



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL APPEAL NO. 90 OF 2018

JOHN MUNYOKI MUTHUI.....APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

JUDGEMENT

1. The appellant was charged with two counts. Count I robbery with violence contrary to section 296(2) of the Penal Code. Count II robbery with violence contrary to section 202(2) of the Penal Code. The appellant was initially charged at Kyuso Law Courts in Criminal Case No. 211 of 2016.
2. By an order dated 23rd September 2016 – Lady Justice L. N. Mutende under section 81(1) and (2) of the Criminal Procedure Code transferred the case to Mwingi Law Courts.
3. The reason being that Hon. B. M. Kimtai of Kyuso Law Courts requested transfer of the matter since he had determined Criminal Case No. 14 of 2016 where the witnesses were the same and persons alleged to be accomplices had been charged and one of them already convicted. The appellant was initially charged in Kyuso Law Courts in Criminal Case No. 212 of 2016 as John Munyoki Muthui.
4. When the charge sheet was amended on 10/1/17 the words alias Vaati Koka were introduced into the charge sheet.
5. The prosecution in a charge such as this one is required to prove beyond reasonable doubt that the appellant committed the offence of theft and in the process was done with dangerous or offensive weapon or was in the company of other persons and at the time of committing the offence or immediately before or thereafter used actual violence on the complainant.
6. The prosecution case is based on oral accounts of witnesses' oral, documentary and physical evidence vis avis Count 1 where the complainant was one Musembi Mutio and Count 2 where the complainant is Dorcas Muyathi Mutemi and appellant defence .
7. After full trial he was found guilty, convicted and sentenced to serve 20 years' imprisonment in Count 1 and Count 2 respectively to run consecutively.
8. Thus he was unhappy with verdict and therefore filed instant appeal in which he raises the issues:

(1) An error on identification.

(2) The issue of drunkardness.

(3) A finding whether a girl was a minor at the time of alleged crime was committed.

(4) Whether there was prove of case as required by the law.

9. The parties were directed to canvas appeal via submissions.

APPELLANT'S SUBMISSIONS:

10. The appellant submits that although the victim complainant alleged that there was a moonlight, nobody would know the density light of moonlight in order to ascertain whether the moonlight would enable the complainant to identify the appellant and whether there were no clouds on the sky which could have been blocking or covering the moonlight and this making the victim not able to identify the appellant properly.

11. The victim argued that he saw the three men sitting on the rock and so being guided by his sentiments no distance was given before the trial court from where the victim was to where the assailants were sitting on the rock in order to prove whether the PW1 was able to identify the appellant properly whereby he had the following to say, *"I saw three men sitting on the rock. There was moonlight and I could see them well."*

12. The appellant submits that PW1, PW3 and PW4 were all drunk during this incident and that it is very clear that they were all half normal because they were coming from drinking spree whereby they had already entered into a club at around 5-6pm and they left about 9.30pm.

13. He submits that PW4 Musembi Nderu was very categorical before the trial court that he knew Muithya and Kimanzi for a long time before the incident but he had only seen the appellant (Vaati) that day earlier in the day and then he had seen him for the second time during the incident revealing the fact that the appellant was stranger to the PW4 and hence due to the circumstances PW4 could not be able to identify the appellant properly.

14. It is appellant's submission that the trial court magistrate erred in points of law and facts when reaching the decision to convict the appellant while overlooking the fact that the charges that were preferred against him were duplex hence defective.

15. He was charged incorrectly with the charges of robbery with violence under section 296(2) of the Penal Code whereby the charge sheet itself does not contain any nor mention the name of the offensive weapons or any instruments which were used by appellant in the robbery to wound, beat, strike on complainants.

16. The appellant cites the case of ***Ouma vs Republic Criminal Appeal No. 91 of 1985*** in support of the submission that all the time of evaluating the prosecution's evidence, the court must have in mind that the accused persons defense must satisfy itself that the prosecution had by its evidence left no reasonable possibility of that defence being true.

RESPONDENT'S SUBMISSIONS:

17. The respondent submits on appellant grounds set out hereunder as follows ;The issues raised in appeal are ;

(1) The trial court erred on identification.

(2) In failing to note that the complainant was drunk.

(3) Failing to note that the prosecution failed to prove its case beyond reasonable doubt.

(4) For violating section 169 (1) of the Criminal Procedure Code.

18. On whether the trial court erred on identification, the respondent submits that the appellant was not only identified by one but by PW1, PW2, PW3 and PW4 whose testimony was watertight. There was no doubt that the appellant was placed at the scene of crime.

19. On whether the complainant was drunk, the appellant was seen by PW2 who testified that she was attacked by people she knew among the appellant just about the same day the complainant was also attacked by the appellant.

