



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 160 OF 2016**

**MUNYIKA MWAKALELA NYAMAWI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal from the conviction and sentence of Hon. Lutta, SPM, in Mariakani Senior Principal Magistrate's Criminal case No. 273 of 2016 delivered on 28th November, 2016)**

**JUDGMENT**

1. The appellant herein, Munyika Mwakalela Nyamawi, was charged with the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code. The particulars were that on the 29th day of October, 2015 at Mugalani area of Kinango sub-county within Kwale County, jointly with others not before the court while armed with dangerous weapons namely hammers and knives attempted to rob Bonface Gitau of a motor vehicle registration No. KBZ 659L make Mercedes Benz (Actros) loaded with iron sheets and immediately before such attempt wounded the said Bonface Gitau.

2. He was found guilty and convicted for the said offence. The Hon. Magistrate imposed the death sentence on the appellant, who being dissatisfied with the conviction and sentence passed against him filed grounds of appeal to the following effect:-

- (i) There was lack of proper identification as the circumstances prevailing at the scene of crime were not conducive for proper identification;
- (ii) The identification parade was not fair and free from the possibilities of error for there was no description given by the complainant when he made the report, which would have led to the identification of the appellant;
- (iii) The source of the appellant's arrest was not established to have any connection with the offence in question, as those who arrested him never testified to clear the doubt of his arrest thus the prosecution did not prove its case beyond reasonable doubt;
- (iv) The Learned Trial Magistrate considered hearsay evidence which was not proved; and
- (v) The Learned Trial Magistrate erred in law and fact by not considering the appellant's defence statement.

**SUBMISSIONS**

3. The appellant filed written submissions to support his appeal. It was his submission that the Hon. Magistrate erred in law and fact by finding him guilty of the charge of attempted robbery with violence when there was no evidence of an attempt to steal that came through the evidence of PW1, Bonface Gitau. The appellant indicated that the attackers did not demand for anything from PW1 or attempt to steal from him. He relied on the case of **Okethi Okale & others v Republic** (1965) EA 555 where the court held that a conviction must be based on the weight of the actual evidence adduced and that it is dangerous and inadvisable for a Judge to put forward theories not advanced by evidence. In the appellant's view, he could have been convicted for the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code.

4. On the issue of the P3 form that was produced in court, the appellant stated that Part 1 of the said form reads that PW1 was sent to hospital on 20th April, 2016, which was 6 months after the alleged offence, which took place on 29th October, 2015. The appellant added that PW1 testified that he was issued with a P3 form on the said date. As such, the appellant argued that there was no evidence of the nature of the treatment PW1 received on 29th October, 2015. It was submitted that the foregoing discrepancies left PW1's evidence uncorroborated and that this factor was not considered by the Hon. Magistrate.

5. On his identification at the scene of crime, the appellant stated that PW1 did not indicate the length of time that he had him under observation, more so taking into account that there were 4 attackers, 2 of whom entered the motor vehicle to go and show them where the charcoal was. The appellant further stated that PW1 did not indicate if it was the appellant who stabbed him on the forehead, thus his evidence was imprecise and scanty. The appellant further stated that no physical description was given of him in total exclusion of the other attackers and that PW1 only said that he was stabbed on the forehead but did not indicate that it was the appellant who stabbed him.
6. It was also argued by the appellant that the Investigating Officer, PW5 in his evidence said that PW1 stated that he could identify the suspect physically. In the appellant's view, PW1 was lying as he gave no description of his attackers. He relied on the case of **Maitanyi v Republic** (1986) KLR 198 to fortify his submission. The appellant therefore asserted that his identification at an identification parade that was held after his arrest was not free from the possibility of error, as it amounted to dock identification which was worthless.
7. The appellant further tore into the prosecution evidence by stating that the scene of crime personnel did not dust the motor vehicle and the knife that was recovered, for fingerprints on 25th October, 2015.
8. Ms Ocholla, Prosecuting Counsel conceded to the appeal. She submitted that the identification of the appellant was not positive as PW1 informed the court that they were attacked by 4 people but when he went to the Police Station, he said that he could identify only some of the attackers but did not state if the appellant was one of them. Further, that although the offence occurred during the day, no description of the appellant was given to the Police. Counsel stated that the length of time that the appellant was under observation was not given by PW1.
9. She submitted that the Doctor's evidence is at variance with the P3 form. Although the Doctor said that he filled the P3 form on 29th October, 2015, it shows that PW1 went to the hospital on 20th April, 2016 and the P3 form filled and signed on the said date.
10. It was also submitted for the respondent that the ingredients of the offence were not proved as there was no evidence of an intention to rob PW1 of the motor vehicle or the iron sheets on board the said vehicle since no demand was made for the said items. In the respondent's Counsel's view, the Hon. Magistrate misdirected himself by holding that the appellant attempted to rob PW1 of the motor vehicle as such a conclusion is not supported by any evidence on record.

