



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 4 OF 2019

JOHN MWANGANGI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. E. M. Muiru (SRM) in the Senior Resident Magistrate's Court at Kilungu Criminal Case No.385 of 2018, delivered on 21st December, 2018)

JUDGEMENT

1. The appellant was charged with offence of robbery contrary to section 296 (1) of the Penal Code Cap. 63 Laws of Kenya.
2. Particulars being that on 20/5/2018 at Enzae Trading Centre Mukaa Location, Mukaa Sub-County, Makueni County robbed one Michael Mwangangi Muinde Kshs. 2,650/= and immediately before the time of such robbery used actual violence to the said Michael Mwangangi Muinde.
3. The appellant pleaded not guilty and matter went into full trial. The appellant was convicted and sentenced to serve 7 years imprisonment.
4. Being aggrieved by the aforesaid decision, the appellant lodged instant appeal setting out 5 amended grounds of appeal namely;
 - (1) *That the learned trial magistrate erred in law and in fact when he sustained unsafe conviction and sentence by relying on a defective charge sheet.*
 - (2) *That the learned trial magistrate erred in law and in fact when he based a conviction and sentence on a serious defect in trial.*
 - (3) *That the learned trial magistrate erred in law and in fact when he drew and applied the doctrine of contradictory of the charged offence.*
 - (4) *That the learned trial magistrate erred in law and in fact by convicting appellant on a case based on grudge fabrication.*
 - (5) *That the learned trial magistrate erred in law and in fact when he failed to consider that the prosecution failed to produce essential witness during the course of the trial.*
5. The court directed that, the appeal to be canvassed via submissions of which only appellant filed. The prosecution relied on recorded evidence.

Appellant's Submissions:

6. The appellant submitted that, the prosecution witness gave contradictory evidence as the complainant testified that the crime was committed on 17th May 2018 and PW2 stated that the complainant was attached on 17/5/2018 which was contrary as the charge sheet which indicated that the offence was committed on 20/5/2018.
7. Thus it was submitted that, the judgement of the trial court was based on an irregular trial. The finding was far-fetched by the trial court. He relied on the case of **Burunyi & Ano. vs Uganda [1968] EA.**
8. The appellant submitted that the evidence on identification was unsafe. He contended that, no descriptions of the person seen at the scene of crime were given or even a name if there was recognition.

9. He submits that his defence wasn't given adequate consideration before being rejected as required.

10. He contends that, crucial witnesses were not summoned to testify and that any conviction in a case where the crucial witnesses were not produced should be quashed. He cited the case of **Daniel Muli Mulyongi vs Republic HCCR No. 72 of 2012 at Garissa.**

11. He plays his appeal be allowed, conviction quashed and sentence be set aside.

Duty of the First Appellate Court:

12. The duty of the first appellate court is to evaluate evidence recorded by trial court and reach its own conclusion. See the case of **David Njuguna Wairimu vs Republic [2010] eKLR** where the Court of Appeal held as follows:-

“The duty of the first appellate court is to analyse 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.”

Prosecution's Evidence:

13. **PW1 Michael Mwangangi** testified that on 17/5/2018 he left work late at 8 pm and he boarded a matatu from Sultan to Salama. At Salama he alighted and boarded another vehicle to Nunguni at 9.30 pm. He alighted at Enzae so as to board a motorbike for home. When he alighted at Enzae there was a blackout and it had been raining therefore motorbikes were parked the shop corridors.

14. When the matatu left PW1 stated that he took two steps and heard someone hit him on the back and he fell on the ground. The said person then stabbed him on the back of his head and then got into his left side pocket of his shirt. PW1 stated that he had 2,650/= therein. The said person took it and tore his shirt. He screamed for he thought the said person wanted to kill him.

15. Joseph Muendo Mutuku approached with a torch as he came to rescue him. PW1 asserted that from the torch light he was able to see his attacker and it was John Mwangangi. Joseph Muendo also asked isn't this you Mwangangi. John Mwangangi then left and said anybody who was a man to follow him.

