



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 145 OF 2018

CONSOLIDATED WITH CRIMINAL APPEAL NO. 146 OF 2018

SHABAN WAMUKOYA MUKONGOLO 1ST APPELLANT

HARUN MURUNGA KHATA 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

(from the original conviction and sentence by C. C. Kipkorir, SRM, in Mumias PMC Criminal Case No. 979 of 2017 dated 12/10/2018)

JUDGMENT

1. The two appellants were convicted of two counts of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and each sentenced to serve 30 years imprisonment on each of the counts. Sentence was ordered to run concurrently. The appellants were aggrieved by the conviction and the sentence. They filed two separate appeals – Kakamega High Court Criminal appeals No. 145 of 2018 and 146 of 2018 that were consolidated for purposes of hearing. The appellant in Criminal Appeal No. 146 of 2018, Shaban Wamukoya will herein be referred to as the 1st appellant while the appellant in Criminal Appeal No. 145 of 2018 will be referred to as the 2nd appellant.

2. The 1st appellant was represented by Miss Omar advocate while Professor Wilson Hassan Nandwa had initially filed submissions for both appellants before he ceased acting for them. The 2nd appellant relied on the submissions filed by Prof. Nandwa.

3. The state opposed the appeal through the oral submissions of the prosecution counsel, Mr. Ng'etich.

4. The particulars of the charges against the appellants were that on the 2nd October 2017 at 10 pm at Ejinja Village, Koyonzo Location in Matungu sub-County within Kakamega County jointly with others not before court they robbed John Museka (herein referred to as the complainant in Count 1) of one mobile phone make Nokia 1110 and cash Ksh. 1,500/= all valued at Ksh. 4000/= and at the same time and place as in count 1 robbed Phylis Akinyi (herein referred to as the complainant in Count 2) of 18 bottles of whisky, one dozen of Afya drinking juice and cash Ksh. 3,775/= all valued at Ksh. 15,175/= and at and immediately before or immediately after the time of such robbery wounded the two complainants.

5. The grounds of appeal are in summary that the identification of the appellants was not proved; that the trial court erred in failing to resolve the contradictions in the prosecution evidence; that the trial court erred in relying on the testimony of incredible witnesses; that trial court erred in failing to consider the appellants' defences of alibi; that the sentence meted out against the appellants was harsh and excessive and that the conviction and the sentence are a miscarriage of justice.

Case for Prosecution –

6. The prosecution called 9 witnesses in the case. John Museka the complainant in count 1 testified as PW1 in the case while Phylis Akinyi, the complainant in Count 2 testified as PW2 in the case. The evidence for the prosecution was that Phylis PW2 was employed as a bar attendant at the bar of one Moses Nabongo PW3. She was in charge of the counter. John the complainant in Count 1 was her boyfriend.

7. That on the material day between the hours of 9-10 p.m. Phylis was selling at the bar. John PW1 was a customer at the bar. There was also a watchman called Peter at the entrance to the bar. That two people went to the bar. The first one was armed with a panga and a rungu while the second was armed with an axe. The first person cut the watchman on the head. He entered into the bar and hit John PW1 with the rungu. He stole from him a mobile phone and a wallet containing some money. John fell down on being hit and lost consciousness. The first person then went to Phylis and forced her to open the counter. When she hesitated he cut her. He took from the counter a crate of tusker beer, bottles of afya juice and bottles of whisky. He and the second person ferried the goods away. When John PW1 regained consciousness he ran away home. Phylis reported to her employer PW3 who in turn reported to the in-charge Ijinja AP post Cpl. Muramba PW6.

Administration Police officers went to the scene. They looked for the robbers but they did not get them. On the following day John PW1 reported to a village elder Ismael (PW5) that he had identified one of the people who had attacked him as Keya. PW5 passed the report to Cpl Muramba. Cpl. Muramba went and met John PW1. They went and arrested Keya, the 1st appellant.

