



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

HCCR APPEAL NO. 77 OF 2018

SAMSON MWANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment dated 20thSeptember,2017 by Hon. M.L.Nabibya,

Senior Resident MagistrateatHamisi SRM'S Criminal Case No. 843 OF 2016)

JUDGMENT

1. Samson Mwangi the appellant herein was charged with the offence of robbery with violence Contrary to Section 295 as read with Section 296 (2) of the Penal Code.

The particulars were that the appellant on the 18th day of December, 2015 at Wandega village Bugina Sub Location within Vihiga County jointly being armed with offensive weapon namely Knife, Rungu and handcuff S/No 85421 robbed COLLINS MUHANDO of his motor cycle Registration number KMDR 975 Z make boxer 150 cc valued at Kshs. 112,000/= and immediately before the time of such robbery used actual violence by beating the said COLLINS MUHANDO.

2. After a full hearing he was found guilty, convicted and sentenced to suffer death.

3. He was aggrieved with the judgment and filed this appeal citing the following grounds:-

i. The charge was defective as it gave wrong dates of his arrest and appearance in court.

ii. The trial magistrate convicted and sentenced him on insufficient evidence.

iii. The learned trial magistrate misdirected herself by blaming him when the owner of the motor bike had not reported loss of her motor bike.

iv. That his right to access to information under article 35(1) (2) (b) (i) was contravened since he was not served with prosecution evidence as enshrined under Article 50(2) (i) of the constitution.

4. The prosecution called a total of six(6) witnesses in support of its case. The appellant gave a sworn statement and did not call any witness.

A summary of the case before the court is that on 18thDecember 2015 8 pm PW1 (**Collins Muhando Mugami**) who is a bodaboda rider of motorbike KMDR 975 Z was called by a client who required his services. He promptly went and took him to Wandega as requested, after settling on a charge of Shs.100/=.

5. As they argued on the mode of payment a motorbike reg no KMDD 227 U BLUE TVS STAR stopped ahead of them. The rider sought to be assisted with direction which PW1, did. Making as if to go to Wangulu the rider turned up to where PW1 was with his client, and jumped off the motorbike, and went for PW1. His client punched him and removed a knife and placed it on his chest. They struggled over the knife and he was injured on his right palm.

6. In the process his client drove away his Motorbike KMDR 975Z. He remained struggling with the intruding rider, and continued screaming. Neighbours responded and the intruding rider ran away leaving behind the Motor bike KMDD 227 U (EXB 1a and b). He lost his

own motorbike KMDR 975 Z whose certificate of insurance (EXB2) and purchase receipt for Kshs. 112,000/- (EXB 3) he produced.

7. A report was made at Mudete police station and thereafter he was treated at Sabatia subcounty hospital as confirmed by the Clinical officer Loy Aguona(PW6), who produced the P3 Form (EXB4).

8. PW2 **Emmanuel Mbuka** and PW4 **Mary Itoka Muchera** both confirmed that one Benson Amugune who they said was the appellant was employed by PW4 as a motorbike rider, on 7th December, 2015. An agreement was entered into whereby he was expected to remit to PW4 Kshs. 900/= every within three(3) days. He only worked for one week and remitted the money and disappeared.

9. On 19th December, 2015 PW2 & PW4 learnt of the presence of PW4'S motorbike at Mudete Police Station, and they went and identified it. Benson was nowhere to be seen. On 11th July, 2016 the said Benson was arrested while impersonating a police officer at Elwayole within Khwisero. PW1 and PW4 identified the appellant as the Benson they were referring to as their employee, who had disappeared.

10. PW3 **Corporal Rechar Odara**, testified of having received a report on 11th July, 2016 5 pm of a police imposter. On the way to the Elwangale area they met the appellant on a motorbike with other motorbike riders in pursuit. On seeing the officers he jumped off his motorbike and ran to them for safety. He was taken to the Police Station while in handcuffs S/no 855421(EXB1).

PW5 **Corporal Shadrack Sirwa** was the investigating officer. He explained the report he received and the action taken.

11. When placed on his defence, the appellant in his sworn statement testified on how he was arrested on 11th July, 2016 3 pm after being called by his former wife.

They disagreed over the issue of his child whom his former wife had moved with to another marriage. As they talked three motorbike riders arrived and he was slapped and beaten randomly. He was then handcuffed and forced onto a motorbike but when he saw an A.P in uniform he jumped from the motorbike. The Police were then told how he tried to impersonate a police officer while at a drinking place. He had been handcuffed when he jumped off the motorbike and so was taken to hospital.

12. In cross examination he said he had been working at a construction site in Kawangware, on 18th December, 2015 and was there for three months. He denied having masqueraded himself as a Police Officer.

