REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CRIMINAL APPEAL NO. 9 OF 2017

MUTINDA WAMBUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being an appeal from the judgement of the Principal Senior Magistrate Hon. E. Boke delivered on 2.2.2017, at Kitui Chief Magistrate's Court vide Criminal Case No. 324 of 2014.

J U D G E M E N T

1. **Mutinda Wambua**, the Appellant herein, was charged with the offence of robbery with violence contrary to ***Section 296 (2) of the Penal Code*** vide **Kitui Chief Magistrate's Court Criminal Case number 324 of 2014.** The particulars as per the charge sheet presented to the trial court were that, on the night of 1st April, 2014, at about 22 hours at Oil Libya Petrol Station in Kitui Township within Kitui County, jointly with another before court, robbed Eunice Mbura cash money of Kshs. 4,200 and or immediately before or after the time of such robbery used actual violence to the said Eunice Mbura, the complainant.

2. The Appellant denied committing the offence but after trial, he was found guilty, convicted and sentenced to death on 2nd February, 2017. He felt aggrieved and filed this appeal raising six grounds.

3. Before I consider the grounds, I will consider the evidence tendered and the basis for judgement from the trial court. The prosecution's case hinged to some extend on direct evidence, particularly the evidence of the complainant.

4. Eunice Mbura Syengo (PW1) the complainant in the case told the trial court on 1st April, 2019 at around 10:00 PM as she was walking home, she saw someone walking ahead of her going the same direction and after a short while, as she got near her home, another man came from behind and grabbed her and attempted to strangle her. She testified that, she struggled and as she was struggling, she dropped her wallet and screamed.

She stated that, she saw the man who was walking ahead of her turn back to join in the attack and after seeing the wallet drop, he picked the wallet and saw the two men ran away. She told the trial court that, he identified the man who grabbed her from behind because she saw his face when she turned back after being grabbed from behind. She identified him as the Appellant herein and that there were street lights as well as lights from nearby buildings. She testified that, a lady came out of one of the houses after hearing her screams and assisted, as she had been injured in the process. She testified that, she reported the matter at Kitui Central Police Station and later went for treatment at Kitui District Hospital.

5. The Complainant added that, she knew the Appellant well as he used to wash her car at car wash located at Kalundu. She insisted that she gave the police the full names of the Appellant as one of the assailants because she knew him well.

6. Corporal George Apima (PW2) also testified and informed the trial court that he was given a report of robbery with violence to investigate on 2nd April, 2014, and that he called the complainant and interrogated her. He further testified that, he established that the complainant knew the person who attacked her well and reported that it was the Appellant who grabbed her from behind and robbed her. He further told the trial court that, the face of the complainant was swollen and she reported to have been hit on the right eye. She testified that, the injury was classified as ''harm'' at Kitui District Hospital. He further added that, the Appellant was arrested on 10th April, 2014 and was duly identified by the complainant as she knew him.

7. Benson Samburu Muli (PW3) testified and informed the trial court that he was a village elder and a member of community policing, Kambui Village. He told the trial court that, he assisted the complainant trace the Appellant herein, and that the Appellant was known by an alias name ''Kisoo'' and that is the name the complainant used when seeking the assistance of the local administration to have the Appellant arrested for the offence of robbery.

8. Peter Wambua Muthengi (PW4) a clinical officer at Kitui General Hospital testified and confirmed to court that, the complainant was treated at the said facility for a cut wound on her left upper orbital region and that, he was the one who filled the P3 which he tendered as P.Ex. 1. The P3 classified the injuries reviewed by the complainant as ''harm''.

9. When placed on his defence, the Appellant denied committing the offence. He told the trial court that, on the material day, he went to his place of work to wash cars as usual and that he worked until 5:00PM when he retired to his home to rest. He testified that, he was arrested on 3rd April, 2014, (date on the proceedings indicates August which may be some inadvertence) while working and taken to the Chief's office before being escorted to the police station from where he was later arraigned. He insisted that, he had no knowledge about the allegations made against him.

10. The trial court evaluated the evidence and found that, the Appellant was positively identified by the complainant who knew him well as ''Kisoo'' and found the evidence by PW1 consistent with the evidence the village elder (member of community policing (PW3) and the investigating officer (PW2). The trial court was not convinced by the defence put forward and found the prosecution's case proved beyond doubt.

11. Aggrieved by the above finding, the appellant lodged this appeal on the following grounds namely: -

(i) That the Trial Magistrate erred in convicting the Appellant while relying on the evidence of PW1 who said she was attacked at night at a place with no enough light for identification.

(ii) That the magistrate erred by not considering that the case long proved recognition whereby the complainant didn't give the Appellant name while reporting the case.

(iii) That in the case the person who reported to have been robbed is not the one who came to testify as the complainant.

(iv) That the medical officer was replaced in unlawful manner and did not prove the reality.

(v) That the investigating officer together with the trial magistrate erred by relying on hearsay as collaborative evidence.

(vi) That according to PW3 the 'nyumba kumi' elder relied on past reports to hold the Appellant.

12. In his written submissions, the Appellant took issue with the charge sheet contending that it was defective by virtue of the fact that, it did not contain the alias name ''Kisoo''. This ground was however, not raised initially in the petition of appeal. The Appellant has raised it in his written submissions with first obtaining leave of this court.