#### ANALYSIS OF THE EVIDENCE

The duty of the first appellate court is to analyze and re-evaluate the evidence tendered before the lower court and arrive at its own finding. In the case of **Simiyu and Another vs. Republic (2005) 1KLR at p. 192** the Court of Appeal stated thus:-

***“It is the duty of the first appellate court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice. It is not enough for the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial court’s findings and conclusions.”***

11. The evidence adduced before the lower court was to the effect that PW1, Bonface Gitau was working as a Turn Boy aboard motor vehicle registration No. KBZ 659L. It was his evidence that on 29th October, 2015, he and the Driver of the said vehicle, by the name of Peter Magero had traveled to Mombasa to collect iron sheets. They loaded the iron sheets on the vehicle and on the way at Taru at 2.00 p.m., they went to eat at a hotel. While therein, 4 people approached them and said they had charcoal to be taken to Nairobi. 2 of the men entered the vehicle to show them where the charcoal was. They went and found the others who had left earlier. They took a diversion but the Driver decided to turn as he said it was far.
12. He testified that they were then attacked by the men who were armed with knives and hammers. He struggled and managed to jump out of the vehicle. He had been stabbed on the forehead. He found some good Samaritans whom he told what had happened. They went to the place where the vehicle was and found that the Driver had been killed in the cabin. There was blood all over. It was his evidence that the good Samaritan called the OCS Taru Police Station. PW1 was treated. He identified his P3 form, which was marked as MFI-1. PW1 later learnt that one of the suspects had been arrested. He was able to identify the appellant at an identification parade. He identified the postmortem report for the deceased as MFI-2, he also identified a knife that was recovered at the scene of crime and photographs that were taken at the scene as MFI-3 and MFI-4, respectively.
13. On being cross-examined, PW1 indicated that he gave a description of the assailants to the Police. He stated that he did not know the appellant before the incident.
14. PW2, Doctor Ngali Mbonko, produced the postmortem report of the deceased Driver, Peter Oduor Magere, as P. exh. 2. The postmortem was conducted on 1st November, 2015. The Doctor observed several cut wounds on the deceased's body and concluded that the cause of death was excessive bleeding as a result of being cut on the neck.
15. Rashid Omar, a Registered Clinical Nurse at Samburu Health Centre testified as PW3. It was his evidence that on 29th October, 2015, he examined PW1 and filled a P3 form. He alleged that he had been assaulted with a hammer and knife on the same day. It was PW3's evidence that PW1 had a cut on the face and bruises on the chest and stomach, for which he was treated. PW3 assessed the degree of injury as harm. He produced the P3 form as P. exh. 1.
16. No. 233682 Chief Inspector Henry Wesonga testified as PW4. It was his evidence that he was the OCS Taru Police Station and on 20th April, 2016 the Investigating Officer in this case requested him to conduct an identification parade. He spoke to the appellant whom he informed about the parade and he agreed to participate in it. PW4 indicated that the appellant gave the name of his sister, Saumu Mulongo Mwakaleta as his witness during the identification parade. PW4 stated that he housed the witnesses in different offices. He looked for 7 people who were of similar appearance to the appellant and conducted the identification parade behind the Police Station. He indicated that the appellant stood between the 6th and 7th parade members. He called the first witness, Bonface Gitau (PW1), who identified the witness by touching him on the chest. He called the 2nd witness Hamisi Kakunza who was unable to identify anyone. PW4 stated that the appellant said

that he was satisfied with the parade and signed the parade forms, which PW4 also signed. He produced the identification parade form as P. exh. 5

