



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
(CORAM: MAJANJA J.)
CRIMINAL APPEAL NO. 182 OF 2014
CONSOLIDATED WITH
CRIMINAL APPEALS NOS. 184 AND 185 OF 2014
BETWEEN
AMOS MUTAMBA.....1ST APPELLANT
KEVIN VIKADZI.....2ND APPELLANT
SOSPETER SHISANYA.....3RD APPELLANT
AND
REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. S. M. Shitubi, CM dated 4th December 2014 in Criminal Case No. 1209 of 2013 at the Chief Magistrate's Court at Kakamega)

JUDGMENT

1. The appellants, **AMOS MUTAMBA**, **KEVIN VIKADZI** and **SOSPETER SHISANYA** were charged, convicted and sentence to death 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 19th June 2013 at Buyokha Village, Museno Sub-location, Khayega Location within Kakamega County, they jointly with others not before the court while armed with offensive weapons namely pangas, slasher, pistol and other crude weapons robbed **ALICE KHANGISHA** cash Kshs. 20,000/- and assorted shop goods all valued at Kshs. 37,000/- and immediately before the time of such robbery used actual violence on the said **ALICE KHANGISHA**.
2. The appellants now appeal against conviction and sentence on the grounds set out in their respective petitions of appeal and written submission. The appellants case centres on the issue of identification. They contended that the circumstances obtaining during the incident were not favourable for positive identification hence the identification was not free from error. Counsel for the 3rd appellant also emphasised that the evidence was inconsistent and contradictory and could not support the conviction.
3. The respondent opposed the appeal. Counsel for the respondent contended that the prosecution proved all the elements of the offence of robbery with violence. The respondent further submitted that the appellants were identified in circumstances that were favourable to positive identification.
4. **The** elements of the offence of robbery with violence **under section 295 as read with 296 (2) of the Penal Code** were elaborated by the Court of Appeal in **Ganzi & 2 Others v Republic [2005] 1 KLR 52** as follows:

The offence of robbery with violence under section 296(2) of the Penal Code is committed in any of the following circumstances namely:-

(a) The offender is armed with any dangerous or offensive weapon or instrument; or

(b) The offender is in company with one or more other person or persons or

(c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.

5. For the offence to be established, the prosecution need only prove any of the elements set out as “or” in the **section 296(2)** of the **Penal Code** is to be read disjunctively (see ***Oluoch v Republic [1985]eKLR***).

6. The fact that a robbery took place on the evening of 19th June 2013 is not disputed. On that day Alice Khangisha (PW 1) was at home with Edwin Nyamu (PW 3) and Chrispinus Matekwa (PW 4) preparing some mandazi in the shop owned by PW 1 and her husband, Simon Irumba Shisumu (PW 2).

7. PW 1 recalled that at about 8.00pm, the 3rd appellant knocked the door and stated that he wanted a cigarette whereupon two other people entered. One of them wore police jungle uniform and the other wore a black overall. They were all ordered to lie down and as they all lay down, the assailants ransacked the shop and started removing things. One of the assailants hit her on the forehead and back with the flat side of the panga. The assailants took Kshs. 20,000/- and assorted goods from the shop. She confirmed that she was only able to see the 3rd appellant who had knocked the door.

8. On his part, PW 3 testified that he was in the house when the 3rd appellant came and asked for a cigarette suddenly two people whom he described as government officer appeared. One of them was dressed in a jacket and had something like a pistol and the other had a panga. They were ordered to lie down and as they were down, the assailants went to ransack the shop and left. When PW 1 told them to stand up, he found that the three appellants had been arrested outside the house by villagers. In cross-examination, he stated that he identified the 3rd appellant who came to buy a cigarette. PW 4 also confirmed that the 3rd appellant came to buy a cigarette when other assailants came into the house and attacked them. He could only identify the 3rd appellant who had come to purchase a cigarette.

9. PW 2 recalled that he arrived home at about 7.45pm and instead of going to his house, he passed by his father’s house. While there, he heard a child scream. He initially disregarded the scream but when he decided to go to the house, he met the three appellants at the door of his shop. They told him they were police officers. He recalled that the 1st appellant slapped him with a panga on the back. The 2nd appellant struggled with him and snatched his torch while the 3rd appellant tried to make away with his phone by he resisted and they continued to struggle. As they struggled, PW 2 screams attracted neighbours and they managed to arrest some of the assailants while other ran away.

10. PW 2 identified the slasher which the 3rd appellant had, a jungle green, maroon and cream desert storm t-shirt which he identified as one worn by the 2nd appellant, a belt lock that came from 1st appellant as they struggled. As the neighbours came, they threatened to burn the appellants but police officers arrived. PW 2 also prepared an inventory of the things that had been stolen and they included 20kg Mumias sugar, 20kg Dawat rice, 4 dozen Eveready batteries, assorted cooking fat, Savannah and Excel quencher, Valon and Vaseline oil, Fresher and Kshs. 20,000/- cash.

