



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 36A AND 36B OF 2015 (CONSOLIDATED)

MUSYOKA MUTUKU.....1ST APPELLANT

MUTHUI MUTHAMI.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The two appellants were jointly charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code. The facts for the first count are that on the 28th March, 2012, at about 10.00pm, at Kwa Muli village, Katulani Location, in Kitui County jointly while armed with a gun, knife and rungu, robbed Monicah Nyamai Mutuva cash Kshs.7,000/=, a mobile phone make Safaricom valued at Kshs.3,000/=, and at or immediately before or after the time of such robbery used actual violence to the said Monicah Mutuva.

2. On the second charge, it is alleged that on the same date, time and place, the appellants robbed Lulu Mwangangi cash Kshs.250/=, and also used actual violence to the said Lulu Mwangangi.

3. The prosecution lined up 6 witnesses in support of its case. PW1's evidence was that on the 28th March, 2012 at about 9pm, she was at her bar at Kivuku attending to customers when she heard commotion outside the bar. Her son one Kiema Kilonzo was seated outside. PW1 then saw two strange men push her son inside the bar. There was light from a generator and she was able to see the two well as their faces were not veiled. They were armed with a gun, rungu and knife. She identified the two as appellant 1 and appellant 2. Appellant 1 was armed with a gun, while appellant 2 was armed with a sword and a rungu.

EVIDENCE ADDUCED:

4. The two appellants forced the customers to lie down while PW1 was at the counter watching. Appellant 1 stood at the front door while appellant 2 went and closed the rear door. Appellant 2 then went and forced open the door to the counter, pointed the sword at PW1 and demanded for money. PW1 gave him a Samsung phone that was at the counter.

5. At the time, appellant 1 was frisking the bar patrons and the two took about 30 minutes. Appellant 1 then told appellant 2 to hurry and the two left and closed the door. PW1 and the others then came out and saw a motorcycle being rode off. She then called her husband who came with AP officers but no arrest was made.

6. On 1st April, 2012, at about 8 am, a person came to the bar and bought a cigarette. He then asked for beer but PW1 told him that it was not yet time to sell alcohol. When PW1 saw the person, she identified him as appellant 1. PW1 then called her son and a boda boda operator called Mulu and who had been in the bar during the robbery. They too identified the person as appellant 1.

7. The person went to another bar, and PW1 called her husband who came with two Aps and appellant 1 was arrested together with appellant 2 who PW1 identified also. The two were then escorted to Itoleka Police Station where they were later charged. PW1 had never seen either of the appellants before.

8. On being cross examined by appellant 1, PW1 stated that she did not lie down when the attackers ordered the people to as she was inside the counter. She also said that she could see the attackers properly. She also stated that her son is underage and that her husband was not at the scene of the robbery and thus he was not a witness. To appellant 2, PW1 stated that there was sufficient light from a generator although she did not mention a generator in her statement to the police.

9. PW2 stated that on the 28th March, 2012, at about 10pm, he was at Generation bar at Ithuku village taking a soda. The bar belongs to PW1's husband and that there were about 10 customers being served by PW1. The bar has a generator that lights the place. After about 30 minutes, PW2 decided to leave and was using his motorcycle. After about 50ms from the bar, he saw using his motorcycle headlights two

suspicious people standing on the side of the road.

10. He then decided to return to the bar and alert those in the bar about what he had seen. While outside the bar talking to a man, appellant 1 came and pointed a gun at him. PW2 was still on his motorcycle. There was security light outside the bar and that appellant 1 asked him what kind of a man he was. PW2 was then forced to enter the bar by appellant 1 while appellant 2 who was armed with a rungu and a sword forced one Kimanzi and a child called Mutuva to enter the bar. Appellant 1 then closed the main door while appellant 2 rushed and closed the rear door. Appellant 1 ordered the people to lie down and appellant 2 went around demanding money and phones. Appellant 2 then went to the counter forced that door open and demanded money. PW2 lost Ksh.250/= which appellant 2 took from him. The attackers were the same people PW2 had earlier seen standing along the road and that they took about 30 minutes. They then closed the door and left. According to PW2, appellant 1 was wearing a marvin on the head and a stripped white and yellow sweater. Appellant 2 was in a black jacket and a red shirt.

