



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 60 OF 2020

BETWEEN

DAVID MITHIKA MURUNGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case Number 1348 of 2014 in the

Chief Magistrate's Court at Maua by Hon. A.G.Munene (SRM) on 06.08.2020)

JUDGMENT

Background

1. **DAVID MITHIKA MURUNGI (Appellant)** was charged with robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code committed on 23.02.2014 against one **PATRICK KOOME MIRITI upon whom personal violence was also used.**

The prosecution's case

2. The prosecution called six (6) witnesses in support of the charges. Complainant testified that on 23.02.2014 at about 09.00 pm, he was going home when he met three persons. That they shone at a torch at him and when he shone at torch at them, one of them hit him the head knocking him down unconscious. That he came to in hospital where he was taken by his mother Janet Nkirote (PW2) to find he had broken his left leg and had lost a phone worthy Kshs. 3,000/- and cash Kshs. 15,000/-. It was his evidence that he identified Appellant who was his neighbour as the person who attacked him. Peter Ntonja stated that he rushed to the scene of crime when he heard screams and he saw Appellant there with complainant lying down injured. It as his evidence that he had a torch that enabled him to identify Appellant who was armed with an iron bar. Patrick Muroki arrived at the scene after complainant was injured.

3. Complainant was on 04.03.2014 examined and was found with swelling around face, left side of scalp and right leg and fracture of left leg. As shown on the P3 form PEXH. 1, the injuries were assessed as grievous harm. Upon receiving complainant's report, PC Masango immediately arrested the Appellant and caused him to be charged.

Defence case

4. In his unsworn defence, the Appellant denied the offence.

5. The trial court after considering the evidence found the prosecution case proved, convicted and sentenced the Appellant to 10 years' imprisonment.

The Appeal

6. The conviction and sentence provoked this appeal. In his petition of appeal and written submissions, Appellant argues that the prosecution case was not proved beyond reasonable doubt.

Analysis and Determination

7. As the first appellate court in the instant appeal, I am required and indeed duty bound to subject the evidence tendered in the lower court to thorough re-evaluation and analysis so as to reach my own conclusion as to the guilt or otherwise of the appellant. In doing so I must give allowance to the fact that I neither saw nor heard the witnesses as they testified and therefore cannot comment on their demeanour. (See **OKENO – VS – REPUBLIC (1972) E.A. 32**).

8. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the Appellant, the State having not filed any.

9. The complainant and Peter Ntonja testified that they knew the Appellant well since he was their neighbour. In the case of **Anjononi & Others –Vs – Republic [1980] KLR** it was held that evidence of recognition is **“more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”** In this case the complainant and Ntonja were identifying a person whom they were able to recognize thus reducing the risk of a mistaken identity. I am satisfied that notwithstanding the fact that identification was at night, my view is that the identification was water tight.

10. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of **OLUOCH –VS – REPUBLIC [1985] KLR** where it was held:

“Robbery with violence is committed in any of the following circumstances:

a. The offender is armed with any dangerous and offensive weapon or instrument; or

b. The offender is in company with one or more person or persons; or

c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person”

11. The use of the word **OR** in this definition means that proof of **any one** of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code. In this case the complainant said that he was accosted by a group of three men. Complainant stated he was robbed and there is evidence that he was injured. Given a chance to defend himself, Appellant merely denied the offence. From the foregoing, I am satisfied that the appellant was properly convicted.

12. Section 295 of the Penal Code (*the Act*) that Appellant was charged provides as follows:

Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

13. The punishment for robbery is prescribed under section 296 of *the Act* as follows:

1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

14. It is worthy to note that the Appellant having been convicted under Section 8(3) of the Act was liable to be sentenced to a mandatory death sentence.

15. Appellant should count himself lucky that although notice of enhancement of sentence was filed, there was no evidence that he was notified that the sentence might be enhanced.

16. Consequently, I decline the invitation to vary the sentence meted by the trial magistrate. This appeal has no merit and it is thus dismissed.

DELIVERED AT MERU THIS 09TH DAY OF DECEMBER 2021

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Accused - Present