17. No. 92412 PC Job Ouma attached to Taru Police Station was the Investigating Officer in this case. He testified before the lower court that on 29th October, 2015 at about 7.00 p.m, he was at the said Police Station when he was informed that someone had been murdered at Mugalani area. He proceeded to the area in the company of other Police Officers where they found motor vehicle registration No. KBZ 695L make Mercedes Benz Actros. In the cabin of the said vehicle they found a dead body with a lot of blood. The said body had a lot of injuries. PW5 reported to them that he was a Turn Boy in the vehicle and they were headed to Naivasha from Mombasa with the deceased. Upon reaching Taru, they stopped and 4 men who appeared to know the Driver approached them and said they had charcoal to be ferried to Nairobi. Two of them boarded the vehicle and found other people on the way who also boarded the vehicle. They drove in the bush but the Driver said that he could not move any further. The men became violent and removed weapons whereupon they attacked the Driver and PW1. The latter managed to escape.

18. It was the evidence of PW5 that the OCS Taru Police Station was called and the Turn Boy found the Driver had been killed. PW5 stated that he took photographs of a blood stained knife at the scene and took the flash disk to the scenes of crime personnel. PW5 further testified that PW1 stated that he could identify the suspects physically. PW5 conducted investigations and on 13th April, 2016, he arrested one of the suspects. He called PW1 to attend an identification parade wherein he identified the appellant. PW5 produced the knife as P. exh. 3 and identified the photographs he took at the scene as MFI- 4.

19. No. 56261 CPL Stephen Nyamai attached to Scenes of Crime Mombasa, gave evidence before the lower court as PW6. He stated that on 24th May, 2016 at 12.30 p.m., he received a letter from PC Ouma of DCI Kinango (PW5). PW6 was required to enlarge photographs he had taken at a scene of crime at Mugalani area. He indicated that he enlarged the images and printed them. He also did a certification for the same. He also had with him a copy of the letter from PW5. He produced the documents as P. exhs. 4, 6 and 7.

20. In his sworn defence, the appellant said that he hails from Makina and was working as a casual labourer. He was aware of the charges that he was faced with. He denied having committed the offence in question.

21. The Hon. Magistrate considered the evidence tendered and found that the prosecution had proved its case beyond reasonable doubt.

## **DETERMINATION**

The fundamental issues that call for determination are:-

- (i) If the appellant was positively identified;
- (ii) Whether the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code was proved beyond reasonable doubt; and
- (iii) If any discrepancies in the prosecution evidence affect the substratum of the evidence tendered.

22. The appellant in his submissions challenged his identification in that the PW1 did not give a description of his attackers to the Police and did not indicate the duration under which he had the attackers under observation. The evidence is very clear that PW1 and the Driver of motor vehicle registration No. KBZ 659L, Mercedes Benz Actros which was laden with iron sheets, when enroute to Naivasha from Mombasa were approached by 4 men at Taru area where they had stopped for lunch. The time was **2.00 p.m.**, it was thus in broad daylight. The men said they had a load of charcoal they wanted transported to Nairobi. The said Driver obliged and requested to be shown where the charcoal was. He was led into a bush and after driving for quite a distance, he said it was far and wanted to turn back. It was at that juncture that he and his Turn Boy, PW1 were attacked by the 4 men who were armed with hammers and knives. PW1 was stabbed on the forehead but managed to escape. The Driver was not lucky, his dead body was recovered in the cabin of the lorry when PW1 returned to the scene with good Samaritans.

23. It was the evidence of PW1 that he gave a description of his attackers to the Police and PW6, the Investigating Officer confirmed the same in his evidence. In the course of his investigations, he arrested the appellant who was positively identified by PW1 in an identification parade. PW5 who conducted the said parade testified that the appellant stated that he was satisfied with the parade. When it was being conducted, his sister, Saumu Mulongo was present. The appellant duly signed the identity parade forms and so did PW5.