16. PW1 indicated that he later lost consciousness and when he came to find himself at Mutungu Hospital. He later reported the incident at Kilome. PW1 clarified that he was not robbed on 20/5/2018 but on 17/5/2018. PW1 indicated that he stopped passing by appellant person's home and usually goes round.

17. **PW2 Joseph Muendo Mutuku** testified that he knew both the complainant and the appellant person before. He indicated that on 17/5/2018 he was at Enzae and at about 9.45 pm he was headed to the house to get a jacket when he heard a scream. He had a torch and shone it towards the screams. He saw John Mwangangi on top of Michael Mwangangi.

18. He stated that he was able to identify John Mwangangi because he had been at the market all day wearing a yellow short. He went to where they were and pulled John Mwangangi off of Michael Mwangangi. John left and he was left with Michael. Michael stood up while holding his head and his hand was full of blood.

19. He told him that he had been stabbed by John Mwangangi. He also told him that he had taken money in his pocket. He later got a boda boda to take Michael to Kilome Police Station. He also asserted that Michael's wife came to the scene. PW2 indicated that he had testified against the appellant person before because he brings chaos at Enzae where he (PW2) lives.

20. **PW3 Inspector Rama Mwachuo OCS Kilome Police Station** testified that he was in the office when the complainant reported that he had been assaulted and robbed. He recorded the report in the OB and issued the complainant with a P3 form and recorded statements. He later charged the attacker with the offence before court.

21. PW3 stated that the appellant had been arrested on 19/5/2018 by officers from Salama Police Station on another offence and complainant learnt about it and informed them. The investigating officer stated that he wanted to charge the appellant person with stealing but when the P3 form was filled, he charged him with robbery. He indicated that the incident was reported on 20/5/2018 but the incident had taken place on 17/5/2018.

22. **PW4 Erick Kasiamani** produced the P3 form and informed the court that it was established that the complainant had sustained a cut wound on the back of his head. The age of injuries was 5 days. He stated that the cut had irregular edges, hence he formed the opinion that a blunt object had been used.

23. The doctor asserted that a knife can be a blunt object if the same is not so sharp on the side it is used to cause an injury. The doctor indicated that the complainant was treated on 17/5/2018 but the time of treatment was not indicated in the card.

Defence Case:

24. The appellant person gave a sworn testimony and indicated that on 20/5/2018 he was in custody at Salama Police Station and was told he had another case at Kilome Police Station. He was later charged in court on 22/5/2018 with the said charges and he denied committing the

offence for he had not robbed Michael Muinde.

25. It was his testimony that previously about 2 months ago, they had family issues as complainant was his cousin and he wanted to disinherit from him land he inherited from his grandfather.

26. He also stated that he had differences with PW2 over land and he had testified against him in another case. The appellant person further contended that PW2 stated that the complainant was taken to hospital by his wife, but his wife did not testify.

Issues:

27. After going through the submissions and evidence on record, I find the issues are;

Ø Whether the charge sheet was defective?

Ø Whether the case was proved beyond reasonable doubt?

Analysis and Determination:

28. The appellant complain that he was charged with defective charge sheet. The only error noted was that the date of the incident was on 17/5/2018 whereas the charge sheet indicated the same occurred on 20/5/018.

29. In *B N D vs Republic [2017] eKLR, Ngugi J* laid out the test to be followed in determining whether a charge sheet is defective. The Learned Judge stated as follows:

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective.”

30. The appellant alleged that he did not commit the offence as the charge sheet reads the offence was committed on 20/5/2018 however the complainant and the investigating officer were categorical that the incident occurred on 17/5/2018.

31. The trial court noted that there was an error in the charge sheet. However it did not find it grave or prejudicial to the appellant person. He was aware of the charges and the issue of the error was not substantial to vitiate the charge sheet entirely.