8. That on 16/10/17 Phylis was admitted in hospital when a person whom she identified as the 2nd appellant went to hospital and started to strangle her. She screamed and he ran away. That on the 19/10/2017 the 2nd appellant and another who was acquitted by the trial court went to the hospital bed of Phylis where she was admitted. She alerted her brother PW4 that the people were the ones who had attacked her. Her brother alerted the hospital security and the two of them were arrested. The appellants and a third person were charged. After a full trial the appellants were convicted of the two counts as earlier stated and sentenced accordingly.

9. Phylis stated that the 1st appellant is the person who entered into the bar while armed with a panga and a rungu, assaulted them and robbed them. She said that the 2nd appellant is the one who was left at the entrance and assisted the 1st appellant to carry away goods out of the bar. John PW1 said that the 1st appellant is the person who assaulted him and robbed him. He did not see the 2nd appellant there.

Defence Case –

10. The 1st appellant gave a sworn statement in which he stated that he was a volunteer village security member, *nyumba kumi*. That on the evening of the material day he was at his home with his wife and a neighbour called Mama Velma, DW5. That he slept at 9.30 p.m. That at 10.30 p.m. he was woken up by one of the village security members, Wilberforce Ogola DW4 who wanted them to go and attend to a scene where some people had been attacked. His wife however restrained him from going away. His evidence was supported by Wilberforce Ogola DW4 and Mama Velma (DW5).

11. The 2nd appellant stated in a sworn statement that he works as an Imam at Kilgoris. That on the 1/10/2017 he travelled to his rural home at Sanyangwe Village to attend to a family meeting. That he stayed there upto 18/10/19 when he went back to Kilgoris. That on the 19/10/19 he and a friend, Mohamed Nyangweso (who was acquitted by the trial court) went to visit his aunt at St. Mary's Hospital Mumias where she was admitted. They checked her in the wards but did not find her. They were informed that she had been transferred to another hospital. They then heard a woman saying that they are the ones who had attacked her on 2/10/2017. A mob set upon them and attacked them. They were rescued by the hospital security men. They were taken to Harambee Police Station. His father, Ali Khata DW6, supported his evidence that he, the 2nd appellant, was at his father's home on the evening of 2/10/2017 where they slept in one house at 11.30 p.m. DW6 said that the 2nd appellant went back to Kilgoris on 6/10/2017.

Submissions –

12. In her submissions Miss Omar for the 1st appellant submitted that Phylis PW2 did not give a prior description of the people that she saw in the bar. That the trial court did not address itself on how the witness was able to identify the 1st appellant several days later when she had not in the first instance given his description. That it is not known how long the incident took. That the witness said that she lost consciousness on being attacked. That it was doubtful that she would have recognized the 1st appellant in that state. That the trial court erred in relying on the evidence of a single identifying witness who was in panic, injured and paranoid.

13. Prof. Nandwa in his submissions stated that the investigating officer PW8 admitted in his evidence that John Museka PW1 did not mention the names of the appellants when he made his report to the police in OB report No. 9/3/10/2017. Therefore that the linking of the appellants to the offence was an afterthought.

14. That John said that he saw 2 assailants while Phylis said that she saw 3 people. That Phylis told her employer PW3 that one of her assailants was Keya, the 1st appellant, yet she did not give this information to the AP officer PW6 who went to the scene on the evening of the attack. That PW3 on his part said that when he went to the bar he found Keya telling people how the attack had occurred yet he did not have him arrested when Phylis had told him that Keya was one of the attackers. That the AP officers found Phylis at the scene yet she did not give the names of the assailants to them. That PW3 also did not take the AP officers to the home of Keya yet it had been reported to him that one of the attackers was Keya.

15. Further that Phylis said that a person called Florence had seen the 2nd appellant strangling her at the hospital. That the said person was not called to testify in the case. That the incident about strangulation was not reported to the hospital management. That the inference is that the evidence was fabricated.

16. The advocate further submitted that Phylis said that she did not know the 2nd appellant prior to the robbery. That no identification parade was conducted to rule out the possibility of mistaken identity. That in the absence of this the conviction was not safe.

