



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 54 OF 2019

MULI CHARLES MBITHI APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

(From the original judgment of Hon. J.O Magori (SPM) in Makindu Senior Principal Magistrate's Court PMCRC No. 118 of 2017 delivered on 17th December, 2018).

JUDGMENT

1. The Appellant was charged in the magistrates' court at Makindu with robbery with violence contrary to section 296(2) of the Penal Code. The particulars of offence were that on 4th February 2017 at Kiunduani market, Makindu Sub-county within Makueni county jointly with another not before court robbed George Onan Odongo of a gas cylinder valued at Kshs.6,000/= and at or immediately before the time of such robbery struck the said George Onan Odongo with Y-12 twisted bar.

2. He denied the charge. After a full trial he was convicted of the offence and sentenced to suffer death as provided by law.

3. Dissatisfied with the conviction and sentence, the Appellant has now come to this court on appeal through a petition of appeal filed by Elizabeth Isika advocate on the following grounds –

1) The learned trial magistrate erred in both law and fact by failing to observe that the identification process did not follow the law and identification parade was never conducted in accordance with the

provisions of Chapter 46 of the Police Standing Orders thus rendering serious miscarriage of justice upon the Appellant herein.

2) The learned magistrate erred in matters of law and fact while basing the Appellant's conviction on the basis of circumstantial evidence that did not meet the required legal threshold thus rendering prejudice.

3) The learned magistrate erred also in both law and fact by failing to observe properly that the prosecution side did not at all affirmatively prove its case against the Appellant beyond all reasonable doubt.

4) The investigation police preferred the charge against him without conducting any investigations to ascertain who was to be charged.

5) The sentence meted down against him is harsh and excessive in the circumstances of the case.

4. The appeal proceeded by filing written submissions and both the Appellant and the Director of Public Prosecutions filed their written submissions. The Appellant's counsel relied on several legal authorities. I have perused and considered the submissions on both sides.

5. I will start by reminding myself that this being a first appeal, I am required to re-evaluate all the evidence on record and come to my own independent conclusions and inferences – see **Okeno –vs- Republic (1972) E.A 32**.

6. I have re-evaluated the evidence on record. In establishing their case, the prosecution called 6 witnesses. On his part, the Appellant elected to give unsworn testimony.

7. The evidence of the prosecution witnesses was in summary that on 4th February 2017 at around midnight the Complainant Pw1 George

Onan Odongo was sleeping in his house with his wife Pw2 Catherine Pesa when they heard something fall from the detached kitchen.

8. Pw1 then walked out, switched the alarm and lit the outside security light and saw three people who had broken into the kitchen and were coming out with the gas cylinder. The gas cylinder was carried by a person whom he described as tall and dark and whom he knew and wore a cream t-shirt. He stated that he recognized the person who carried away the gas cylinder as a person he had known before. The gas cylinder was not recovered.

9. Pw2 Catherine Pesa the wife of Pw1 also came out of the house and witnessed the three robbers escaping. Pw3 Tabitha Mutuku Makau a neighbour heard screams and peeped through her window and saw three people escaping, one of whom was tall and whom he knew before, and who carried the gas cylinder.

10. A report was made to the Administration Police Camp and later to the Police, and the Complainant was treated at the hospital, and the medical report produced as exhibit by Pw5 Kennedy Mutua a Clinical Officer showed that the Complainant suffered an injury which was classified as harm.

11. When put on his defence, the Appellant gave unsworn testimony and stated that he used to sell miraa and added that he had no evidence to offer.

12. From the evidence on record in my view, that the robbery occurred on the material date is not disputed, that the Complainant Pw1 was injured during the incident and suffered an injury classified as harm was also not in dispute. The issue for my decision is whether the Appellant was identified as one of the three robbers.

13. I note that the Appellant in his written submissions cited many legal authorities. In particular he cited the **English case of R –vs- Turnbull & Others (1976) 2 ALL ER 549** in which the court stated as follows with regard to identification –

“... the Judge should direct the Jury to examine closely the circumstances in which the identification by a witness came to be made. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way?

14. Here in Kenya, in **Nzaro –vs- Republic (1991) KAR 212**, the Court of Appeal stated that evidence of identification by recognition at night must be watertight to justify a conviction.

15. In the present case, the Complainant Pw1 George Onan Odongo stated that he knew the Appellant before. The incident occurred around midnight. Though he did not say how close he reached to him, he described him as tall and dark, and wearing a cream coloured shirt. When the Complainant switched on the alarm and put on the security light, the Appellant rushed out from the kitchen carrying the gas cylinder and hit Pw1 with a metal bar injuring him. According to this witness also the Appellant was arrested wearing the t-shirt.

16. Pw2 Catherine Pesa the wife of the Complainant also came out of the house and said that she identified one of the robbers as Muli the Appellant. Pw3 Tabitha Mutuku Makau a neighbour attracted by the screams of Pw1, peeped through the window and saw Muli a person whom she knew before as the tallest of the robbers. This was the total evidence of the eye witnesses.

17. It is of note that none of the three eye witnesses said that they saw the face of the Appellant and how close they were to him when they saw him. The police on the other hand gave a different story about the t-shirt. Pw4 APC Willis Bororo testified that Charles Muli had dropped his shirt on the ground and that he recovered the metal rod and the t-shirt outside Pw1's home. Pw6 PC John Wafula the investigating officer on his part also stated that he was informed by Pw4 that the cream coloured t-shirt dropped at the scene and that the same had been used by the Appellant to cover himself, but dropped on the ground as he ran away with the gas cylinder.

18. Was there sufficient positive identification on recognition of the Appellant as one of the robbers? It is to be noted that in his defence the Appellant left the court to decide the case on the prosecution evidence, and in his written submissions before the trial court, written in Kiswahili language, the Appellant raised the issue of contradictions in the prosecution evidence, and the adequacy of the evidence on his identification on recognition.

19. In my view, the evidence on record on identification or recognition of the Appellant cannot be said to be positive and free from the possibility of error. This is firstly because none of the prosecution witnesses said that they saw the face of the Appellant. Secondly, being tall and dark cannot be sufficient description to identify or recognize a person. Thirdly, none of the eye witnesses described how close to the assailant they reached in order to identify or recognize him. Fourthly, there is the evidence of the two Police Officers which contradicted the evidence of the Complainant that the Appellant wore the cream shirt when he was arrested. The two Police Officers Pw4 and Pw6 clearly stated that the cream t-shirt and the metal rod were recovered outside the house of Pw1 the Complainant. More importantly, the investigating officer Pw6 PC John Wafula testified in his evidence that the assailant who carried away the gas cylinder of the Complainant and injured him with a metal rod had actually covered his face with the cream t-shirt which dropped as he ran away. These contradictions in the prosecution evidence on the identification of the Appellant are material and glaring, and the benefit has to be given to the Appellant.

20. In the above circumstances, it cannot be said that the prosecution proved beyond reasonable doubt that the Appellant was identified or recognized as one of the robbers. On that account the appeal will succeed. I will quash the conviction and set aside the sentence.

21. I thus find merits in the appeal. I allow the appeal, quash the conviction and set aside the sentence. I order that the Appellant be set at liberty unless otherwise lawfully held.

Delivered, signed & dated this 9th day of March, 2021, in open court at Makueni.

GEORGE DULU

JUDGE