



REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

HIGH COURT CRIMINAL APPEAL NO. 28 OF 2020

DUNCAN KIPKURUI ROTICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of twenty (20) years imprisonment by Hon. B. R. KIPYEGON (SRM) in Kericho CMCC No.3196 of 2019 delivered on 24/06/2020)

J U D G M E N T

1. The Appellant was convicted with the offence of Robbery with Violence Contrary to Section 296 (2) of the Penal Code Chapter 63 Laws of Kenya and he was sentenced to twenty (20) years imprisonment on 24/06/2020.
2. The particulars of the charge were that on 26/07/2019 at SOET in BERET Sub-County within Kericho County, the Appellant robbed DAVID KIPSANG of his cash Kshs. 12,900/= and at the time of such robbery wounded the victim.
3. The Appellant pleaded not guilty to the charge and the Prosecution called five (5) witnesses. The Prosecution evidence in summary was that on the material day between 9-10 pm, the Appellant gave the Complainant DAVID KIPSANG KOROS a ride on the Appellant's Motor Cycle. When they reached where the Complainant was to alight, the Appellant demanded for more than they had agreed on and he followed the Complainant and hit him with a stone. The Complainant fell down injured and the Appellant tied his neck with a rope and tore his Jacket and removed Kshs. 12,900/= but he could not escape from the scene since the Motor Cycle could not start.
4. The two sons of the Complainant PW.2 and PW.3 arrived at the scene after hearing their father scream and found him tied with a rope and bleeding from the mouth. They said that the Appellant emerged at the scene and said he had been attacked together with the Complainant and he wanted to take the Motor Cycle but the crowd that had gathered at the scene refused to give him the Motor Cycle.
5. The following day the Appellant went to the home of the Complainant and pleaded with the Complainant, the Complainant led the Appellant to Roret Police Station. The Complainant reported the matter and the Appellant was arrested and charged.
6. PW4 Kipngeno Cheruiyot the Clinical Officer at Roret Hospital who examined the Complainant confirmed he had injuries on his head, and neck swellings with bruises.
7. The Appellant in his statement of defence said he was at his home on 27/07/2019 when he was arrested by the Complainant and other people. He was told he would know the reason at the Police Station and he learnt of the charges against him in Court.
8. The Trial Court found the Appellant guilty and convicted him of the offence of Robbery with Violence Contrary to Section 296 (2) of the Penal Code Chapter 63 Laws of Kenya and sentenced him to twenty (20) years imprisonment.
9. The Appellant who is aggrieved with the conviction and sentence has appealed to this Court on the following grounds:-
 - (i) THAT he was convicted on uncorroborated evidence, which was inconsistent and insufficient to sustain a conviction.
 - (ii) THAT the Court did not consider his alibi defence.
 - (iii) THAT the Trial Court did not consider Article 50 (4) of the Constitution and Section 151 of the Criminal Procedure Code Chapter 75 Laws of Kenya.
 - (iv) THAT the Trial Court failed to note Section 137 (f) of the Criminal Procedure Code Chapter 75 Laws of Kenya and violated

Section 211 (1) of the Criminal Procedure Code Chapter 75 Laws of Kenya and also failed to comply with Article 49 (1) (a) (i) of the Constitution.

10. The parties filed written submissions which I have duly considered. The Appellant submitted that the Complainant alleged that he was robbed and he screamed and a crowd gathered but no reason has been given why the matter was not reported to the Police and why the Appellant was not arrested at the time of the robbery.

11. The Appellant further submitted that no exhibits were produced in Court such as the torn jacket, bag, rope and the Complainant's sandals and the Kshs. 12,900/= cash.

12. The Appellant further submitted that the charge stated that the robbery took place at Soet at Bureti Sub-County but the Complainant said he comes from Getarwet Chemosot and this contravenes Section 137 (f) of the Criminal Procedure Code Chapter 75 Laws of Kenya.

13. The Appellant also submitted that the charge was not read to him after it amended that is Contrary to Section 214 of the Criminal Procedure Code Chapter 75 Laws of Kenya and a violation of Article 49 (1) (a) (i) of the Constitution.

14. The Appellant submitted that Section 211 (1) of the Criminal Procedure Code Chapter 75 Laws of Kenya was contravened as the Trial Court did not indicate that the same was complied with when the Court made a ruling that the Appellant had a case to answer. He said he ought to be accorded the benefit of doubt and acquitted.

15. The Respondent opposed the appeal and submitted that the Prosecution proved the ingredients of Robbery with Violence which are as follows:-

(i) THAT the offender was armed with a dangerous weapon or

(ii) THAT the offender was with one or more person (s) or

(iii) THAT immediately before or immediately after the time of such Robbery, the offender wounds, strikes, beats or causes any other personal violence to any person.

16. The Respondent also submitted that the Prosecution evidence was consistent, credible and coherent and that it is not true that it was not corroborated. The testimony of the Complainant was corroborated by that of his two sons who rushed to the scene upon hearing the Complainant screaming.