17. The advocate submitted that the trial court erred in rejecting the 1st appellant's defence on the basis of contradictions between the evidence of appellant and his witness DW2 as to how the appellant was dressed, as to who opened the door and as to whether the appellant came out to meet DW4 when DW4 went to the appellant's house. The advocate submitted that these contradictions were not material to the case. That there was no evidence to contradict the appellants' alibi. That the alibi defence of the 2nd appellant that he was at his rural home on the night of the robbery was not displaced by the evidence for the prosecution.

18. The advocate submitted that the appellants are young men. That the value of the stolen property was Ksh. 4,000/= . That there were no aggravating circumstances and therefore that the sentence of 30 years was harsh and excessive.

19. In opposing the appeal, the prosecution counsel submitted that the bar where the robbery took place was well lit. That the bar attendant

PW2 saw the appellants assault the watchman and her boyfriend PW1. That she had sufficient time to see them as they were people known to her. Therefore that the charges were proved beyond all reasonable doubt.

Analysis and Determination –

20. This being a first appeal the duty of the court is to analyse and re-evaluate the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – See **Okeno –Vs- Republic (1973) EA**.

21. In convicting the appellants of the offences the trial magistrate held that the 1st appellant was identified by both complainants PW1 and PW2. That the witnesses knew him before. That the scene of the attack was well lit and that the witnesses saw him properly. That the 2nd appellant's visit to the hospital bed of Phylis connected him to the offence. The trial magistrate accordingly did not believe the alibi defences by the appellants and dismissed them.

22. It was the evidence of John Museka PW1 that he hails from Tororo in Uganda. That he was working for a couple called Osodo and Mary in Mumias. That Phylis PW2 was his girlfriend. That on the evening of the material day he was at the bar where Phylis was working. That two people entered into the bar. That one was tall and the other one short. He identified the tall one as Keya, the 1st appellant. The other one was unknown to him but he used to see him at Ijinja. The short one remained at the entrance while the 1st appellant went towards him. The 1st appellant hit him with a rungu and stole his wallet and mobile phone. He fell down and lost consciousness. When he came to he ran away home and slept. He thereafter reported to the police and the 1st appellant was arrested. He was treated at Matungu. He was issued with a P3 form P.Ex.2 that indicated that he had swellings on the right mandible and occipit and painful shoulder. The witness said that the 1st appellant was his friend and that they used to hang out together. That the 1st appellant used to work as a security man at night. That the scene of the attack was well lit.

23. Phylis PW2 testified that she was at the time near the counter of the bar. That she saw two people at the entrance talking with the watchman. She identified one of them as Keya, the 1st appellant who was a neighbour. He was armed with a panga and a rungu. His colleague was armed with an axe. Keya cut the watchman on the head. He then proceed to where John PW1 was and hit him with a rungu. He went to her and forced her to open the door to the counter. She did so. He ordered her to kneel down. She refused and he cut her. The person who was at the entrance went to the counter. They took away drinks from the counter. A third person went to assist them to ferry away the goods. She lost consciousness. After she came to she reported to her employer PW3. She was taken to hospital. She was issued with a P3 form. The P3 form indicated that she had deep cut wounds on the head and left shoulder. The witness said that the 1st appellant used to be a customer at her bar. That the bar was well lit at the time of the attack.

24. The witness further said that the 2nd appellant is the one who was guarding the entrance as the 1st appellant attacked her and John. That he and the third person assisted the 1st appellant to carry away drinks from the counter. That on the 16/10/17 while admitted at the hospital, the 2nd appellant went there and started to strangle her. She screamed and he ran away. That on the 19/2/17 the 2nd appellant and the third person went to her hospital bed. She raised alarm and they were arrested.

25. The employer to Phylis PW3 testified that Phylis went to him after the robbery and told him that she had recognized one of the robbers as Keya, the 1st appellant. That he went to the bar and found the 1st appellant outside the bar with other people.

