



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

IN BUNGOMA

CRIMINAL APPEAL NO. 165 OF 2016.

WASHINGTON OBIMO OTIENO.....1ST APPELLANT

PETER MAKOKHA JUMA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in criminal case Number 890 of 2013 in the

Chief Magistrate's at Bungoma – E. N. Mwenda (SRM) 19th July, 2016).

JUDGMENT

1. The Appellants **Washington Otieno alias Monya** and **Peter Makokha Juma**, were convicted in three counts of Robbery with violence contrary to **section 295** as read with **section 296(2)** of the **Penal Code**. They filed Criminal Appeal No. 166 of 2016 and No. 165 of 2016 respectively which were later consolidated with Criminal Appeal No. 165 of 2016 being the lead file.

2. The particulars of the three counts were that on the 8th day of May, 2013 at Mashambani village in Bungoma South district within Bungoma County, jointly with others not before court, being armed with offensive weapons namely clubs and machetes, they robbed:

- a. In count I: Irene Nyongesa of cash Kshs. 100,000/-, mobile phone make Nokia 100 valued at Kshs. 1,900/-;
- b. In count II: Timothy Nyongesa of one mobile phone make Nokia X2-02 valued at Kshs. 5,500/-; and
- c. In count III: Lilian Nyongesa of one mobile phone make Nokia 5130 valued at Kshs. 8,500/-.

In all three counts, it was alleged that at, or immediately before the time of such robbery they used actual violence to the three victims. Further that the said violence caused fatal injuries to Timothy Nyongesa and Lilian Nyongesa.

3. A brief summary of the prosecution evidence is that on the 8th of May, 2013 at Mashambani in Bungoma town, **PW1** was in her kitchen when her late husband, Timothy Nyongesa, arrived home. She saw her daughter **PW3** Miriam Nyongesa running from the house and she stood up to find out what was going on. A stranger, whom she later identified as the 1st Appellant, entered the kitchen and ordered her to lie down. He hit her on the head.

4. She tried to run away but met another person outside who ordered her to lie down. She was dragged into the house where she could see her husband being cut by 3 other attackers. The 1st Appellant assaulted her and eventually broke her arm. He told her that they had been sent to collect a sum of Kshs. 100,000/- from her husband and forced her into the bedroom to get the money. She was however unable to open the door of the bedroom due to the injury to her arm. **PW1** eventually gave the 1st Appellant a sum of money she later realized was Kshs. 80,000/-.

5. The attackers began to fight over the money giving **PW1** a chance to run from the house and call for help. Outside the house, she spotted their driver trying to get away in their car. She jumped in front of it to stop him. She and the driver screamed on their way to the Cereals Board to call for help. On the way, they came upon a Securicor vehicle which took them to hospital. Her husband passed on while undergoing treatment.

6. In his defense, the 1st Appellant gave sworn testimony in which he denied committing the offence and stated that on 8th May, 2013 he was working at his mother's Anyole Hotel which is located near the Cereals Board. That on 9th May, 2013, some people came to the hotel and asked for the hotel owner's child. They arrested him and subsequently charged him with the offence herein.

7. The 2nd appellant in his sworn testimony denied the offence and stated that he could not recall where he was on the 8th of May, 2013. He stated that the police had a case against him namely Criminal Case Number 1393 of 2002 which was withdrawn under **Section 87A** of the **Criminal Procedure Code**. That on 15th May, 2013 while going to Kakamega district hospital, he met with one Omundi, a police officer who was in the company of other police officers. He informed them that he was going to the hospital. That as soon as he was done at the hospital, he was arrested and subsequently charged with this offence.

8. At the close of the trial, the Appellants were convicted and sentenced to death in count I, while the sentences in count II and count III were held in abeyance to await the outcome of the appeal in count I. Being disgruntled, they immediately lodged this appeal on grounds that: they were not accorded a fair trial as provided under **Article 50** of the **Constitution**; the evidence adduced by the prosecution witnesses was false and contradictory; the evidence of recognition was unreliable; the prosecution witnesses failed to state their real names as indicated in the charge sheet and that theirs was dock identification. They also argued that the trial court failed to consider **section 333(b)** of the **Criminal Procedure Code** and their defense was rejected contrary to **section 169(1)** of the **Criminal Procedure Code**.

9. On the first ground, the Appellants argued that their right to a fair trial guaranteed under **Article 50** of the **Constitution** was contravened. In advancing this ground, the 1st Appellant complained that he was held for five (5) days after his arrest before being arraigned in court. On his part, the 2nd Appellant complained that he was held at the police station for two (2) days before he was arraigned in court. Further that there were many adjournments which not only delayed but also denied them justice. He urged that it took the prosecution almost six (6) months to consolidate the files and to proceed with the hearing.

10. In reply, Mrs. Njeru submitted that the issue of the delay in the arraignment should have been raised at the trial for the Investigation Officer and the arresting officers to be put to task. She admitted that there were delays in concluding the case but stated that both sides contributed to the delay.

