



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 18 OF 2018

DAVIES MIESO INDASIO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence of Hon. Nang'ea delivered on 30th August, 2017 in Mombasa Chief Magistrate's Court Criminal Case No. 1435 of 2015)

JUDGMENT

1. The appellant was convicted and sentenced to death for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. His co-accused in the lower court was acquitted.
2. The particulars of the charge were that on the 22nd day of July, 2015 at Maweni area in Likoni District, within Mombasa County, jointly with others not before court, while being armed with dangerous weapons namely knives, robbed Nassoro Bakari Mwachadai of one motor cycle Reg. No. KMDQ 593K make Haojin, one mobile phone make Nokia and cash Kshs. 1,700/= all valued at Ksh. 98,700/= and at/or immediately after the time of such robbery threatened to use actual violence to the said Nassoro Bakari Mwachadai.
3. The evidence adduced before the Trial Magistrate by PW1, Nassoro Bakari, a "Bodaboda" (motor cycle) Rider was that on 22nd July, 2015 at 10:00 a.m., he was at a Bodaboda Check Point Stage. He stated that a customer requested to be taken to Maweni in Kwale County. They agreed on a fare of Kshs. 150/=. On the way, his customer told him that his friend was sick and asked PW1 to carry his friend to hospital.
4. PW1's evidence was that they picked the appellant's friend and ferried the two to Maweni up to a place where there were no houses. He indicated that he feared for his and declined to go further. The passenger alighted and PW1 demanded for his charges. The men he had ferried as passengers requested to call a person whom they referred to as "Foreman". While there, 2 other men appeared and they quarreled over the fare. PW1 testified that a passerby appeared, stopped briefly and then walked away. PW1 gave evidence that ignition keys for the motor cycle were grabbed and he was told that he was under arrest. His cell phone was also stolen as well as some money he had. He further testified that 2 attackers who were armed with knives threatened to stab him. They ordered him to walk with them. He did as ordered.
5. He further testified that one of the attackers who had the ignition keys stayed behind. PW1 was then ordered to sit down in a thicket where 3 of his attackers tied his hands with a rope behind his back. One attempted to cut his stomach with a knife. His reflector jacket was removed and used to cover his mouth. He was then abandoned. He recounted that he could hear his attackers riding away on his motor cycle. PW1 stated that he managed to walk up to Check Point Stage where he was untied. He indicated that the registration number of the motor cycle was KMDQ but he could not remember the other numbers. He gave the name of the owner of the said motor cycle as Monyasi, who had employed him to ride it for business. PW1 reported the incident to Inuka Police Station.
6. It was his evidence that the following day he went to the said Police Station and saw one of his attackers being carried on a motorcycle that was passing by, after one Gitonga who was with him at the Police Station alerted him about it. PW1 explained that it was the said Gitonga who had passed by the previous day as he was arguing with the group of assailants. On seeing one of his assailants, the Police were alerted. They gave chase and arrested the appellant. After his arrest, PW1 identified him as one of his attackers. PW1 indicated that the appellant was one of the two who appeared after he stopped at Maweni area (on the day of the robbery).
7. PW2, Nahashon Gitonga testified that on 2nd July, 2015 at 11:00 a.m., on the way from a farm in Ngomeni area, he met Mustafa in the company of 5 others. He also saw a motorcycle at the place they were in. PW2 greeted them and passed. He delivered the maize he had with him to one Mzee Mwabanda. As he was sitting with the said person, he saw the said motor cycle carrying 4 people. Amongst them was Mustafa. PW2 further testified that one Fadhili later rang to tell him that his relative's motor cycle had been stolen. PW2 told them that he had seen the motor cycle carrying Mustafa and others.

8. PW2 said that he took Fadhili to the place where he had first seen Mustafa and others with the motorcycle. They found the person who had been riding the motor cycle tied with a bandage or ropes. PW2 stated that they reported the matter to Inuka Police Station.