26. The brother to Phylis PW4 testified that he went to see her at the hospital on 19/10/17 when he found the 2nd appellant and another person seated on her hospital bed. His sister told him that the people were the ones who had attacked her. He reported to the hospital guards. Policemen went there and they were arrested.

27. Ismael PW5 testified that he is a member of *nyumba kumi*. That on the material night he received a report of the incident from the in-charge Ijinja AP post. He went to the scene and found AP officers and members of community policing. He saw a girl and a man injured. On the following day a boy called Johny who was a victim of the attack informed them that he had identified one of his attackers as Keya, the 1st appellant. The 1st appellant used to help them in village security work.

28. Cpl. Muramba PW6 stated that he arrested the 1st appellant on 3/10/17 after he was pointed out to him by John (PW1). Cpl. Muramba in his evidence stated that John PW1 took them to the bar and they found that the place was being lighted with electricity.

29. The incident of robbery took place at night. It is trite law that before a court can convict on the evidence of identification that took place in difficult circumstances, the evidence has to be examined with great care so as to satisfy the court that the identification was free from the possibility of error. The trial court was aware of this requirement and cited the Court of Appeal decision in **Cleophas Otieno Wamunga – Vs- Republic (1989) eKLR**, where the court stated that:-

“It is trite law that where the only evidence against a defendant is evidence of identify of recognition, a trial court is enjoined to examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of conviction.”

30. It is clear from the evidence adduced at the lower court that the 1st appellant was arrested on the following day after the incident arising from information given by John PW1 that he, John, had recognized him as one of the robbers. The 1st appellant admitted in his evidence that he was arrested by Herbert (Cpl. Muramba PW6) and Ishmael PW5 on the following day after the incident. The OB report by John was made on the same day that the appellant was arrested. John therefore made no delay in mentioning the 1st appellant as the person who had robbed him. The arguement that John did not mention the 1st appellant to the police does not stand.

31. It is also clear from the evidence that Phylis mentioned the 1st appellant to her employer PW3 immediately after the attack. It is not in evidence as to whether Cpl. Muramba PW6 questioned Phylis whether she had identified any of her attackers. It then cannot be argued that the reason why she did not disclose the information is because she did not know who her attackers were. Neither was the complainant's employer asked why he did not have the 1st appellant arrested when he found him outside his bar. This cannot now work against the prosecution when no question was asked about it.

32. The 1st appellant was a person well known to both John PW1 and Phylis PW2. They were all residing in the same area. There was electricity light in the bar when the incident took place. Phylis was well placed to see the 1st appellant when he cut the watchman at the entrance and when he hit John inside the bar. She talked to the 1st appellant before he cut her. She therefore had sufficient time to see the 1st appellant before she was cut. Though the witness stated that she at some time lost consciousness she was not questioned at what point that happened nor was she questioned on how she was able to see the 1st appellant and two others ferrying away drinks from the counter if at all she had lost consciousness. The court cannot say that she was lying when she was not questioned on those issues. I agree with the trial court in its finding that Phylis saw the 1st appellant and two others ferrying away drinks from the counter.

33. Phylis said that a 3rd person joined the other two to ferry the drinks out of the bar. By that time John had been hit and lost consciousness. That would explain why John did not see the third person.

34. John PW1 saw the 1st appellant entering into the bar. He saw him when he hit him. Since there was electricity in the bar there was no possibility of mistaken identity. The fact that he mentioned him to Ishmael and to Cpl. Muramba on the following day puts credence to his evidence that he had identified him during the robbery.

35. In view of the foregoing I find that the 1st appellant was identified to have been among the people who robbed the two complainants. The defence evidence did not displace the strong evidence adduced by the prosecution witnesses. The trial court was right in dismissing the 1st appellant's defence.

36. The 1st appellant was in the group of 3 people that robbed the complainants. They were armed with pangas and axes. They assaulted the complainants during the incident. The charges of robbery with violence against the 1st appellant were proved beyond all reasonable doubt.