11. Under **Article 49(1)(f)** of the **Constitution**, an arrested person has the right to be brought before a court as soon as reasonably possible, but not later than twenty-four hours after being arrested; or if the twenty-four hour period ends outside court hours, or on a day that is not an ordinary court day, the end of the next court day as provided.

12. The charge sheets on the record show that the Appellants were arraigned in court outside the stipulated twenty-four (24) hour period. The 1st Appellant was arrested on 9th May, 2013 and arraigned in court five (5) days later on 14th May, 2013 while the 2nd Appellant was arrested on 15th May, 2013 and arraigned in court two days later, on 17th May, 2013.

13. The arraignment of an accused person outside the stipulated 24 hour period does not however result in an automatic acquittal. This is because the Appellant is at liberty to seek remedy, in damages, for the violation of his constitutional rights. (See: **Julius Kamau Mbugua vs. Republic Criminal Appeal No. 50 of 2008** and **Evans Wamalwa Simiyu vs. Republic Criminal Appeal 118 of 2013 [2016] eKLR**). The best practice would be to raise this issue at trial so that it can be properly addressed and put to rest by the Investigating Officer and the arresting officers. From the evidence on the record, there is nothing to show that the five-day and two-day delay occasioned to the Appellants had an effect on the trial process and prejudiced their case. I therefore find that it was not fatal to the prosecution's case.

14. On the delay in the consolidation of the charges leveled against the six (6) accused persons, at trial, I note from the record that the delay was occasioned by both the prosecution and defence. The record shows that on various days when the matter came up for consolidation of the charges, the matter did not proceed either because one of the accused persons was not produced or because the police file had not been brought. In the premise, the delay in the circumstances of this case cannot be said to have been unreasonable as contemplated by the provisions of **Article 50(2)(e)** of the **Constitution**.

15. On the second ground, the Appellants argued that the prosecution evidence was marred with falsities, contradictions and inconsistencies. The 1st Appellant complained that from the evidence presented, it was not clear whether it was Kshs. 80,000/- or Kshs. 100,000/- which was stolen from the victims. This issue was however clarified by **PW5** Benard Barasa, the CID officer who investigated the robbery. He stated that on investigation, he learnt that it was Kshs. 89,000/- and not Kshs. 100,000/- which was actually stolen from the victims' home.

16. On his part, the 2nd Appellant pointed out that whereas **PW5** said that the phone stolen from the deceased Timothy Nyongesa was tracked and found in the possession of Daniel Aluku Wafula who was accused 6, **PW2** said that the phone was found on the 2nd Appellant. From the testimony of **PW5**, it is clear that two phones were recovered. The first phone was recovered from the said Daniel Aluku Wafula which was produced as Exh. 3, whereas the second phone was recovered from the 2nd Appellant and produced as Exh. 6.

17. The Appellant urged that the evidence tendered by the prosecution was at variance with the particulars in the charge sheet and that this rendered the charge sheet defective. I note however, that it is not every contradiction that discredits the evidence of the prosecution case, but only those that affect the substance of the case. In the instant case, I find that the discrepancies are curable under **section 382** of the **Criminal Procedure Code** and did not affect the substance of the charges leveled against the Appellants.

18. By dint of the finding that the variance in the charge sheet was not fatal to the prosecution's case, the 1st Appellant's argument that the sentence contravened **section 389** and **297(2)** of the **Penal Code** collapses. The punishment for the offence of robbery for which he was charged is stipulated under **section 296(2)** of the **Penal Code**. Having found that the discrepancy in the amount taken from the victims was not fatal, the 1st Appellant's argument that he should have been convicted of the lesser charge of attempted robbery with violence fails.

19. The third, fourth and fifth grounds attacked the evidence of the identification of the Appellants. I am however satisfied from the evidence on record that both Appellants were properly identified as the assailants by the prosecution witnesses.

20. The 1st Appellant was identified by **PW1** who referred to him as “Minyo” and “Washington”. She recognized him as the person who had hit her on the head and dragged her back into the house. The relevant part of her testimony in examination in chief in her own words is as follows:

“I was able to identify the person. We called him Minyo – he is also called Washington. He is the 1st accused. He was wearing a muslim cap...I had known accused 1 for 2 years.”

On cross-examination by accused 1, who is the 1st Appellant herein, she stated as follows:

“I saw you in my house and you injured me. I had not differed with you. I know you used to work at your mother’s hotel...I had known you for 3 years.”

21. The testimony of **PW1** found support in the testimony of **PW3** who stated that her mother, **PW1**, was held by the 1st Appellant whom she also referred to as “Minyo”. In examination in chief, she stated in her own words as follows:

“She was held by a person called Minyo - the 1st accused person. I had known him before for about 5 years. I used to see him at the hotel where he used to work.”

