



IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 127 OF 2017

BETWEEN

RAMADHAN JUMA WAMBIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. H. Wandere,

PM dated 13th October 2017 in Kakamega Magistrates Court Criminal Case No. 2871 of 2014)

JUDGMENT

1. The appellant, **RAMADHAN JUMA WAMBIA**, was charged, convicted and sentenced to 14 years' imprisonment for the offence of robbery with violence contrary to **section 296 (2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were that on 1st November, 2013 at Jua Kali Estate, Kakamega Municipality, while armed with an offensive weapon namely a panga, he robbed **CHARLES YESWA MUSUNDI** of Kshs. 5,000/= and immediately before the time of such robbery used actual violence on the said **CHARLES YESWA MUSUNDI**.

2. The singular issue in this appeal is whether the appellant was identified as the person who committed the felonious act. As it is a question of fact, I am required to review the evidence independently and come to my own conclusion as to whether or not to uphold the conviction bearing in mind that I neither heard or saw the witnesses testify in order to assess their demeanour.

3. The prosecution case was that on 1st November 2013, as Charles Yeswa (PW 1) and his wife Gladys Akinyi (PW 3) were in their house, an assailant came into the house, removed a knife, stabbed PW 1 on the mouth and right eye and demanded money. PW 3 gave him Kshs. 5,000/=. He then hit her with a knife. PW3 raised alarm and the assailant ran away.

4. Protus Baraza (PW 2), who was coming to see PW 1 on that morning, testified that he saw the assailant coming down from the stairs with a blood drenched knife. He found PW 1 has been injured. He sought help from the neighbours who took PW 1 to the hospital.

5. Patrick Mambili (PW 4), a Clinical Officer, confirmed that PW 1 was treated at the hospital on 1st November 2013. He produced the P3 medical form that showed that PW 1 had stab injuries on the right jaw and the injured upper eyelid had been stitched. He concluded that the injuries had been inflicted with a sharp object.

6. The Investigating Officer, PC David Sugut (PW 5), told the court that PW 1 made a report to Kakamega Police Station that he had been stabbed and robbed by a suspect who had escaped. In the course of investigations, PW 1 received information that the appellant had been arrested in another case whereupon he was arrested while in court at Kakamega.

7. In his defence, the appellant denied the offence and stated that he had been falsely accused by PW 1 as PW 3 who had been his former girlfriend and that they had framed him in order to obtain his property.

8. The offence of robbery with violence under **section 296(2)** of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see *Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, *Oluoch v Republic* [1985] KLR 549 and *Ganzi & 2 Others v Republic* [2005] 1 KLR 52).

9. I have no doubt that the prosecution proved all the elements of robbery with violence. The testimony of PW 1 and PW 2 was that an assailant came into their house and robbed them of Kshs. 5000/-. PW 1 was injured as a result of violence inflicted on him by a panga and the injuries he sustained confirmed by PW 4.

10. The other issue is that of the assailant's identity. It is true that the incident took place at 8.00am but both PW 1 and PW 3 stated that it was the first time they had seen the appellant. Likewise, PW 2, who met the assailant at the stairs, did not know the appellant. All this points to a need for some caution as it is clear that the witnesses did not describe the assailant to the police or at any rate give evidence on how they knew him in order for the court to properly assess the quality of evidence of identification.

11. In his testimony, PW 5 clearly stated that witnesses did not recognise the assailant while in cross-examination he stated that the PW 1 said in his statement that the suspect was known to him but did not give his name. PW 5's testimony is inconsistent with the testimony of PW 1 who told the court he did not know the accused. The totality of the evidence begs the question how did PW 1 identify the assailant.

12. The appellant is entitled to the benefit of doubt. It is not for him to disprove the prosecution case but for the prosecution to prove its case and satisfy the court that the appellant committed the act of robbery with violence.

13. I allow the appeal and quash the conviction and sentence. The appellant is set free unless otherwise lawfully held under a separate warrant.

DATED and DELIVERED at KAKAMEGA this 2nd day of September 2019.

D. S. MAJANJA

JUDGE

Appellant in person.

Ms Ombega, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.