11. Among the officers who arrived at the scene on the material day at about 9.30pm, was Cpl Evans Makori (PW 5). He testified that he found members of the public had arrested some robbery suspects. He recalled that the 3rd appellant had been tied. APC Erick Ochoki (PW 6) also found three suspects had been arrested and were sitting in front of the shop. The officers re-arrested the suspects and took them to the Kakamega Police Station. Inspector Oyapidi Hamsa, testified that he took over investigation of the matter prepared statements and caused the appellants to be charged.

12. The 1st appellant testified that he was at home when PW 2 and PW 3 came to his house and told him they were looking for him and they started bearing him while accusing him of stealing. They thereafter took him to Khayega AP Camp. In his sworn defence, the 2nd appellant testified that on 19th June 2013 at 7.00pm, he was asleep in his grandmother’s house when he was awoken by someone knocking the door. He was arrested by police officers and strangers and taken to Khayega AP Post where some items were planted on him and he was accused of stealing. The 3rd appellant also testified on oath that he was at home when some people came home and he was ordered to dress and he was left with them. He stated that he saw PW 2 outside the house when he was arrested.

13. It is clear that PW 1 was attacked by more than one person who used violence on her. The fact that the P3 form was not produced does not diminish the case for robbery with violence as the other alternative requirements, that the assailants were more than two and that they had weapons were satisfied. The main issue for consideration in this appeal is whether the appellants were the assailants. The prosecution case was grounded on direct evidence of identification by the witnesses in difficult circumstances.

14. The prosecution case was grounded on direct evidence of identification in difficult circumstances and the doctrine of recent possession. In ***Wamunga v Republic [1989] KLR 424***, the Court of Appeal warned that;

[W]here 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 be the basis of a conviction.

15. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see ***Maitanyi v Republic [1986] KLR 198*** and ***R v Turnbull [1967] 3 ALL ER 549***).

16. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger (see ***Anjononi & Others v Republic [1980] KLR 59***). But in ***Wanjohi & 2 Others v Republic [1989] KLR 415***, the Court of Appeal held that, “*recognition is stronger than identification but an honest recognition may yet be mistaken.*”

17. I now turn to consider the evidence against each appellant in light of the principle I have outlined. PW 1 was clear in her testimony that it is the 3rd appellant who came to the shop and asked for a cigarette. Since she knew him, PW 1 had no difficulty in letting him in. The fact that the 3rd appellant came to the shop is corroborated by PW 3 and PW 4. In his case, this was a case of recognition and not identification of a stranger and in as much as there was little light from the tin the room, his identity was established from the brief interaction. In short he was at the *locus in quo*. The 3rd appellant's complicity is further augmented by the testimony of PW 2 who saw him outside the shop and they struggled together until he was arrested by neighbours. His alibi defence when considered alongside the testimony of PW 1, PW 2, PW 3 and PW 4 cannot stand and was an afterthought as nothing was suggested to PW 2 indicating that he came to the 3rd appellant's house. The evidence against him is watertight and I affirm his conviction.

18. The 1st and 2nd appellants were not identified by PW 1, PW 3 and PW 4 within the shop. The evidence against them is that of PW 2, who met them outside the shop and had a confrontation with them and in the course of that altercation, the neighbours came and arrested them at the scene. The 1st and 2nd appellants were not strangers to him as they were from the same locality and as such he clearly recognised them. The struggle with him and the subsequent arrest by neighbours, in view, formed an unbroken chain of events that leaves no doubt they too were involved in the robbery. Their alibi defence is defeated by the fact that they were arrested at the scene. Nothing was suggested to PW 2 or the police officers who testified that they were arrested from their respective home. The totality of the evidence is that the appellants were part of the gang of assailants who robbed PW 1 after the 3rd appellant had created a ruse that he wanted to buy cigarettes. I accordingly affirm their convictions.

19. The Supreme Court in *Francis Karioko Muruateru & Another v Republic SCK Pet. No. 15 OF 2015 [2017]eKLR* declared the mandatory death sentence unconstitutional. The Court of Appeal in *William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018]eKLR*, applied the *Muruatetu* decision *mutatis mutandis* to the provisions of **section 296(2)** of the *Penal Code*. I therefore quash the sentence of death imposed on the appellants. I now invite the appellants to their mitigation before imposing the final sentence.

DATED and DELIVERED at KAKAMEGA this 5th day of April 2018.

D. S. MAJANJA

JUDGE

RULING ON SENTENCE

The appellants' conviction on the offence of robbery with violence contrary to section 296(2) of the Penal Code has been dismissed. I have considered the appellants' mitigation. The offence was committed at night and with a gang and is sufficiently serious. Considering that the maximum sentence for simple robbery under **section 296(1)** of the *Penal Code* is 14 years' imprisonment, I sentence each appellant; **AMOS MUTAMBA, KEVIN VIKADZI and SOSPETER SHISANYA to fourteen (14) years' imprisonment.**

Right of Appeal explained.

DATED and DELIVERED at KAKAMEGA this 5th day of April 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Ng'etich, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.