22. The 2nd Appellant, who was accused 3 at the trial was also positively identified as shown in the testimony of **PW1** and **PW6**. In her testimony, **PW1** stated that she identified the 2nd Appellant since she had seen his face in her house during the incident. On cross-examination she stated as follows:

“I knew you when you came to my house. The attackers were about 30 minutes in my house...I picked you out in a parade.”

23. **PW6** John Nyongesa in his testimony stated as follows:

“I identified the person who broke the window. It was accused 3. I had not known him. I had seen him before. There was electric light outside our house at that time.”

On cross-examination by the 2nd Appellant, **PW6** stated as follows:

“I saw you outside my house. You wore a black jacket and a marvin.”

24. I note that whereas the offence occurred at night, the electric lights inside the house and security lights outside the house were on throughout the attack. I also note that the 1st Appellant was a person known to the robbery victims prior to the incident. Further, it was not mandatory for the identification witnesses to refer to the Appellant by his full names. The evidence tendered shows that the 1st Appellant was popularly known by the name “Minyo” and this was therefore sufficient to describe him as one of the assailants.

25. On the issue that theirs was dock identification, I note that the 1st Appellant was someone known to the victims prior to the incident. In his judgment, the learned trial magistrate rightfully stated that his was therefore a matter of recognition as opposed to identification. In convicting the 2nd Appellant, the learned trial magistrate observed that the 2nd Appellant had been positively identified by three people namely **PW1**, **PW3** and **PW6** at the scene of crime. The learned trial magistrate noted that the circumstance of identification that is the electric lighting inside the house was compelling and further that the identification was corroborated by circumstantial evidence.

26. From the evidence on record, and the prevailing circumstances, I find that the Appellants were positively identified by the witnesses at the scene of the robbery and in the dock as they testified. It is therefore fallacious for the Appellants to assert that they were only identified in the dock.

27. Lastly, the Appellants argued that the trial court failed to consider section 333(b) of the **Criminal Procedure Code** and rejected their defence contrary to section 169(1) of the **Criminal Procedure Code**. The said section 333(b) referred to by the Appellants is a non-existent section and so I will not belabor the argument.

28. Section 169(1) of the **Criminal Procedure Code** as cited stipulates what a judgment ought to contain. A scrutiny of the judgment on record shows that it was written in English which is the language of the court and that it contained: the points for determination, the decision thereon, the reason for the decision and the date and signature of the presiding officer who delivered it. From the judgment it is also evident that the learned trial magistrate considered the Appellants’ defence and found that it failed to displace the evidence of the prosecution.

29. The 1st Appellant contended that the evidence presented before the trial court was fabricated because of a grudge between his family and that of the Complainants. I note from the record that the 1st Appellant never raised this issue at the trial during cross-examination of the prosecution witnesses, or during his defence testimony. In my considered view therefore, it is an afterthought intended only to exculpate the Appellant and must be discarded as such.

30. This being the first appeal, I am tasked with the duty of reevaluating the entire evidence and coming up with my own independent findings bearing in mind that I did not have the privilege of observing the witnesses as they testified and give due allowance therefor. See - **Nganga Kahiga Alias Peter Nganga Kahiga vs. Republic Criminal Appeal No. 272 of 2005.**

31. 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 that:

“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”. (emphasis mine).

32. From the evidence on record it is clear that the Appellants were armed with offensive weapons. **PW1** stated in her evidence that the person who attacked her first had a club as did the second attacker, with which he hit her. She saw four (4) attackers who were armed with machetes and clubs. The testimony of **PW1** found support in the testimony of **PW3** who reiterated that the 1st Appellant was armed with a club. It is therefore not in doubt that the Appellants were armed with offensive weapons.

33. The evidence further shows that both **PW1** and **PW3** were injured during the incident. A P3 form produced by the medical officer, **PW7**, shows that the injuries occasioned to **PW1** were classified as grievous harm. **PW1**'s husband Timothy Nyongesa sustained fatal injuries during the incident. A post-mortem report produced at the trial shows that the deceased died as a result of hemorrhage, secondary to severe head injury. This is consistent with the evidence tendered by the prosecution witnesses on how the assailants attacked the deceased.

34. In sum therefore, all three ingredients of robbery contrary to **section 296(2)** of the **Penal Code** have been proved against the Appellants in the robbery herein. The presence of any one of those three ingredients would have sufficed but in this case, all three ingredients were present.

35. In the end, I have anxiously considered the grounds of the appeal at length and the evidence from the lower court and find that the prosecution proved their case against both Appellants beyond reasonable doubt. The evidence on record was sufficient to sustain the conviction against the Appellants on each of the charges against them.

The upshot is that the appeal is lacking in merit and I consequently dismiss it. I uphold both the conviction and sentence imposed by the trial court.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 17TH DAY OF JANUARY 2019.

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S. N. RIECHI

HIGH COURT JUDGE