32. The appellant was charged with an offence known to law and it was disclosed in a sufficiently accurate fashion to give him adequate notice of the charges facing him.

33. Section 214(2) of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya which states that: -

“Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof”.

34. Further, Section 382 of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya provides as follows: -

“Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

35. As said, apart from the date the rest of the evidence of the complainant tallied with the evidence of the other witnesses. Now, was the charge instituted within the timelines and did that error or irregularity cause any injustice to the Appellant? The charge was timeously instituted against the Appellant and I do not see how the error or irregularity prejudiced the Appellant.

36. The Appellant understood the matter before court and even cross-examined the complainant and all the other witnesses. He also had an opportunity of raising the objection earlier in the proceedings but did not. The issue is hence squarely taken care of by Sections 214(2) and 382 of the Criminal Procedure Code.

On whether the prosecution proved its case beyond reasonable doubt, the court analyzed evidence as hereunder:

37. The complainant testified that while on his way back home, he alighted at Enzae stage to take a motorbike home. However when he alighted and the matatu he had boarded left, he was hit from behind and he fell.

38. The person who hit him then proceeded to stab him at the back of his head. He indicated that he was rescued by PW2 who had a torch and with the torch light he was able to identify his attacker as the appellant person herein.

39. The complainant did inform the court that the appellant person was his cousin. It was his testimony that the appellant person also stole from him by taking Ksh.2650/= that was in his pocket shirt whereby he tore his shirt while taking the money.

40. PW2 corroborated the complainant's testimony and informed the court that he heard screams and went towards the scene where the incident was taking place. He had a torch light and saw it was the appellant person herein on top of the complainant. The appellant person then left the scene and the complainant informed him that he had been stabbed and money taken from him.

41. The doctor produced the P3 form and indicated that it was established that the complainant had sustained a cut at the back of his head. The investigating officer informed the court that upon receipt of the complaint he duly charged the appellant person upon learning that he was already in custody at Salama Police Station.

42. The appellant person contended that on the date of the offence he was already in custody and further that the complainant who was his cousin wanted to disinherit him. In addition he alleged that he had differences with PW2 because he had previously testified against him.

43. From the foregoing it is evident that the complainant and the prosecution witnesses were people known to each other. PW2 stated that when he shone his torch on the material night he was able to identify the appellant person immediately because on that day he was in a yellow short and had been at the market the whole day in the said short.

44. He further knew the complainant and the appellant person were related and duly informed the complainant that the person who had attacked him was his relative. Thus there was substantial evidence placing the appellant person at the scene of the incident.

45. It is correct that a court has to be careful in considering evidence of recognition. In Hassan Abdallah Mohammed vs Republic [2017] eKLR it was stated that:

“Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in Wamunga vs Republic (1989) KLR 424 at 426 had this to say:

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

46. . In Nzaro vs Republic (1991) KAR 212, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction.

47. The factors to be considered with respect to recognition as set out in R vs Turnbull & Others (1976) 3 ALL ER 549 must always be borne in mind when a court is dealing with the question of identification. The court in that case stated as follows:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

48. The PW2 shone torch light and saw the complainant's attacker. The complainant also in the same circumstances saw the attacker by the aid of the light sourced from the same torch in the PW2 hands. There was no possibility of an error as the two PW1 and PW2 knew the attacker and in fact he was complainant's cousin. The attacker never denied that fact.

49. The appellant on the other hand alleged that he had been falsely accuse by PW1 and PW2 because of their differences however the two duly countered the said allegation in court sufficiently.

50. PW1 testified that he no longer passed through the appellant person's samba hence the allegation that the wanted to disinherit him was unfounded .On the other hand PW2 testified that he had testified severally against the accused person because he does criminal acts at Enzae where he (PW2) lives.

51. Thus court finds no merit in appeal and thus makes the following orders ;

i. The appeal is dismissed, the conviction is affirmed and sentence confirmed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

C. KARIUKI

JUDGE