11. When they went out, they saw a motorcycle being ridden away. PW1 then called her husband who came with AP officers.

12. On 1st April, 2012 at about 3pm, PW2 got reports from PW1 that appellants had been seen. He then led police officers to a bar called Syokua where the two appellants were found drinking alcohol and they were arrested and escorted to Itoleka Police Station.

13. On being cross examined by appellant No. 1, PW2 stated that he lay down on one side and was looking at the gun and sword. He also stated that he had seen appellant 1 when he had pointed a gun at him and that there was light from a generator. He also responded the same to appellant 2 regarding the source of light, though he admitted that the source of light was not indicated in his statement.

14. PW3 was also in the bar on the fateful day. He saw PW2 a boda boda rider leave but returned shortly at the bar and asked him if he knew some people standing by.

15. Before PW3 could answer, two people one tall and the other short appeared. PW3 stated that there was light just above them and he could see clearly and did see the taller man carrying a gun. The two persons asked PW2 what kind of a person he was while pointing a gun at him and told him to alight from the motorcycle. They then led into the bar and appellant 2 ordered everyone to lie down. There was light in the bar and PW3 could see clearly. Appellant 1 then told appellant 2 to go to the counter and get money. PW3 stated that he was lying on one side. Appellant 2 was then told to collect money and phones from the customers. Appellants then left and PW3 followed outside and saw a motorcycle pick the two. On being cross examined by each of the appellants, PW3 stated that he saw the appellants well and that he could identify them.

16. PW4 was also in the bar when two people came in. One was armed with a gun and the other a rungu and sword. He identified the two as the appellants before court. PW4 stated that he was seated facing the door and that there was electricity lights from a generator. He stated that the appellants closed both the front and rear doors and then ordered everyone to lie down.

17. During the incident appellant 2 hit PW4 with a rungu and told him to lie down. PW4 stated that appellant 2 asked him for a phone but he did not have, and then went to the counter where he demanded money from PW1 and was given. The two appellants then left and PW4 heard a motorcycle leave.

18. Later on 1st April 2012, he was called by PW1's husband who told him to go and see some suspects who had been arrested. PW4 was able to identify the two suspects as the appellants.

19. On being cross examined by each appellant, PW4 was emphatic that he had seen with other officers and talked to PW1 who told them that she could identify the robbers if she saw them on the 1st April, 2012, PW5 again received information that the suspected robbers had been seen at a bar called Syokua at Kwa Muli. He proceeded there with other officers and PW1 and PW2 pointed the suspects. They arrested the two appellants and later handed them over to the police at Itoleka Police Station.

20. PW6 investigated the matter after he had revived the appellants from Katulani Aps. He recorded statements of witnesses and alter preferred charges now facing appellants. Placed on their own defence, each appellant made a sworn statement and called no witness. Appellants' defence is that on the 28th March 2012, he was at Ngengecha village where he was grazing cows and living at one Mama Kilonzo's home where he worked upto 31st March, 2012. The following day, he went to see an unnamed uncle and found him with a stranger and they went to Kwa Muli bar. The uncle was then called by a friend and left appellant 1 taking beer with the stranger. Appellant 1 stated that he was then arrested at the bar by AP officers, handed over to the police then later charged with offence he did not know.

21. Appellant 2's defence is that he was at his employer's place on 28th March, 2012 until 1st April, 2012 when a visitor visited his supervisor and invited appellant 2 and the supervisor for a drink at Syokua bar Kwa Muli. He was while there that they were arrested and taken to Katulani AP Camp and then Itoleka Police Station where they were charged with an offence he did not know.

22. After full trial the appellants were each found guilty, convicted and sentenced to death.

23. Being aggrieved by the aforesaid verdict they lodged appeals No. 36A/2014 and 36B/2014 respectively and their grounds of appeal which were consolidated and heard together. Their main thrust of appeal are that:

- ***That the evidence on identification was unsafe.***
- ***There was no prove of element of theft in alleged robbery.***

· *The defence was not considered.*

24. They both put their separate submissions. The prosecution indicated it would rely on its submissions which court finds are not on record.