13. In his written submissions the appellant contended that the charge showed that he was arrested on 19th July, 2016 and arraigned in court on 25th July, 2016 whereas in actual fact he was arrested on 11th July, 2017 and arraigned in court on 18th July 2017. He referred to the evidence of PW3. It was his submission that the charge sheet was therefore defective. He further stated that when arraigned in court on 18th July, 2017 no plea was taken, hence a violation of his constitutional rights.

14. He appellant further submitted that PW1 did not identify the perpetrators of this offence. Further that the owner of the motorbike never made any report of her missing motorbike from 8th December, 2015 to 19th December, 2015 when the motorbike was found at the police station.

15. He again complained of violation of his right to access of information. That he was never provided with witness statements and he elected to proceed without them. That the trial court relied on extraneous evidenced like the agreement purported to have been entered into between him and PW4. He dismissed the said agreement since it was never examined to confirm that he was party to it.

16. Mr. Mwaura for the State (respondent) opposed the appeal, and submitted that the evidence was well evaluated by the trial court. That the complainant was said to have been attacked by his client and rider, and a motorbike was recovered and was linked to the appellant.

17. Counsel further submitted that PW1's evidence was corroborated by that of the investigating officer (PW5). PW4 who owned the motorbike produced the logbook (EXB 2a and b). That it was proved that PW1 had been injured during the incident.

18. Counsel argued that there was no grudge between PW1 and the appellant who were both employees of PW4. Further that the appellant never raised the issue of a grudge during the trial in the lower court.

ANALYSIS AND DETERMINATION

19. This is a first appeal and this court has a duty to reconsider the evidence on record a fresh. An allowance must be given by this court owing to the fact that it did not see nor hear the witnesses.

See **Okeno V R 1972 EA 32; Mwangi and another V R 2004(2) KLR 28, Kiilu and another V R 2005(1) KLR 174.**

20. I have considered the evidence on record, the grounds of appeal and the submissions by both parties and I find three main issues to be falling for determination.

The issues are:

- i. Whether the charge sheet was defective

ii. Whether the offence of robbery with violence was proved

iii. Whether the appellant was proved to be one of the robbers

Issue no. i. Whether the charge sheet was defective

21. The appellant has only raised issue on the dates shown in the charge sheet as the date of arrest and arraignment in court. That they differ from his actual arraignment in court. The consolidated charge sheet shows that the appellant and his co-accused were arrested on 19th July, 2016 and were to be arraigned in court on 25th July, 2016. The court record shows that the consolidated charge sheet which is the one in the record of appeal was only introduced in court on 18th October, 2016.

22. The initial charge sheet is not in the record of appeal. It is however very clear that the appellant was first arraigned in court on 18th July, 2016 whereby the plea could not be taken as the court D. Ogal (Resident Magistrate) did not have jurisdiction. The same was deferred to 25th July, 2016. However plea was properly taken on 18th October, 2016 before E.W. Muleka Senior Resident Magistrate after the presentation of a consolidated charge sheet.

23. In the said charge sheet the particulars are clearly set out including the date of the alleged offence. There is nothing to show that the indication of wrong dates for the arrest and arraignment in court caused an injustice to the appellant. The court record shows when he appeared in court and when plea was taken. I find that there was no defect in the charge sheet.

Issue no. ii. Whether the offence of robbery with violence was proved.

24. Section 295 of the Penal Code defines what an offence of robbery is. The aggravated violence is defined under Section 296(2) of the Penal Code, as follows:-

“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.”

A theft accompanied by any one of the circumstances explained under Section 296(2) Penal Code qualifies as a robbery with violence.

25. From the explanation given by PW1, his motorbike reg no. KMDR 975 Z make BOXER 150 CC valued at shs. 112,000/= was stolen from him. He was robbed after being attacked by a person armed with a knife. He was injured by the knife as he tried to shield himself. The Clinical officer who testified as PW6 confirmed this and produced a P3 Form (EXB 4) to that effect.

26.b PW1 produced a certificate of insurance of the motorbike (EXB2) and the receipt of purchase (EXB3) to prove ownership. The motorbike had not been recovered as at the time PW1 testified in court. I am therefore in agreement with the learned trial magistrate that the prosecution indeed proved that an offence of robbery with violence Contrary to Section 296(2) of the Penal Code had been established.

Issue no. iii. Whether the appellant was proved to be one of the robbers

27. It is clear from PW1'S evidence that he did not identify the client he was carrying whom he claims to have taken off with his motorbike.

Secondly though he stated that he had been called by the client to go and pick him he did not give the details of the communication e.g the phone number that was used to call him. From his evidence its further confirmed that it is not the appellant who took off with his motorbike. He made it clear that he did not know the client.