17. The Respondent also submitted that the Trial Court considered the Appellant's alibi defence and found that the Complainant recognized and identified the Appellant and further found that the Appellant's Motor Cycle was found at the scene of crime.

18. The Respondent asked the Court to disregard the submissions that Section 151 of the Criminal Procedure Code Chapter 75 Laws of Kenya was disregarded and submitted that the said section deals with swearing of witnesses. All the Prosecution witnesses were sworn in compliance with the Law.

19. This being the first appellate Court, it is the duty of this Court to re-evaluate the evidence adduced before the Trial Court and to arrive at my own conclusion as to whether to support the findings of the Trial Court bearing in mind that the Trial Court had the advantage of seeing the witnesses.

20. The role of an appellate Court of the first instance is well settled. In the case of **OKENO VS. REPUBLIC (1977) EA 32** and further in the Court of Appeal case of **MARK OIRURI MOSE VS. REPUBLIC (2013) eKLR** it was held that :-

".... an appellate court of first instance is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that."

21. The ingredients of the offence of Robbery with Violence are outlined in section 296 (2) of the Penal Code Chapter 63 of the Laws of Kenya which states as follows: -

The offender is armed with a dangerous weapon; or the offender was with one or more person (s); or immediately before or immediately after the time of such robbery, the offender wounds, strikes, beats or causes any other personal violence to any person.

22. The issues for determination in this appeal are as follows :-

(i) Whether the Appellant was properly identified;

(ii) Whether the Prosecution proved the guilt of the appellant to the required standard; and

(iii) Whether the Trial Court contravened the law.

23. On the issue as to whether the Appellant was properly identified; I find that this was a case of recognition as opposed to identification. Although the Trial Court relied on the testimony of one witness on identification, the said witness who was also the Complainant was with the Appellant on the Appellant's Motor Cycle and after alighting, the Appellant first demanded more money from the Complainant before hitting him with a stone and straggling him with a rope and tearing the pocket and taking the money.

24. The Complainant's two sons heard the Complainant screaming and rushed to the scene where they found the Appellant's Motor Cycle next to the Complainant who was bleeding from the mouth.

25. The Court of Appeal in the case of **WAMUNGA VS. REPUBLIC (1989) KLR 426** stated that :-

"It is trite law that 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 of error before it can safely make it the basis of conviction."

26. In the Court of Appeal in **JAMES MURIGU KARUMBA VS. REPUBLIC [2016] eKLR** held thus in regard to the evidence of identification: -

"It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested."

27. I find that the Complainant was able to identify the Appellant as the person who robbed him furthermore, the Appellant's Motor Cycle was recovered at the scene of crime.

28. **MAITANYI VS. REPUBLIC [1986] KLR 198**, the Court of Appeal held that where the evidence of identification was made in difficult circumstances, the court is required to consider whether the prosecution adduced other evidence whether circumstantial or direct to corroborate the evidence of identification.

29. In the present appeal, the Appellant's Motor Cycle was recovered at the scene of crime.

30. The issue as to whether the Prosecution proved the guilt of the Appellant to the required standard, I find that the Complainant's testimony was corroborated by that of PW.2 and PW.3, his sons who answered the Complainant's distress call and went to rescue him. There is evidence that the Appellant's Motor Cycle was found at the scene of crime.

31. The testimony of the Complainant was therefore corroborated by circumstantial evidence in that the Appellant's Motor Cycle was found at the scene of crime.

32. I find that the Prosecution has proved that the Complainant was robbed and that it was the Appellant who robbed him after hitting him with stone and also injuring him with a rope.

33. The Appellant submitted that Sections 137 (f) and 211 (1) of the Criminal Procedure Code Chapter 75 Laws of Kenya were violated. Upon perusing the record, I find that the amended charge was read over and explained to the appellant in accordance with the law. There is no variance between the charge and the evidence. PW.2 said he comes from Soet Village in Getarwet. No prejudice was suffered by the Appellant.

34. The Court explained to the Appellant that he had a case to answer and explained the options available under Section 211 of the Criminal Procedure Code Chapter 75 Laws of Kenya. I find that although Section 211 was not mentioned, the same was complied with and no prejudice was suffered by the Appellant.

35. I find that the Trial Court considered the alibi defence by the Appellant at the last two pages of the Judgment and relied on the case of **VICTOR MWENDWA MULINGE VS. REPUBLIC [2014] eKLR** the Trial Court found that the Appellant's alleged alibi did not displace the Prosecution evidence which was cogent and that the said alibi was an afterthought.

36. I find no reason to interfere with the sentence considering that the law provides for the death penalty for Robbery with Violence Contrary to Section 296 (2) of the Penal Code.

37. I accordingly find that the appeal herein lacks in merit and the same is dismissed.

38. This Court upholds both the conviction and sentence by the Trial Court.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 1ST DAY OF OCTOBER, 2021.

A. N. ONGERI

JUDGE