ISSUES, ANALYSIS AND DETERMINATION:

25. After going through the proceedings, evidence and submissions, find the issues are; whether the ingredient of robbery under section 296 (2) of the penal code cap 63 LOK? Whether the appellants were positively identified? And whether the appellants' defences were considered?

26. 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:

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

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

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” *[our own emphasis].*

27. 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.

28. On the first issue, the prosecution called four eye witnesses who confirmed that indeed a robbery took place on the said date and place. PW1 and PW2 confirmed that they were robbed of cash and a phone. The robbers were armed with a gun, sword and rungu. The evidence by PW1, PW2, PW3 and PW4 corroborated each other. I find that the evidence is well founded and has met the threshold of prove to the required standard of beyond reasonable doubt. I therefore find that it has been proved that indeed a robbery took place as alleged.

29. On the second issue of whether appellants or either of them was identified beyond reasonable doubt to have taken part in the robbery, this court has carefully considered the evidence tendered. The robbery is said to have taken place at about 10pm inside a bar Christened Generations. PW1, PW2, PW3 and PW4 all were consistent that there was light in the bar from a generator.

30. All the four eye witnesses confirmed having seen the attackers very well. PW1 stated that she saw the two attackers enter the bar and did not lie down when the people were ordered to. She also stated that appellant 1 had a gun while appellant 2 had a rungu and sword and that it was appellant 2 who went to where she was and demanded for money and a phone.

31. PW2 stated that he saw the two appellants standing along the road, when they appellant 1 pointed a gun at him outside bar and forced him to enter the bar and also inside the bar where he was robbed Kshs.250/=. PW3 was with PW2 outside the bar and he also saw the appellants when appellant 1 pointed a gun at PW2 and forced them into the bar.

32. PW4 on his part stated that he was inside the bar seated while facing the door and clearly saw the two appellants enter the bar and ordered them to lie. All the four witnesses were categorical that there was sufficient light inside the bar to enable them see the appellants clearly. Three days after the robbery, PW1 saw appellant 1 who with AP officers went and arrested the two appellants in a bar. PW1 and PW2 positively identified the two as the people who had robbed them.

33. From the evidence above it is clear that what is before court is visual identification as no identification parade was conducted. In the case of *Muiruri & Two Others vs Republic [2002] KLR 274*. It was held that not all dock identification is worthless. The court stated that a court might base a conviction on the evidence of dock identification if it is satisfied that on the facts and circumstances of the case, the evidence must be true and if prior thereto the court warns itself of possible dangers of mistaken identity. In the case of *Said Awadhi vs Republic [2014] eKLR*, it was held:

“Visual identification can be a basis for finding a conviction in a criminal case. However, the circumstances of the identification have to be critically evaluated by the trial court before conviction can be found on the same. The court must be satisfied that the identification relied upon is free from the possibility of error.”

34. In the present case, I have carefully evaluated the identification of the appellants. The appellants were identified not by one witness, not two, but by four witnesses. The four were consistent as to the source of light, how each of the appellant was armed and what each did during the robbery. Such consistence could not be possible if the witnesses were making a story.

35. I have warned myself of the possible dangers of mistaken identity, but I am however satisfied that the evidence of the four eye witnesses is true. Further, it is PW1 and PW2 who led to the arrest of the two appellants by PW5 and other officers.

36. Each of the appellant raised a defence of alibi, claiming that they were not at the scene of the robbery. Although it is not the onus of the appellants to prove that they were not at the scene, the prosecution has mounted credible evidence that has placed the appellants at the scene of the robbery.

37. The court finds no merit on appeal on conviction however the court notes that, the sentence was based on mandatory aspect of the statute which prescribes penalty of death. The same has since been declared unconstitutional by the supreme court case of **MURUATETU**. Thus the sentence herein cannot stand.

38. The court therefore finds no merit in appeal on conviction but sentence will be adjusted as per orders below;

(i) The appeal on conviction is dismissed, upheld.

(ii) The death sentence is set aside and appellant will be taken to trial court for sentencing after mitigations.

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

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C. KARIUKI

JUDGE