



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 12 OF 2019

HAMISI SAID.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Senior Principal Magistrate Court at Mombasa Criminal Case No. 1720 of 2017 by Hon. F. Kyambia (SPM) dated 8th November, 2018

Coram: Hon. Justice R. Nyakundi

Mr. Muthomi for the Respondent

Appellant in person

JUDGMENT

The appellant was charged with two counts of the offence of Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code and one count of the offence of resisting lawful arrest contrary to Section 253 (b) of the Penal Code. The particulars of the offence as captured in the charge sheet were that the appellant, on the 3rd December, 2017 at Shoda Area Likoni sub-county within Mombasa County, jointly while armed with a dangerous weapon namely a wooden club robbed **Rai Tsuma Chaka** cash to the tune of Kshs.380 immediately after the time of such robbery visited actual violence to the complainant.

In count two, on the 3rd December 2017 at Shoda Area Likoni sub-county within Mombasa County, jointly while armed with a dangerous weapon namely a wooden club robbed one **Fatuma** cash to the tune of Kshs.50 immediately after the time of such robbery visited actual violence to the complainant. The particulars of count three are that on the 3rd December 2017 at Shoda Area in Likoni sub-county within Mombasa County, the appellant willfully resisted arrest of **No. 105330 PC Collins Mbumile and No. 1117789 PC Henry Alinyo** police officers who at the time said resistance were acting in the due execution of their duty.

The appellant denied the charges levelled against him. He was found guilty of the two counts of robbery with violence contrary to Section 296 (2) of the Penal Code after a full trial. He was convicted and sentenced to death. He was dissatisfied by the Learned Magistrate's decision and he has since filed the instant appeal against both conviction and sentence. The grounds of appeal are that:

- (a). That the evidence of identification was not free from error.***
- (b). That the source of his arrest was not established to have had any connection with the offence in question.***
- (c). That the prosecution was not proved beyond reasonable doubt.***
- (d). That his defence was not given due attention.***

The prosecution called a total of three witnesses. **(PW1), Rai Tsuma** a tuk tuk driver dropped a passenger at Shoda at around 1 p.m. on the material date. As he was driving away, he was approached by two young men, one armed with a wooden club. They demanded money to the tune of Kshs.50/- from him. He enquired why they wanted the money after which they visited violence on him using a wooden club which cut his head. The two men then proceeded to take his money which was placed on the dashboard of the tuktuk. The robbers then ran away.

(PW1) rushed to the police station to report the matter. He was escorted by two police officers to the scene where they found the two young men having already been apprehended by members of the public. Upon cross examination, **(PW1)** told the trial Court that he did not seek

medical attention because he was not seriously injured. He also told the Court that the incident happened in the road and the same was witnessed by a myriad of members of the public.

(PW2), **Fatuma Juma** testified that on the material date, she was selling potatoes at Shoda Area when she saw the two young men demanding money from (PW1). She confirmed (PW1's) testimony that they were armed with a club which they used to assault and rob (PW1). When they finished with (PW1), they approached her and demanded money claiming they were working with the County Government. After some threats to visit violence on her, she conceded and gave them Kshs.50/= that she was holding in her hand. Shortly after her ordeal with them, (PW1) came back with police officers who apprehended them.

(PW3) and his colleague visited the scene after a report had been made by (PW1) that there were two young men robbing members of the public. When they arrived, they found that the appellant and his colleague had already been apprehended by the members of the public. The officers arrested them but they refused to board a tuk tuk which was to take them to the station. One of the perpetrators escaped but was later arrested and in the course of arrest the appellant bit one of the officers. The officer produced his treatment notes pertaining to the said incident. The Learned trial Magistrate found the appellant his colleague to have a case to answer and proceeded to place them on their defence. The both denied the charges levelled against them.

Submissions

The appellant filed submission received by the Court on the 4th August 2020. The appellant argued that the prosecution failed to prove the ingredients of the offence of robbery beyond reasonable doubt. He argued that there was no evidence that he was in company of another person or harmed anyone with a dangerous or offensive weapon. He pointed out that the 2nd accused was the one holding the club and he is the one who took the money according to (PW1) and (PW2). He is adamant that he did not take part in the alleged robbery. He also argues that the alleged stolen money and the club alleged to have been used in the robbery was not recovered from him. Further, that there was no medical evidence produced in Court to show that (PW1) sustained any injuries on the material day.

