



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 27 OF 2018

PASCHALINA NDUKU KAMANDA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original Criminal Case No. 63 of 2017 of the PM's Court Makueni Judgement delivered on 01/08/2018)

JUDGEMENT

1. The Appellant was charged with offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars are that on the 19th day of December, 2016 at about 1930 hours at Kyambuti village, Luani Sub-location in Makueni District within Makueni County together with others not before court robbed Mwendwa Mutua of Kshs.39,000/= and immediately before or immediately after the time of such robbery wounded Mwendwa Mutua.
2. She pleaded not guilty and matter went into full trial. She was found guilty, convicted, and sentenced to serve 10 years imprisonment.
3. Being aggrieved by the said decision, she lodged instant appeal and set out the following grounds:
 - i. That the learned trial magistrate erred in both law and fact by convicting him without regard to my basic right for disclosure of the prosecution evidence which was intended to be brought against the appellant as laid down in Article 50 (2) (c) and (j) of the Constitution.**
 - ii. That the learned trial magistrate erred in law and fact by convicting him on incurably defective charge sheet.**
 - iii. That the pundit trial magistrate erred in law and in fact when he failed to observe that the prosecution evidence was untenable, unworthy, contradictory, inconsistent and full of lies hence not capable to pass the test of credibility.**
 - iv. That the trial pundit magistrate erred in law and in fact when he failed to consider that the prosecution failed to produce (essential) vital witnesses during the course of trial.**
 - v. That appellant's conviction based on the evidence on record was manifestly unsafe.**
4. The parties agreed to canvas appeal via submissions but only appellant who filed same. The prosecution relied on record in opposing the appeal.
5. Appellant submitted that the ingredients of offence of robbery under Section 292 (2) the charge sheet talked of Kshs.39,000/=was robbed yet PW1 said he lost Kshs.60,000/=. Further PW2 said PW1 he had fallen. She further submitted that her defence was unjustifiably rejected.
6. 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.”:

Evidence Adduced:

7. **PW1, Mwendwa Mutua** testified that the complainant said he was a shylock. That he had lend some money to the appellant .On 19/12/16 he went to collect his money from her. It was about 7.00 pm. The appellant insisted he lend her another Kshs.5,000/= which he declined.

8. Appellant had requested him to walk near her house. An argument arose as appellant walked with her hands behind her. Appellant said if he didn't lend her the money, the money would be taken from him while unconscious. That appellant then hit him on the head with a short shovel. He lost consciousness which he regained at the hospital. That he had Kshs.60,000/= which he lost. That he regained consciousness after 7 days.

9. **PW2, Joshua Mainga** said on 19/12/2016 at about 7.40 pm he found the complainant groaning in pain. He told him he had fallen down. He said complainant was at his (PW2) compound. He said appellant is her brother-in-law.

10. **PW3, Chrysotomus Theolmonah** said on 19/12/16 he was called by some people who told him complainant had been beaten and was at the appellant's compound. He went and found complainant at the appellant's compound. He also found appellant and others asking him what had happened.

11. **PW4, Paul Musyoka** said he too did go to the scene. That complainant was laying on a parcel of land belonging to appellant's family and about 150 metres from appellant's house.

12. **PW5 Musyoki Musyoka** a community policing member said he was told complainant was injured and that he was required to look for the appellant. He traced her in the home of one Nyaa. Appellant appeared frightened when she saw him and asked him if she had committed any offence. He took her to where complainant was. Complainant said it was appellant who assaulted her.

13. **PW6 Benjamin Kioko** said he was among the people who arrested the appellant hiding at the home of one Nyaa. That complainant said it was appellant who had assaulted him.

14. **PW7 Police Constable Roselyne Masika** identified and produced as exhibit the P3 form given to the complainant and some records showing he was transacting some money lending business. She said complainant went into a comma following the assault.

15. In her sworn defence, the appellant said complainant was her customer at a boutique shop and that he had lend her some money. That complainant went to her home on 19/12/16 at about 6.30 pm. He had a book showing what she owed him. They amended the book and complainant left.

16. That at about 9.00 pm one Agnes Mainga went and asked for a lamp to assist someone she had found lying on the roadside. They went and found it was the complainant who had fallen near a wall adjacent to a trench whereat stones were.

17. They called him and he said he had fallen down. People went to the scene and he was taken to hospital. That on 17/1/17 one Musyoki Musyoka went to her drunk and said they should be charged to establish who assaulted the complainant.

18. That she was arrested on 5/2/17 after she had gone to Nyaa's place to find out why police officers were looking for her. She said complainant had gone to her on 19/12/16 to demand money he had lend her. That she did ask him they move a distance from where he had found her to record something in his book. That they found complainant injured a distance from her house and near one Peter Mutua's home.