20. On whether finding the girl was a minor at the time of alleged crime was proved, the respondent submits that the birth certificate which is a primary document and enough proof of the girl's age persuaded the trial court to reach on its verdict.

21. On whether the prosecution failed to prove its case, the respondent submits that section 296(2) of the Penal Code provides that:

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, or if, at or immediately after the time of the robbery, he wounds, beat, strike or uses any other personal violence to any person....”

22. The prosecution was tasked to prove theft as a central element into the offence of robbery with violence.

23. The respondent submits that PW1 to PW4 testified that they encountered the appellant who was in the company of others and they were armed with dangerous weapon. It was PW1 and PW2 testimony that during their respective attacks, the appellant was not only armed, went ahead to assault them and in the process injured them.

EVIDENCE TENDERED

24. The prosecution case was as follows. PW3 Peter Kimanzi Nderu and PW4 Musembi Nderu were both brothers who were in the company of PW1 Musembi Mutio the complainant on 17th January 2016. PW3 Peter Kimanzi stated that he had been in a pub with the complainant Musembi Mutio who was his cousin and his brother Musembi Nderu.

25. He saw Muithya Munyoki, Kimanzi Munyoki his brother, Mathuva Mwasya and Vaati Koka. Peter stated that he had earlier seen them during the day. Kimanzi knew Muithya Munyoki and Kimanzi Munyoki well since they were from the same area and were previously well known to each other. Peter Kimanzi also stated that he knew Mathuva Mwasya from childhood.

26. Both Peter Nderu and Musembi Nderu stated that they were left at the club by the four persons and followed them later. Peter Kimanzi Nderu and the complainant and also Musembi Nderu stated that it was about 10 pm. They saw Mathuva Mwasya who held the complainant's arm and told him that they go back to buy a matchbox.

27. When they left that is, Mathuva and the complainant, the rest Muithya Munyoki, Munyoki Kimanzi and Vaati Koka who had been ahead of them ordered them to sit. They had pangas and knives. Peter Kimanzi sat down while his brother Musembi Nderu ran away. Muithya then gave chase to Musembi Nderu. Muithya came back and ordered Peter Kimanzi to go home.

28. PW4 Musembi Nderu confirmed what his brother stated. He confirmed that it was about 10pm and the area was Musavani. He stated that Musembi Mutio was his cousin and they were going home together. He stated that they met Muithya and Kimanzi Munyoki who were brothers and Vaati. They were armed with knives and ordered them to sit after Mutio had left with Mwasya to buy a matchbox.

29. Musembi Nderu stated that Muithya and Kimanzi were well known to him and Vaati he had seen him earlier in the day. As Vaati Koka and Kimanzi Munyoki went towards Peter, Muithya Munyoki chased him and he managed to escape and came back later and met Peter Kimanzi who told him he was allowed to go.

30. The complainant Musembi Mutio stated that on 17/1/2016 at 10pm he was in company of PW3 and PW4. Mathuva Mwasya asked him to go back to Musavani town to buy a matchbox. The rest went ahead. They did not get a matchbox and on the way back at Musavani river Mwasya pretended to answer a call of nature at a house near a river.

31. When Musembi Mutio the complainant walked ahead he saw Muithya Munyoki his bother Kimanzi Munyoki and Vaati Koka seated on a rock. The two brothers were previously well known to him. The complainant asked who they were and they asked him what he was searching for. Musembi Mutio stated that there was moonlight and he could see them and proceeded on since he knew them.

32. They then followed him, took his walking stick. Kimanzi took his walking stick and hit him on the head. Vaati held the complainant's neck and Muithya his waist. Kimanzi held the complainant's legs and they carried him near a rock. Vaati held the complainant's neck as they beat him.

33. Vaati was strangling him and they took his Itel phone valued at Kshs.1,500/- and they beat him up until he lost consciousness. The complainant stated that they tore his trouser and belt, his shoe came off in the process, tore his vest, cut his pocket and took Kshs.700/-, using a knife tore his inner wear shorts.

34. The complainant stated that they were armed with knives. They then stabbed him on the neck and left him for death. He later came to and went home dressed only in a T-shirt.

35. The prosecution evidence to prove a charge of robbery with violence proffered evidence as follows:

PW1, PW3 and PW4 testified that there was moonlight on 17/1/2016 at about 10pm when they were on the way home from a club. They identified two brothers being Kimanzi Munyoki and Muithya Munyoki as well as their cousin Vaati Koka with whom they had been at a club immediately before and who walked ahead of them.

36. The complainant stated that the three beat him up and caused him injuries as well as did steal his mobile phone Itel and Kshs.700/- while being armed with knives.