28. PW1 in his evidence in chief stated that the rider of motorbike reg. No KMDD227 U is the one who assisted his client to take off with his motorbike. He struggled with the said rider but he too took off. He was also not able to identify him.

In cross examination by the appellant at page 11 line 22 of the recorded proceedings in response to a question by the appellant PW1 stated:-

“ The client I carried I had never seen him. I don't know you.”

29. It is therefore evident that PW1, did not at any point identify his client or the rider of the motorbike KMDD 227 U, whose photos were produced as EXB 4a and b. Evidence has been led to show that PW4 Mary Itoka Muchera was the owner of the said Motorbike (EXB4a and b) and that she had employed one Benson Amugune as its rider.

The appellant who is known as Samson Mwanga has denied being known as Benson Amugune and being an employee of PW4 as testified by PW2 and PW4.

30. A copy of an alleged agreement between PW4 and the appellant was produced as EXB 3. It has ID No shown as - **24733850**, and phone No. **0713830206**. It was the evidence of PW2 and PW4 that after being employed on 8th December, 2015 Benson Amugune worked for one week and disappeared. It means he was not heard of after 15th December, 2015. Of course there is no mention of him having returned the motorbike and it has been confirmed that neither, PW2 nor PW4 reported the matter to the Police.

31. When asked in cross examination about her failure to report his disappearance, this is what PW4 told the court at page 22 of the recorded proceedings.

“I didn’t report your disappearance because I assumed you had a problem and you were still looking for money to pay me as required.”

She therefore confirmed that she did not report anywhere anything about the missing motorbike and rider. She however appeared at the station on 25th December 2015 in respect to this motorbike.

32. It was PW1’s evidence that he went with villagers to Mudete Police Station to report the matter. It was however his friend Ambere who took the Motorbike KMDD 227 U to the said Station as it had been left at the scene.

33. In his defence the appellant while on oath denied the charge. He said he was arrested for impersonation of a police officer an offence he was never charged with. He also stated that his ex-wife who had left with their son was the cause of all this. He further stated in cross examination that on 18th December, 2015 he was working at a construction site in Kawangware and he remained there for 3 months.

34. The above is a summary of the evidence by the key witnesses and the appellant. There are a few issues that appear not to add up and I will list them here as follows:

i. Is Benson Amugune the same as Samson Mwanga? The charge sheet only refers to Samson Mwanga and there is no alias name of Bernard Amugune.

ii. According to PW2 and PW4 there was an agreement entered into between PW4 and the appellant. The same was produced as EXB3. The said agreement refers to Benson Amugune and not Samson Mwanga. In spite of all these glaring differences the prosecution did not make any attempt to show that Benson Amugune and Samson Mwanga is one and the same person. His fingerprints were never taken for the necessary examination. How then can this court confirm that the two names refer to one and the same person, who is the appellant?

iii. Besides the recovery of the motorbike KMDD 277U which was identified by the owner(PW4) on 25th December 2015, the prosecution had the duty to prove that the rider of that motorbike(EXB 4a and b) that night of 18th December, 2015 was indeed the appellant(Samson Mwanga).

iv. It was not enough for the prosecution to assume that since PW2 and PW4 said it was the Benson Amugune who had been employed as a rider he was the one rider of the said motorbike on that material night. PW1 himself did not identify the said rider. None of those who came to his rescue testified. Mr. Ambere who took the motorbike to the Police Station did not testify and neither did he make mention of the rider to the Police. PW5 who investigated the case did not receive the report nor anything about the rider.

v. I therefore find that the only thing that tends to link the appellant to this incident is his alleged work agreement with PW4. Due to the unestablished link in the two sets of names this assumption by the prosecution has not been proved.

vi. Some handcuffs said to have been found on the appellant who was masquerading as a police officer were produced herein as EXB1. It was said he had gone to a chang’aa den and presented himself as a police officer. There is no single officer who attested to this. It is an offence to be found in possession of handcuffs. It’s equally an offence to impersonate a police officer.

vii. It therefore beats logic that after all that the witnesses testified on, the prosecution elected not to charge the appellant with the alleged offences, relating to the handcuffs.

35. After doing the above analysis I do find that the prosecution did not prove that the appellant was the one riding motorbike KMDD 227 U, on the night of 18/12/16 and that he was at the scene of crime. The prosecution failed to prove its case against the appellant to the required standard. I therefore allow the Appeal. The conviction is quashed and sentence set aside.

36. The appellant shall be released forthwith unless lawfully held under a separate warrant.

Orders accordingly

Delivered signed and dated this 9th day of September, 2019 in open court at Kakamega.

H.I.ONG’UDI

JUDGE