on their way home, that PW1 was on a bicycle he rang a bell and then a scuffle took place between PW1 and one of them and this corroborates the prosecution's evidence in some material particulars. Both PW1, 2 and 4 were able to recognize two of the culprits. It was early in the evening and PW4 said that it was not very dark and according to PW4 there were still ample light. This proves that PW1, 2 and 4 were able to see and recognize the accused persons and were also assisted by torch light and headlights of a vehicle. That he rejects the evidence of alibi adduced on behalf of the second accused as incredible. That there was overwhelming evidence to prove that he was with the first accused when the offence was committed. Even PW4 admitted under cross-examination that accused 2 arrived home at about 7.00 p.m. when they also arrived. This proves that he was not away from the scene of crime at the time when the offence was committed, that the offence charged is one of simple robbery where the court does not require medical evidence in order to convict.

On the basis of the foregoing the learned trial magistrate found the case proved beyond reasonable doubt and convicted the appellants accordingly.

I have considered these findings in the light of the evidence adduced and I find that the evidence of PW1 is that he was cycling home and on the way he saw three people walking in the middle of the road. He does not however state whether these people were facing him or facing the other direction when he reached them is when they grabbed, kicked him, threw the bicycle and he fell down unconscious. He does not say for how long he was unconscious. He then saw the second accused grab his shirt, tore the pocket, took Kshs.600.00 and a wristwatch and they fled. It is not indicated in which direction they fled. Then PW1 adds that a vehicle came and with the help of the vehicle's lights he was able to recognize the assailants. I therefore, agree with the contention of the appellants' counsel that if the offence was sudden and then it is only possible that complainant recognized the attackers before they grabbed him, if we take it that it was not very dark if these people had been facing him as he approached them. Further if we take it that he fell down unconscious and the attackers fled as soon as they had robbed him then it was necessary for him to say for how long he was unconscious and after how long the vehicle came to shine lights. I agree that PW1's evidence was a bit confused. In cross-examination he stated that when the vehicle stopped accuseds were running away facing their home direction and were not facing him. He does not say that he recognized them from the back and it follows that the vehicle lights did not assist PW1 in the recognition of the assailants.

In cross-examination PW1 admitted that he had complained to the father of the appellants that his sons had attacked him. There was no mention of him having been robbed. He adds that he screamed after he had been hit and his brothers came to his aid. PW2 heard screams and on reaching the scene he saw two men fleeing and on torching them he recognized the second accused.

A motor vehicle came and its lights enabled PW2 to see accused one. PW2 knew them as the sons of mzee. PW2's evidence shows that by the time the vehicle arrived the attackers were already fleeing and so PW1 could not have been enabled by vehicle lights to identify them. Once again PW2 does not say the direction the vehicle emerged from in relation to the direction the men were fleeing to and how far they were from the road. Since they were fleeing from the scene PW2 was convinced that they were the attackers.

When cross-examined he maintained that he stated he met with accused two and another fleeing. He torched them and he recognized accused 2.

PW3 arrested the accused persons following a complaint of assault.

PW4 says he heard screams of PW1 and when they ran there they met with two people fleeing and PW2 flashed a torch at them and then he recognized the second accused and on torching them is when they ran off into a bush and then he says that when the vehicle came it showed lights and he saw accused one holding the www.kenyalawreports.or.ke 11 complainant and after he was recognized is when he ran away. The court's observation on this is that he could not have met the two running and on torching them they turn into the bush and yet at the same time be holding PW1 and let go of him and disappear when the vehicle appears with lights.

The defence of first accused Joseph Nduva is that on the way home on that date one of their group a cousin was set upon by PW1 because he had refused to give way when he PW1 rang the bell. First accused said he was not happy when he found PW1 assaulting Mutisya Moses but did nothing and did not intervene. The defence of the second accused is that he was never at the scene and never encountered PW1 on the way home.

DW4 confirmed that on the material day they were heading home and then PW1 came from behind on a bicycle and he complained that DW4 had not given way and he grabbed DW4 and started beating him up. The first accused asked why DW4 was being assaulted by PW1. It is DW4's evidence that they never assaulted the complainant. First accused intervened and then PW1 took his bicycle and cycled away. He DW4 says it was still light and one could see properly. He denied the suggestion that PW1 was assaulted and robbed. They denied seeing any vehicle at the scene.

DW5 confirmed the defence evidence that accused two had gone to Nairobi and he was not at the scene. DW6 the area assistant chief received the report of assault of PW1 by the accuseds and their brothers.

The court's assessment of the evidence on the record in the light of the findings of the learned trial magistrate and submissions of both counsels is that it is correct that PW1 and first accused and DW4 met on that day. There is no dispute that he was cycling. It is correctly stated by him that the people were in the middle of the road and they refused to give way. According to him and his witnesses they grabbed him and then beat him up and robbed of the items stated. This issue of robbery is not borne out from the evidence. This is because from the evidence of PW1 himself when he met the father of the accused persons, he complained to have been assaulted by his sons. The complaint to PW3 was that he had been assaulted. The complaint DW6 received from the O.C.S was one of assault.

The evidence of the defence is that DW4 was assaulted by PW1 because he refused to give way to his bicycle. They claim that they never did anything to PW1. The court's view is that the first accused and DW4 were brothers and human ingenuity could not allow them just stand and watch one of their own being assaulted and then they just stand and look on. A normal reaction would be for them to hit back and I have no doubt this is what happened. It was a case of assault as this is what was reported to the authorities. The issue of a robbery was an invention in view of the contradictions noted in the prosecution's evidence.

The last issue to be dealt with is the participation in the crime of the second accused. His defence is one of alibi and he was supported by the co-accuseds and other defence witnesses. The law requires that it be considered in totality against the prosecution's case. When this is done I find that it is on record that parties knew each other as neighbours. It was not very dark as confirmed by DW4 and one could see each other. PW1 had no reason to fabricate a charge against second accused and leave out DW4. I find that second accused was at the scene and so the defence of alibi has been ousted.

In the premises I find that the offence of robbery is not proved. The offence disclosed and the one which formed the basis of complaint was an assault. There were no medical documents to confirm the gravity of the injuries. In the absence of that, what the court is left with is an offence of common assault contrary to section 250 of the Penal Code. I, therefore, allow the appeal on conviction in part, set aside the conviction for the offence of robbery and substitute them with a conviction for the lesser disclosed offence of common assault contrary to section 250 of the penal code.

As for sentence I do find that the same will also be interfered with. The maximum penalty is one year imprisonment. The appellants have been in prison since 16th July, 2002 and so they have served one month and two days. The sentence handed out is set aside and substituted with one of a fine of Kshs.1,000.00 each in default three months imprisonment.

Dated, read and delivered at Machakos this _____ Day of

_____2002.

R. NAMBUYE

JUDGE.