9. PW2 further testified that while at the said Police Station on 23rd July, 2015, he saw Mustafa passing the said station being carried on a motor cycle. He alerted the Police and on seeing them, Mustafa alighted from the motor cycle and started running on foot. He was chased and arrested. PW2 identified Mustafa as the appellant herein. He stated that he used to take chang'aa with the appellant at Likoni. He indicated that the appellant's popular name was Mustafa and that he had known him for 2 years.

10. PW3 was Nassoro Swaleh, the owner, of motor cycle registration No. KMDQ 593K which he had given to PW1 for business. It was his evidence that on 22nd July, 2015 he was told that his motor cycle had been stolen. He testified that later that evening, he met someone who told him that he had seen the thieves. The following day, he got information that a suspect had been arrested, whom he saw was the appellant herein. To prove ownership of the motorcycle, PW3 produced a receipt as p. exhibit 1, a log book as p. exhibit 2, a transfer document as p. exhibit 4. He stated that his motor cycle was blue in colour.

11. In his defence, the appellant denied having committed the offence and stated that on 24th July, 2015 he was carrying out his business when at around 4:00 p.m., 2 Police Officers accosted him and said they wanted to interview him. He was taken to Inuka Police Station where he was interviewed. He indicated that he was then put in the cells and charged with accused 2. The appellant stated that the charge was strange to him and the prosecution evidence was insufficient to convict. He denied that Mustafa was his name.

12. It was against the foregoing evidence adduced by PW1 and PW2 that the appellant herein filed a petition and grounds of appeal. He raised the following issues:-

(i) That the Learned Trial Magistrate erred in law and fact in convicting and sentencing him based on dock identification by PW1 without a proper finding that the same was flawed when given the fact that-

(a) There was no suggestion that he had given the appellant's name and/or description to the Police Officer who received the initial report thus leaving his alleged identification by recognition claim unsupported; and

(b) PW2 who claimed to have known the appellant by name did not mention his name in his statement recorded by the Police.

(ii) That the Learned Trial Magistrate erred in law and fact by connecting the appellant's arrest with the matter in question without proper finding that the same was not fair given the fact that-

(a) He was arrested with nothing to link him with this matter;

(b) None of the persons who arrested him were called to testify and inform the court why they arrested him; and

(c) No Police Officer testified to connect him to the commission of the offence.

(iv) That the Learned Trial Magistrate erred in law and fact in failing to see that there were no investigations done in this case and in relying on the evidence of PW1 and his witness PW2 which was a very dangerous approach as there was nothing to prove that what they told the court is what they told the Police in their initial report; and

(v) That the Learned Trial Magistrate erred in law and fact in rejecting his defence without giving any reasons as to why it could not stand against the fabrication of the prosecution's case which lacked any corroboration.

13. The appellant filed his written submissions on 31st January, 2019. He argued that the Police Officer who received the first report was left out of the prosecution's case and it could therefore not be said that the appellant was identified by recognition. The appellant stated that PW1 did not know him before the date of the alleged incident. He relied on the case of **Moses Munyua Mucheru vs Republic**, Court of Appeal Criminal Appeal No. 63 of 1983 (unreported), on the importance of the prosecution adducing evidence of the first report made at the Police Station about the case.

14. The appellant submitted that after he was arrested, he should have been subjected to an identification parade. He cited the case of **Fredrick Ajode vs Republic** 2 KLR 81, to demonstrate the importance of proper identification in a case of this nature.

15. The appellant argued that when he was arrested by the Police, PW1 was called to identify him without being subjected to an identification parade. He took issue with the name that PW2 used to refer to him, namely, Mustafa. He denied that he was known by that name.

16. The appellant stated that the Hon. Magistrate erred in relying on the evidence of one identifying witness without warning himself of the danger of so doing. He relied on the case of **Suleiman Swaleh Ali vs Republic**, Mombasa High Court Criminal Appeal No. 227 of 2003.

17. The appellant also submitted that the Investigating Officer was not called to explain the circumstances that led to him being charged with the offence facing him. He argued that failure to call the Investigating Officer weakened the prosecution's case.