37. PW5 Musembi Mutio the complainant's father on 18/1/2016 saw the injuries on his son. He rushed to the scene led by Mutio's cousin who had accompanied him the day before when the attack happened. He recovered pieces of the torn trouser; his son wore the previous day at Musavani river.

38. It had no water as it was a seasonal river. He recovered red bloody T-shirt, torn blue short, torn vest and one shoe. He took the clothes to Kaningo Police Station and they were produced as exhibit by PW10 the investigating officer.

39. PW5 took the complainant to hospital at Tseikuru. He could not speak at the time. PW5 stated that he knew Kimanzi and Muithya as cousins and he knew Munyoki their father. He stated that Vaati's mother was called Koka. He knew his mother and knew him when he was young. PW5 stated that Koka and Munyoki were brother and sister and Vaati was Koka's son.

40. PW8 Vicky Musangi produced a P3 form completed for the complainant. She also produced a treatment note. The original documents had been produced in the criminal case against Muithya in Kyuso. The witness stated that the complainant was treated on 18/1/2016 and assigned outpatient number 292/16. She stated that he sustained multiple cut wounds on the right side of the neck, left eye redness, multiple cuts.

41. PW9 testified that he picked the appellant from Katithini AP Camp in Meru when he had been

arrested on other offences. PW10 the investigating officer confirmed he caused the appellant to be arrested at Kyuso Law Courts for the offence of robbery with violence.

42. The appellant tendered sworn testimony. He produced his national identity card stating that he was John Munyoki Muthui not Vaati Koka. The evidence of the accused is that the father in-law to Dorcas the second complainant framed him because they had a land dispute. The appellant stated that the witnesses were told to identify him at Tseikuru Police Station. The appellant further stated that his mother was Kasyoka.

43. He denied he was Vaati Koka. He name identified by the witnesses. He claimed he was identified because the witnesses were brought to the police station at Tseikuru and told to frame him. He produced his identity card.

ISSUES, ANALYSIS AND DETERMINATION

44. After going through the proceedings and the submissions by the parties, I find the issues are; ***whether the trial court erred on identification? Whether trial court erred in failing to note that the complainant was drunk? whether trial court erred by failing to note that the prosecution failed to prove its case beyond reasonable doubt? And whether the trial court violated section 169 (1) of the Criminal Procedure Code?***

45. On the first issue above, the prosecution witnesses PW3 and PW4 stated that they had been in a club earlier that day before the incident. The complainant was also at the same club. Kimanzi and Muithya had earlier introduced the appellant as Vaati Koka cousin to the witness PW3 and PW4.

46. The complainant PW3 and PW4 in addition identified the appellant positively in the dock. PW1 the complainant stated that there was sufficient moonlight to identify his attackers. Two of them were previously well known to him. He spoke to them immediately before the attack. They had all been at the club at 7pm.

47. PW1 stated that Mathuva, Muthya, Kimanzi and Vaati were at the club. Vaati and the rest left the club ahead of them and they all headed to same direction. PW3 and PW4 corroborated the fact that they were all at the club earlier. They left headed the same direction just before the attack.

48. The trial court found that there was no ambiguity in the identity of the appellant. The witnesses were able to physically identify him not at the police station but in court and previously. They stated that they had been at the club in company of people well known to each other.

49. PW3 stated that Muithya told him that he was his cousin. PW3 stated that he had seen Vaati during the day. The said Vaati had also ordered him to sit during the attack. They all left the club at about 9.30 – 10 pm with the attackers leaving earlier. The cousins to Vaati were known to the complainant since childhood.

50. In sum, the evidence by the prosecution was sufficient to prove beyond reasonable doubt the appellant committed the offence of robbery with violence as charged in Count 1. The evidence was sufficient to disprove the defence of the accused. He was not framed or identified at the police station.

51. PW1, PW3 and PW4 had identified him earlier at the club and during the attack. He was known to them as Vaati Koka and they were able to physically identify him then and in court. Thus the trial court was justified in finding appellant guilty of Count 1 and convict him under section 215 of the Criminal Procedure Code.

52. In Count 2 the complainant Dorcas Mwithya, PW2 stated that on 17/1/2016 at 10.30 pm she was going home as she came from a Harambe. It was in the same Musavani area. She met Muithya Munyoki and Kimanzi and another one whom she identified only by face.