The appellant has also challenged evidence pertaining to his arrest. He argued that the evidence that he was apprehended by the members of the public ought to have support by a witness in form of one or more members of the public who took part in his arrest, who ought to have explained what led to his arrest. He argues that the same weakens the thread of evidence on the part of the prosecution. He therefore cited the case of **John Kenga v Republic Criminal Appeal No. 188 of 1984** where the Court acquitted the appellant in that case due to the fact that some of the witnesses that had been mentioned were not summoned during trial to clear doubt as regards his arrest. He further relied on the case of **James Kuloba Kuloba Walishe v Republic {2008} eKLR** where the Court acquitted the appellant because the prosecution had failed to call the person who arrested the appellant in order for the Court to understand why the appellant was arrested and that the Court could not understand how the appellant could be connected and or linked to the robbery. He therefore submitted that the source of his arrest was not proved to have had any connection with the offence at hand for the reason that the members of the public who apprehended him were not called as witnesses to testify during trial as to why they arrested him.

He has also raised questions as regard his identification as the perpetrator of the alleged offence. He asserted that it should be overserved that a claim is just an allegation until proved to the contrary. The appellant argues that the testimony was not corroborated by any other evidence other than of (PW1) and (PW2). He cited the case of **Moses Munyua Mucheru v Republic KCA No. 63 of 1983 (UR)** support the argument that identification was not free from error. He also argued that if indeed he was arrested by the members of the public, the police officers upon arriving the station ought to have subjected him to an identification to ascertain if he fits the description of the complainant's initial report. He cited the case of **Fredrick Ajode Ajope v Republic Criminal No. 87 of 2004 (UR)** where the Court propounded the value of dock identification to be of little or no value.

The respondents opposed the instant appeal by way of submissions filed on 11th August 2020. The respondents argued that the robbery transpired in broad daylight, to wit, 1 pm. The appellant engaged with the complainants for a lengthy period of time, and the circumstances for positive identification were therefore conducive. It is further argued that the amount of time that lapsed between the incident and subsequent arrest of the appellant was insignificant as the appellant was arrested on the same day and at the scene of the crime as they had been surrounded by a crowd of people while still at (PW1's) business place. The respondents therefore argued that there was no reason for an identification parade.

Analysis and Determination

The ingredients of the offence of robbery with violence are the evidence of the theft, the number of assailants, the assailants having been armed with a dangerous weapon(s) and the visiting of violence upon the complainant. The ingredients of robbery with violence are well laid down in Section 296 (2) of the Penal Code, as follows:

“296. Punishment of robbery

(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.”

The Court of Appeal in the case of **Odhiambo & another v R (Omolo, Githinji & Deverell JJA) {20055} 2 KLR 176** explained the ingredients of the offence of robbery with violence as follows:

“the act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a

robbery under Section 296 (2) and the one defined under Section 295 of the Penal Code. Other ingredients or elements under Section 296 (2) include being in the company of one or more persons or wounding, beating etc the victim and since all these are modes of committing the offence under Section 296 (2), the prosecution must choose and state which of those elements distinguishes the charge from the one defined in Section 295.”

In charge sheet herein, the prosecution relied on the ingredients that the appellant and his colleague were armed with a club which they used to maim (PW1), they forcibly took some money from the victims and that they were two in number. The first question to ponder is as regards whether the club that the assailants possessed falls within the bounce of a dangerous weapon. The phrase **“dangerous or offensive weapon”** is not defined in Section 296 of the Penal Code or in Section 4 – the interpretation section of the Penal Code. section 89 (1) of the Penal Code creates the offence of possession of a firearm or other **“offensive weapon”** etc and Section 89 (4) of the Penal Code defines **“offensive weapon”** for purposes of Section 89 as meaning:

“any article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under his control for such use.”

It can therefore be argued that albeit the club is not made for purposes of causing injury to a person, it can suffice to be a dangerous weapon in terms of Section 296 (2) of the Penal Code if the robbers in wielding it in the cause of robbery intend to use it for causing injury to any person. In this case, (PW1) alleges that one of the robbers possessed a club which was used to visit violence upon him. Secondly, (PW1) was told the trial Court that the club was employed by one of the robbers to cause injury to him, but however, he did not produce any medical evidence to prove that the assailants indeed visited actual violence upon him. Thirdly, the allegation was that the assailants were caught *flagrante delicto*, arrest by the public and rearrested by police officers, but however, no club was produced before Court to support (PW1's) allegation. Therefore, it is my finding that the prosecution failed to prove that the assailants were armed a dangerous weapon in form of a club.

On whether theft was proved, the complainants testified that he was attacked by two people one of whom he recognized as the appellant and robbed them of their money in the total sum of Kshs.480/= . (PW1) told the trial Court that he was approached by two young men, one armed with a wooden club. They demanded money to the tune of Kshs.50/= from him. He enquired why they wanted the money after which they visited violence on him using a wooden club which cut his head. The two then proceeded to forcibly take his money which was placed on the dashboard of the tuktuk. The assailants then ran away.