18. The appellant submitted that he was discriminated against when he was put on his defence whereas his co-accused was acquitted. He also stated that his defence was not properly considered by the Trial Court. In conclusion, he stated that the prosecution's case was not proved beyond reasonable doubt. He prayed for his appeal to be allowed.

19. The Director of Public Prosecutions through Ms Ogwen, Principal Prosecution Counsel, filed submissions on 5th February, 2019. She submitted that the appellant was identified by PW1 as one of his attackers and recognized by PW2 who pointed him out to the Police, who gave chase and arrested him. It was submitted that PW2 had witnessed the scuffle between PW1 and his assailants.

20. Ms Ogwen submitted that on 23rd July, 2015, PW2 saw Mustafa passing outside a Police Station being carried on a motor cycle. PW2 alerted the Police who gave chase and arrested him. He identified Mustafa as being a person he used to drink chang'aa with, whom he had known for 2 years. It was submitted that the appellant was being carried on the stolen motor cycle, thus he was in possession of an item that was stolen from PW1. The Prosecution Counsel submitted that the offence occurred during day time and the circumstances were ideal for positive identification of the appellant by PW2.

21. On the issue of the Investigating Officer not having been called as a witness, Ms Ogwen relied on the decision in **PM and 2 Others vs Republic** [2014] eKLR where the court held that failure to call the Investigating Officer in the said case was not fatal to the prosecution's case. She prayed for the appeal to be dismissed.

ANALYSIS AND DETERMINATION

22. The duty of the first appellate court is to analyze and reconsider the evidence adduced before the lower court and come to its own independent decision. In the case of **David Njuguna Wairimu vs. Republic** [2010] eKLR, the Court of Appeal reiterated this duty as follows:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

23. The issues for determination in this appeal are:-

(i) If the ingredients for the offence of robbery with violence were satisfied;

(ii) If failure to call the Investigating Officer and the Police Officer who arrested the appellant weakened the prosecution's case;

(iii) If the prosecution proved its case beyond reasonable doubt; and

(iv) If the sentence was harsh or excessive.

If the ingredients for the offence of robbery with violence were satisfied

24. The ingredients for the offence of robbery with violence are set out in the provisions of Section 296(2) of the Penal Code. If an offender is armed with any dangerous or offensive weapon or instrument, or is in the company of 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, at the time of robbing any person, then the assailant will have committed the offence of robbery with violence.

25. In the present case, PW1's evidence was that he was hired by a customer who requested to be taken to Maweni in Kwale County. On the way, the customer requested him to pick his friend who was unwell. At a certain point, PW1 declined to ride his motor cycle further when they reached a place which had no houses, as he feared for his life. At that juncture, the passenger alighted and PW1 demanded for his charges. The passengers said they were calling the "Foreman". Two other men appeared. They quarreled over the fare. They grabbed the motor cycle keys from him. PW1 stated that 2 of the attackers were armed with knives. One attempted to cut his stomach. His hands were bound with a rope behind his back. Some cash, the motor cycle and his cell phone were stolen from him.

26. The robbers were 4 in number, 2 of them were armed with knives and personal violence was used against PW1 when one of his assailants tried to stab him on the stomach. They also tied him up with a rope before abandoning him in a thicket. I therefore hold that the ingredients of robbery with violence were satisfied.

If the appellant was positively identified

27. According to PW1, he was at Centre Point Stage on 22nd July, 2015 when he was hired by a customer. PW1 stated that the time was 10:00 a.m. There was therefore daylight and the circumstances were ideal for positive identification.

28. After being hired, PW1 carried the customer on his motor cycle up to a certain place where they picked his friend who was allegedly sick. They rode to a deserted place, where the 2nd passenger alighted from the motor cycle. Two other men appeared and joined in the quarrel about the charges that PW1 was demanding from his customer. The 4 men turned against PW1 and robbed him of the motor cycle, his cell phone and cash. It is apparent from PW1's evidence that the robbers were strangers to him.