53. Kimanzi and Munyoki were well known to her from the same area. She knew them from childhood. Muithya tripped the second complainant Dorcas. They beat her. Muithya stabbed her on the back, using a knife, one bit her leg.
54. The other put sand in her eyes. The witness stated they took her purse which had a phone and Kshs.500/-. It was a grey Techno phone. The clothes she wore being a yellow blouse blood stained, white petticoat were produced in evidence by PW10.
55. PW6 Kalundu Musyimi rushed to rescue the complainant. It was about 10.30pm on 17/1/16. She saw the stab wound and bound it. She arranged for the complainant to go to hospital.
56. PW7 the father in-law to Dorcas stated that on 10/1/17 at 10pm he heard the screams. He found his daughter in-law had been stabbed and was being offered first aid by Kalundu PW6. The witness said Dorcas identified Kimanzi and Muithya Munyoki but not the third one whom she described as “brown” 59 feet” “tall and slim”.
57. PW8 produced a P3 form for Dorcas Mwithya. She was treated for deep cut on the back between the shoulders and a bit on the leg. Dorcas was treated the same day Musembi was treated. Dorcas was treated on 17/1/16.
58. PW11 Dr. Kiema testified that he completed the discharge summary for Dorcas. She was admitted on 18/1/16 at Mwingi District Hospital. She was discharged on 23/1/16. The discharge summary was produced as exhibit. She had a wound on the back which was sutured.
59. DW12 Dr. Ndirangu testified that Dorcas had been x-rayed earlier and he made request for a second x-ray since the initial one showed blood in the chest cavity after history of stab wound in the back. The x-ray request was produced as exhibit. The evidence of the prosecution was that the appellant was in company of Kimanzi and Muithya Munyoki when the complainant was robbed off her phone, money and injured in the attack.
60. The appellant stated that he was never identified by the complainant and his identity card was produced in evidence. The appellant had in his defence stated failure to carry out an identification parade was fatal to the prosecution’s case and that the witnesses saw him at Tseikuru Police Station and identified him after the police told her to look at him.
61. The trial court looked at the totality of the prosecution evidence and the defence by appellant and made a finding that, Firstly, it was proved a robbery had occurred 30 minutes earlier in the same locality the same night involving Kimanzi Munyoki, Muithya Munyoki and Vaati Koka.
62. The three were said to be armed with knives and pangas. Vaati and the other two were stated to have been at a pub earlier. Where they were identified by PW1, PW3 and PW4. The witnesses said there was sufficient moonlight. Even PW2 Dorcas stated she positively identified Kimanzi and Muithya Munyoki whom she had known well previously since childhood and they were in company of another whom she identified in court.
63. The robbery incidences occurred just 30 minutes apart in the same locality. The suspects were armed with knives as was stated by PW1, PW2, PW3 and PW4. The other accomplices were positively identified.
64. Failure to carry out the identification parade in this case was not fatal since there is material corroborative evidence as to the sequence of events on the night of 17/1/16.
65. The presence of the appellant Vaati Koke has been established beyond reasonable doubt since the complainant PW1 had earlier positively knew him prior to her attack and identified him and stated he was in company of his cousins.

66. The proximity of the attack on Musembi and the people who attacked her lead to the inescapable conclusion that the “other” accomplice was Vaati Koke the appellant. This court agrees with the trial court finding afore said.

67. Secondly, the complainant identified the “other one” by face which she pointed him out in court. At the time of the attack she positively identified both Kimanzi and Muithya at attack which occurred just 30 minutes after Mutio was attacked by the same people identified as Kimanzi, Muithya and Vaati.

68. In addition, there is evidence that the complainant’s phone and money were stolen and the attackers were more than one and she was stabbed with a knife and bitten on the leg.

69. Further PW7 Mutua Mutemi a father in-law to Dorcas stated he decided to investigate who had accompanied Kimanzi and Muithya in the attack. He went to the club where they had taken alcohol the previous night.

70. The waitress Katui told him the third person was Vaati Koka. This would have been hearsay since Katui was not a witness. However, PW1, PW3 and PW4 said they were at the club the previous day before the attack with Vaati Koka and his cousins.

71. IN sum this court agrees with trial court finding that there was no ambiguity in the identification of the appellant by the complainant which did not stand on its own but taken in conjunction with the evidence of PW1, PW3 and PW4 as well as the proximity of the two attacks just 30 minutes apart by the same perpetrators in the same locality

72. Since PW2 identified Kimanzi and Mwithya and in the general flow of events or chain of events to it was safe to conclude beyond reasonable doubt the third accomplice was “Vaati Koka” the appellant herein.

73. The appellant has raised issue that the trial court judgment failed to comply with the provisions of Section 169(1) of the Criminal Procedure Code which requires every judgment to contain the point or points for determination, the decision thereon and the reasons for the decision.

74. This court has looked at the trial court judgement and noted that it complied with the provisions of section 169(1) CPC thus the ground has no merit.

75. Thus this court finds no merit in the appeal and makes the following evidence on orders;

- i) The appeal is dismissed, conviction is upheld and sentence confirmed.**

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF JANUARY, 2020.

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C. KARIUKI

JUDGE