Issues, Analysis and Determination:

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

i. Whether appellant's right for disclosure of the prosecution evidence which was intended to be brought against the appellant as laid down in Article 50 (2) (c) and (j) of the Constitution was violated?

ii. Was charge sheet defective and so was it fatal to prosecution case?

iii. Whether the case was proved beyond reasonable doubt?

20. On the first issue, the appellant complains that her constitutional rights were violated as she was not provided with witness statement in advance, however the record of the trial court indicates that, on 4/9/017 when the matter came for hearing, she told court that she had witness statements but she needed time to read them.

21. The matter was court adjourned and came for hearing on 25/7/017 when hearing commenced. On that date she told that she was ready to proceed and did not complain of anything on statements. She participated in the proceedings and did cross-exam witnesses thus the ground has no merit.

22. On whether the prosecution proved its case to the required period, It is the law in Kenya as entrenched in the constitution under Article 50 (2) (a) that an appellant person is presumed to be innocent until the contrary is proved.

23. The evidence Act Cap 80 of the Laws of Kenya at section 107 (1) provides thus:

“Whoever desires any court to give judgement as to any right or liability dependent on the existence of facts which he asserts, must prove those facts exist.”

24. As to what constitutes the burden of proof beyond reasonable doubt the case of *Miller vs Minister of Pensions [1947] 2 ALL ER 372 – 373* provides as flows in a passage alluded to me considered the greatest jurist of our time Lord Denning:

“That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.”

25. In our criminal justice system there is no duty on the appellant to prove anything on the allegations of a criminal nature filed by the state in a court of law. That burden of proof of an appellant guilt rests solely on the prosecution throughout the trial save where there are admissions by the appellant person.

26. Section 295 of the Penal Code defines robbery in the following terms:

“Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”

27. Section 295 sets out the elements of the offence of robbery as follows -

(i) The act of stealing, and

(ii) Use of or threat to use actual violence to any person or property immediately before or immediately after stealing intended to obtain or retain the stolen item or prevent or overcome resistance to the stealing.

28. Section 296 of the Penal Code provides for both the offences of robbery and aggravated robbery and their respective penalties under sub-sections (1) and (2) as follows:

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) 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.

27. The evidence on record showed that appellant and the complainant were known to each other. It is not in dispute both were together when the incident was allegedly committed.

28. It is further not in dispute that the complainant did sustain serious injuries on the material day. He said the injuries were occasioned by the appellant.

29. That when she met complainant, she told him they move further from where he found her. That she demanded to be lend money and even threatened him if he didn't.

30. That as they moved further from where he found her he walked ahead. The complainant hit him on the head with shovel and he lost consciousness.

31. Appellant denied that she did assault the complainant. She did admit she requested him they move away from where he found her to enable them record something in his book. She said it was not dark and the sun was still up. She created the impression that complainant left her place and either fell down or was assaulted.

32. As it turned out, there was no eye witness to the incident. This court agrees with trial court finding that, the complainant was owed money, and it did not think that would create differences or hostilities as would make the complainant make up a case against her.

33. Evidence on record place the appellant at the scene and her participation was explained by the complainant. The trial court made a finding that the appellant attacked the complainant and this court agrees with the same.

34. However there was no evidence that the complainant had any money and that the attack was to facilitate the stealing of the money in terms of the provisions under which appellant is charged under. In his testimony, the pw1 said that by the time he was hit with a shovel, he had 60,000/= but never got the money when he gained consciousness.

35. However in the charge sheet the amount allegedly robbed was Ksh. 39,000/=. What is the truth? In any case the pw1 does not say that he

was robbed the money but could not find it after he recovered from unconsciousness situation.

36. He gained consciousness after 7 days. The question is did he have any money Ksh39,000/= or Ksh.60,000/= in the first place? Could it have been taken by those who rescued him from the scene of attack?

37. The element of stealing to complete the elements of robbery under sections 296(2) Of the penal code was not proved beyond reasonable doubt.

38. As to the grievous harm occasioned, the evidence was adduced including the production of p3 form which disclosed the injuries sustained. The appellant did not oppose p3 production.

39. Thus the court finds the case proved against appellant beyond reasonable doubt was assault causing grievous harm. Thus appeal has merit to that limited extent.

40. The court makes the following orders ;

i. Appeal is allowed to the extent that conviction on robbery under section 296(2) PC is substituted with assault occasioning grievous harm , and sentence is substituted with sentence of 5 years to run from the date of arrest 5/2/017.

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

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C. KARIUKI

JUDGE