29. PW1 reported the robbery to Inuka Police Station on the same day. On the following day which was the 23rd July, 2015 he was at the said Police Station with one Gitonga, whom he described as the man who passed by him and the 4 robbers the previous day, as they

quarreled about the charges. In his evidence, PW1 explained as follows: -

“A passerby appeared and stopped briefly. He then walked away”.

29. In his evidence, PW1 explained that Gitonga (PW2) was the passerby who had seen him arguing with his assailants. PW1 further stated that it was PW2 who had first seen the appellant on the motor cycle passing by Inuka Police Station the day after the robbery. PW1 however saw him after he had passed.

30. PW2's on the other hand explained that on 22nd July, 2015 he had come across one Mustafa whom he identified as the appellant with 5 others. He had seen a motor cycle as well at the scene where he found them. PW2 greeted them and passed.

31. PW2's evidence was that he delivered maize to one Mwabanda and while there, he saw the motor cycle carrying 4 people, one of whom he identified as Mustafa.

32. PW2 recounted that one Fadhili called him and told him that their motor cycle had been stolen. He informed him of the motor cycle that was carrying Fadhili and others. He stated that they went back to the scene where he had seen Mustafa and others. They found the person who was riding the motor cycle had been tied up with a bandage or rope. They reported to Inuka Police Station.

33. PW2's evidence was that on 23rd July, 2015, he saw the appellant passing by the said Police Station being carried on a motor cycle and he alerted Police Officers. When the appellant saw the Police he alighted from the motor cycle and ran away. He was arrested and taken to the Police Station. PW2 explained that he had known the appellant for over 2 years and he used to drink chang'aa with the former at Likoni.

34. On being cross-examined, PW2 stated that he did not see the appellant stealing the motor cycle but he suspected he was the thief as he later got information about its theft.

35. Although the appellant denied that his popular name was Mustafa, it is my finding that Davis Mieso Indasio was also commonly known as Mustafa. The appellant was well known to PW2 as they used to drink chang'aa together. PW2 had known him for 2 years. The issue of mistaken identity therefore does not arise more so since the offence the appellant was charged with occurred in broad daylight.

36. It is worth noting that the appellant did not cross-examine PW2 for referring to him by the name Mustafa. PW2 saw the appellant among the group of people which was with PW1 as they haggled over charges. After PW2 left the scene, 4 men passed him aboard a motor cycle. He saw that one of them was the appellant. These events happened in quick succession. On being cross-examined by the appellant, PW1 said he was robbed by 4 men. It was therefore not by coincidence that 4 men passed PW2 aboard a motor cycle shortly after PW2 had left PW1 with a group of men behind. PW2 informed Fadhili about the incident he had seen, after the latter told him that his relative's motorcycle had been stolen. It is my finding that the appellant was one of the men who robbed PW1 on 22nd July, 2015.

37. On 23rd July, 2015 PW2 easily identified the appellant when he saw him passing by Inuka Police Station. The appellant's act of running away on seeing the Police was the conduct of a guilty mind. I hold that the identification of the appellant was by way of recognition.

38. Contrary to the appellant's submission, there was no need for an identification parade as the appellant was in the company of PW2 when he alerted him and then reported to the Police that the appellant was passing by. The appellant was chased by the Police, arrested and taken to the Police Station where PW1 saw him. In the foregoing circumstances it would have been superfluous to hold an identification parade.

Whether failure to call the arresting officers and the Investigating officer weakened the prosecution's case

39. It was the evidence of PW2 that he was the one who alerted the Police to arrest the appellant when he saw him being carried on a motorcycle outside the Police Station. Police Officers gave chase and arrested the appellant. PW2 did not in his evidence state that the Police arrested the wrong person but did confirm that the person he had seen with 3 others on 22nd July, 2019 riding on PW1's motor cycle, was the same one who was arrested after he pointed him out to the Police. The arresting officers' role was just that, to arrest the appellant and nothing more.