(PW1) rushed to the police station to report the matter. He was escorted by two police officers to the scene where they found the two young men having already been apprehended by members of the public. (PW1's) testimony was corroborated by the evidence of (PW2) who is also a complainant in this matter. She averred that she was selling potatoes at Shoda Area when she saw the two young men demanding money from (PW1). She confirmed (PW1's) testimony that they were armed with a club which they used to assault and rob (PW1). When they finished with (PW1), they approached her and demanded money claiming they were working with the County Government. After some threats to visit violence on her, she conceded and give them Kshs.50/= that she was holding in her hand. Shortly after her ordeal with them, (PW1) came back with police officers who apprehended them.

There is no doubt from the above evidence that the assailants demanded and succeeded to take away some money from the complainants. Further that it was in connection with the robbery in question herein that the members of the public as well as the police officers apprehended the appellant and his colleague. I therefore find that the appellant's actions of unlawfully demanding and taking away the complainants' money amounts to thievery. I therefore find that the ingredient of theft was proved beyond reasonable doubt.

On the ingredient as to whether the appellant was in company of one or more assailants, from the evidence I have laid above, there is no doubt that he was in company of one more person. On whether the appellant was positively identified as the assailant. I place reliance in the case of **Hassan Abdallah Mohammed v Republic {2017} eKLR** it was stated that:

“Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The Court in *Wamunga v R {1989} KLR 424 at 426 had this to say:*

“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 a conviction.”

8. In *Nzaro v R {1991} KAR 212*, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction.

In light of the foregoing principles on the identification of assailants, this Court finds that the appellant was positively identified as the assailant for the reason that the offence was committed in broad daylight, the assailants were caught in while committing the offence in question hence there could be no other explanation as to why the appellant herein was arrested, charged and committed with the instant offence. I therefore find that the appellant's appeal on conviction fails.

On the question of the harshness and excessiveness of the sentence, I must admit that sentencing the appellant to death in the circumstances under which the offence was committed is quite harsh. The instant matter was robbery in its simplest form. There was no evidence of violence visited upon the victims, no evidence of a dangerous weapon was led hence the same qualifies to be a case of simple robbery. In the case of **R v Scott {2005} NSWCCA 152 Howie, Grove and Barr JJ** stated:

“There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the

circumstances of the crime committed..... one of the purposes of punishment is to ensure that an offender is adequately punished... a further purpose of punishment is to denounce the conduct of the offender.”

In a New Zealand case of **R v AEM {200}** the Court held that:

“..... One of the main purposes of punishment..... Is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield them, they will meet this punishment.”

As appreciated by the Supreme Court in **Muruatetu Case (supra)**:

*“Comparative foreign case Law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the objectives of sentencing. In Kenya, many Courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in **Dahir Hussein v Republic Criminal Appeal No. 1 of 2015; {2015} eKLR**, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.” The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:*

“Sentences are imposed to meet the following objectives:

- 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.*
- 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.*
- 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a Law abiding person.*
- 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.*
- 5. Community protection: To protect the community by incapacitating the offender.*
- 6. Denunciation: To communicate the community’s condemnation of the criminal conduct.”*

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict.”

I am also alive to the principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in **S v Malgas 2001 (1) SACR 469 (SCA)** at para 12 where it was held that:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial Court, approach the question of sentence as if it were the trial Court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial Court However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial Court. It may do so when the disparity between the sentence of the trial Court and the sentence which the appellate Court would have imposed had it been the trial Court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate.”

In light of the foregoing decisions, suffice it to say that whereas the death sentence as provided for in terms of Section 295 as read with Section 296 (2) of the Penal Code is meant to punish the offender, it is also imposed with an objective to deter the offender from committing a similar offence and subsequently to discourage other people from committing similar offences. I am therefore convinced that the application of death sentence in the present case was manifestly harsh and excessive in light of the circumstances under which the offence was committed, to wit, the value of the money stolen, the lack of dangerous weapon and the lack of the use of violence upon the victims of such robbery.

The appellant has been in imprisonment for approximately three years. I am inclined to find the same sufficient punishment for the offence of simple robbery contrary to Section 268 of the Penal Code as read with Section 275, and not robbery with violence.

Accordingly, the Court quashes the conviction of the appellant for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code, sets aside the sentence of death and, therefore, directs that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF DECEMBER 2020

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Mwangeka for the Respondent

Appellant in person