37. Both complainants stated that they did not know the 2nd appellant before. Phylis did not explain how she was able to identify the 2nd appellant from the distance he was from her. If the 2nd appellant is the same person who tried to strangle her on 16/10/17 the matter does not seem to have been reported to the hospital authorities. A material witness called Florence who was said to have witnessed the incident was not called to testify in the case. It is unbelievable that such a serious matter would have been handled in such a casual manner and fail to be reported to the hospital management and to the police.

38. The brother to Phylis PW4 stated that the 2nd appellant and another had been seated at the hospital bed of Phylis before they were arrested. Phylis did not state that they had been seated. She only stated that the people went to the hospital. The 2nd appellant alleged that they were looking for a patient in the ward when they were arrested. The investigating officer confirmed that the patient mentioned by the accused persons had been admitted at the hospital. I do not think that there was sufficient evidence that the 2nd appellant had gone to the hospital with an ulterior motive against Phylis. The presence of the 2nd appellant at the hospital was not by itself sufficient to connect him with the offence. When he was arrested the police did not conduct an identification parade to ascertain whether Phylis could identify him. The charge against the 2nd appellant was not proved beyond all reasonable doubt.

39. The upshot is that the appeal on conviction on the 1st appellant, Shaban Wamukoya Mukongolo, is devoid of merit and is accordingly dismissed. There was insufficient evidence against the 2nd appellant, Harun Murunga Khata. The conviction against the 2nd appellant is therefore quashed and the sentence against him set aside. The 2nd appellant is set at liberty forthwith unless lawfully held.

Sentence on 1st appellant –

40. The 1st appellant was sentenced to serve 30 years imprisonment on each of the two counts of robbery with violence. Sentence was ordered to run concurrently.

41. The 1st appellant was a first offender at the time that he was convicted. He was in custody for one year awaiting trial. He and other people injured the complainants during the robbery and stole from them goods valued at about 20,000/=.

42. Sentencing is a discretion of the trial court. In **Ambani –Vs- Republic (1990) KLR**, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.

43. Section 333 (2) of the Penal Code requires a court when sentencing an accused person to take into account the time spent in custody awaiting trial.

44. I have considered sentences in other cases involving robbery with violence. In **Douglas Muthaura Ntoribi –Vs- Republic, Meru High Court Misc. Criminal Appeal No. 4 of 2015** where the accused had been sentenced to death, Chitembwe J. substituted the sentence with a prison term of 15 years upon considering that the robbers stole a paltry Ksh. 500/= and that the victim sustained minor injuries.

45. In **Benjamin Kemboi Kipkone –Vs- Republic (2018) eKLR** where 3 robbers armed with an AK 47 rifle robbed the complainant of

Ksh. 250,000/= and a mobile phone Chemitei J. substituted the death sentence with 20 years imprisonment.

46. In **Paul Ouma Otieno –Vs- Republic (2018) eKLR** where the accused was armed with an AK 47 rifle and a kitchen knife robbed the complainant of Ksh. 450,000/= and 3 mobile phones, Majanja J. substituted the death sentence with 20 years imprisonment.

47. In **Wycliffe Wangugi Mafura –Vs- Republic Eldoret Criminal Appeal No. 22 of 2016 (2018)** the Court of Appeal imposed a sentence of 20 years imprisonment where the appellant was involved in robbing an Mpesa shop agent with the use of firearm.

48. The appellant herein and his accomplices robbed the complainants of goods valued at around Ksh. 20,000/=. The robbery was aggravated by the fact that the robbers assaulted the complainants. The complainant in count 2, Phylis, was as a result admitted in hospital for several weeks. Upon considering that the 1st appellant was a first offender and a young man at the time of the commission of the offence, I am of the view that the sentence of 30 years imprisonment was manifestly excessive. The sentence of 30 years is therefore set aside. I sentence the 1st appellant to serve 18 years imprisonment on each of the two counts of robbery with violence commencing from the date of sentence by the trial court. Sentence to run concurrently.

Delivered, dated and signed in open court at Kakamega this 18th day of September, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Kibet for State

Appellant - present

Court Assistant - George

14 days right of appeal