40. The decision cited by Ms Ogwen in **PM and 2 Others vs Republic** [2014] eKLR on the failure by the prosecution to call some witnesses applies in this case. The Court of Appeal stated as follows in the said case:-

“Failure to call a witness can only be construed against the prosecution if it can be demonstrated that had such a witness been called, his/her evidence would have been against the prosecution. The question that ponders our minds is whether the evidence of the investigating officer would be prejudicial to the appellants. We think not, the investigating officer would collate, collect and repeat what PW1, PW2, PW3, PW4, PW5 and PW6 as well as other prosecution witnesses stated. We are of the considered view that failure to call the investigation officer and other witnesses was not fatal to the prosecution case. In all the cases, the investigating officer is not an eye witness and in the instant case, the testimony of the eye witness was sufficient to convict the appellants.”

41. On the failure to call the Investigating Officer, the Hon. Magistrate ably addressed the issue and in so doing referred to the case of **Dahir Nuno vs Republic** [2005] eKLR, where it was held thus:-

“Provided that the evidence on record is sufficient to sustain a conviction the failure by the Investigation officer to testify cannot vitiate a conviction.”

42. I also hold a similar opinion. The big role in the present case was played by PW1 and PW2. Failure to call the Investigating Officer in my considered view, did not weaken the prosecution's case or in any way prejudice the appellant.

If the prosecution's case was proved beyond reasonable doubt

43. I have carefully considered if the evidence on record was overwhelming as against the appellant. I am satisfied that the prosecution proved its case beyond reasonable doubt through the evidence of PW1 and PW2. PW1 was robbed of cash, a mobile phone and a motor cycle. Although PW1 did not know the people who robbed him of the said items, a passerby by the name of Gitonga (PW2) was able to identify the appellant whom he had known for 2 years. He commonly knew the appellant as "Mustafa". PW2 was able to identify the appellant the day after the incident when he saw him passing outside Inuka Police Station. He identified him as being among the 4 men whom he had seen riding on a motor cycle after he had seen the appellant with PW1 and 3 other men. It was PW2's evidence that when he saw them, he had also seen a motor cycle at the scene.

44. Although the motor cycle was never recovered from the appellant, both direct and circumstantial evidence point to the appellant as being one of the perpetrators of the offence. A threat of violence was directed at PW1 when an attempt was made to stab him in the stomach with a knife. They used personal violence in tying up PW1 with a rope. The robbers were 4 in number. All the foregoing facts show that the prosecution proved the offence of robbery with violence against the appellant beyond reasonable doubt.

45. The defence by the appellant casts no doubt in the prosecution's case. His defence was an afterthought and it was properly rejected by the Trial Court. I also reject it as such.

If the sentence was harsh or excessive

46. The appellant was sentenced to suffer death as provided under the provisions of Section 296(2) of the Penal Code. The Supreme Court of Kenya in **Francis Karioko Muruatetu vs Republic** [2017] eKLR held that the mandatory nature of the death sentence is unconstitutional as it denies the court discretion in sentencing.

47. In **William Okungu Kittiny vs Republic** [2018] eKLR, the Court of Appeal applied the holding in the **Muruatetu case** in an appeal where an appellant had been charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The Court of Appeal stated as follows:-

".....we hold that the findings and the holding of the Supreme Court particularly in paragraph 69 applies Mutatis Mutandis to section 296(2) and 297(2) of the Penal Code. Thus the sentence of death under section 296(2) and 297(2) of the Penal Code is a discretionary maximum sentence."

48. I have considered the mitigation proffered by the appellant before the Trial Magistrate to the effect that he was 29 years old. He had also prayed for leniency. Applying the reasoning in the case of **William Okungu Kittiny vs Republic** (supra), I hereby set aside the death sentence. I substitute it with imprisonment for a period of 15 years with effect from 27th July, 2015 when the appellant was charged in the lower court, as he has remained in prison custody since then.

49. The appeal succeeds only to the above extent. The appellant has 14 days right of appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 12th day of July, 2019.

NJOKI MWANGI

JUDGE

In the presence of

Appellant present

Ms. Ogweno, Prosecution Counsel for the DPP

Mr. Oliver Musundi – Court Assistant