13. The Appellant further submits that, the prosecution's case did not prove the commission of the offence because he contends that PW4, a Clinical Officer from Kitui District Hospital stated the date of the injury was 2nd April, 2014, while the charge indicates that, the complainant was robbed on 1st April, 2014.

14. The Respondent has contested this ground in its written submissions clarifying that PW4 claimed the complainant was made on 2nd April, 2014 and tendered the P3 showing that the Complainant was harmed during the robbery which is why the offence committed fell within ***Section 296 (2) of the Penal Code***.

15. The Appellant submits that, his defence of alibi was not considered by the trial court and that no identification parade was conducted to positively identify him. He contends that, the trial court should have found doubts in the prosecution's case and he should have been given the benefit of doubt. He relies on the case of **Woolmington versus DPP**. He further submits that, the prosecution did not discharge the burden of proof and faults the trial court for shifting the burden to him.

16. The Respondent in response, has insisted that it proved its case against the Appellant beyond reasonable doubt. It submits that, the Appellant was armed with a dangerous weapon and that the Complainant was attacked by two people who caused actual violence and harm to her.

17. According to the Appellants, the Complainant was positively identified by PW1 who knew him well as ''Kisoo'' and therefore, there was no need for an identification parade.

18. The Respondent further submits that; the defence was considered by the trial court but found wanting, as it was a mere denial.

19. This court has considered this appeal and the response made. The only issue for determination in this appeal is whether there was positive identification because the Appellant has not seriously contested the fact that the Complainant was robbed and harmed in the process. He only questions the medical evidence tendered contending that, it referred to 2nd April, 2014, when the incident took place on 1st April, 2014.

20. However, a look at the medical evidence, it shows that the complainant went for treatment on 2nd April, 2014, but the P3 (P Ex. 1) clearly indicates that the offence occurred on 1st April 2014. It should be noted that, the offence occurred at around 11:00PM and by the time the Complainant got help and was taken to the police station to report before proceeding to the hospital for treatment, the time of reporting could as well have been past midnight which means, 2nd April, 2014, reflected as the time the Complainant was treated is still correct and consisted with the evidence tendered.

21. In a case of robbery with violence, under ***Section 296(2) of the Criminal Procedure Code***, the prosecution is required to establish and prove the following ingredients: -

> *a) The offender must be armed with any dangerous or offensive weapon or instrument; or*
>
> *b) The offender must be in the company of one or more person or persons or;*
>
> *c) At or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or used any other personal violence to any person.*

The above means that, any of the above elements, if established and proved is sufficient to found a conviction. In this instance, the prosecution's case established that the Appellant was in the company of one other person and immediately before or after the robbery, inflicted injury on the complainant as established by medical evidence tendered by PW4. I am not persuaded that, the evidence tendered by the prosecution established that the Appellant was armed with dangerous or offensive weapon but the fact that the prosecution's case established the other two cited elements of robbery (of Kshs. 4,200) and violence as stated in the P3 (P.Ex 1) is sufficient to prove that robbery with violence was committed against the complainant.

22. The only question remaining, is whether the identification of the Appellant was positive. It is true that, the prosecution's case on identification, rested on the evidence of one witness and where courts are faced with evidence of a single witness, caution should always be exercised by checking keenly on surrounding circumstances to ensure that the identification is free from error. In the case of ***Wamunga versus Republic [1989] eKLR 424***, the court made the following observations: -

> ***''Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility or error before it can safely make it the basis of a conviction.''***

The same position was taken by ***Mativo J. in Donald Atemia Sipendi versus Republic [2019] eKLR***.

23. In this instance, the Complainant stated that, he was attacked and robbed by a person well known to her as ''Kisoo''. Though the charge sheet does not reflect the alias name ''Kisoo'' the defect is curable under ***Section 382 of the Criminal Procedure Code***. The Appellant has not stated that the omission of alias name, prejudiced him. The evidence of PW3, the village elder, corroborated the evidence of PW1 that the Appellant was well known in the village by that name.

24. It is also noteworthy from the evidence tendered that, the scene of the crime had sufficient lights from the street and surrounding houses as the incident occurred within Kitui Town. The complainant used to take her car to the Appellant for car wash and was familiar with him as such. In his defence, the Appellant stated that, he does car wash business for a living. That in my view, is significant because it shows that the appellant recognised the Appellant well and that recognition and identification was free from possibility of error. The complainant clearly stated that when he was grabbed from behind, she turned and saw the Appellant face to face. That close proximity in my view, was sufficient in presence of the street lights to enable the complainant positively recognize the Appellant. In the circumstances, I find that, the Trial Court did not misdirect itself to find that identification of the Appellant was positive.

25. On sentence, the provisions of ***Section 296 (2) of the Penal Code***, provides only one sentence for someone found guilty of the offence under that section, it is true that the sentence is harsh but following the directions given by the ***Supreme Court in Petition Number 15 of 2015, Francis Karioko Muruatetu and Another versus Republic,*** on sentencing, the hands of the trial court are tied and the only option for the Appellant is to file a petition challenging the constitutionality of the mandatory sentence prescribed under ***Section 296(2) of the Penal Code***.

In the premises, this court finds no merit in this appeal. The same is dismissed. The conviction and sentence meted out are upheld.

DATED, SIGNED AND DELIVERED AT KITUI THIS 21ST DAY OF SEPTEMBER, 2021.

HON. JUSTICE R. K. LIMO

JUDGE