24. Even if there was total failure to describe the appellant in the statement, a conviction can hold depending on the circumstances of the case. The Court of Appeal held in **Nathan Kamau Mugwe vs. Republic [2009] eKLR:-**

***“As to the complaint in ground six that the witnesses had not given to the police a description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL’s case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness “SHOULD” be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him. In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the***

**identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected.** (emphasis added).

25. It is apparent from the above decision that even when no description of an assailant has been given, an ensuing identification parade cannot be purported to be worthless, if positive identification is made in the said parade. There is no doubt from PW1's evidence that he was present when the conversation between the deceased Driver and the 4 men was taking place as they sought carriage of their charcoal. Two men boarded the motor vehicle at Taru and the 2 others enroute to where the charcoal was to be collected.

26. Although PW1 did not indicate the length of time in minutes or hours it took them to drive from Taru into the bush, it is clear from PW1's evidence that the drive did not take a few minutes. In PW1's own words he stated, "**we took a diversion and the Driver decided to turn because it was far**". The foregoing shows that PW1 was with the attackers for a considerable amount of time that gave him an adequate opportunity to identify them. I am therefore not persuaded by the submissions made by the Prosecuting Counsel and the appellant that he was not properly identified. It is my holding that he was positively identified and placed at the scene of crime.

27. On the issue of the charge facing the appellant, I do agree that PW1 did not adduce evidence to the effect that the appellant and his co-attackers attempted to rob them of motor vehicle registration No. KBZ 659L, Mercedes Benz Actros. That information is only captured in the charge sheet but it was not brought out in evidence. According to the evidence of PW1, he and the deceased Driver were attacked when the latter expressed his wish to turn back enroute to collect the charcoal which was far. There is no indication that there was an attempt made to rob them of the motor vehicle. I therefore hold that the Hon. Magistrate arrived at the wrong conclusion when he found that the offence of attempted robbery with violence was proved. From this court's re-evaluation of the evidence, the offence the appellant was charged with was not proved beyond reasonable doubt.

28. The foregoing finding does however not mean that the appellant is without blemish. PW1 testified that he was stabbed on the forehead in the cause of the attack. He was issued with a P3 form which was filled by PW3 who examined him at Samburu Health Centre. The appellant raised the issue of the discrepancy on the face of the said P3 form which indicated that PW1 was sent to hospital on 20th April, 2016 whereas PW3 stated that he examined PW1 on 25th October, 2015 and filled a P3 form for him. This court has looked at said discrepancy and noted that according to PW3 and PW6, PW1 was treated for the injuries he sustained on the 25th October, 2015. This was confirmed by PW1 in his evidence. The P3 form was filled by PW3 on 20th April, 2016. On page 2 thereof, it states that PW1 was seen in the dispensary on 29th October, 2015 when he was treated, which treatment included administration of stitches. It is common knowledge that stitches could not have been administered on 20th April, 2016 for injuries sustained on 25th October, 2015. It is thus evident that the appellant is clutching onto straws by raising the issue of discrepancies in the P3 form. Nothing turns on that ground of appeal.

29. The appellant had in his arguments stated that PW1 did not indicate which of the 4 attackers stabbed him on the forehead. It does not matter if it is the appellant who attacked the respondent. Since the attackers were in a group of 4, the act of one is deemed to be that of the other offenders.

30. Although the motor vehicle and the knife that were recovered at the scene of crime were not dusted for finger prints, the omission does not vitiate identification of the appellant at the scene of crime.

31. This court under the provisions of Section 354(3)(a)(ii) of the Criminal Procedure Code has the powers to alter the finding of the Hon. Magistrate as to the nature of the offence that was committed and to impose a sentence accordingly. From the analysis of the evidence, this court is of the finding that the offence of assault causing actual bodily harm, against PW1 contrary to Section 251 of the Penal Code was proved beyond reasonable doubt. I therefore quash the conviction for the offence of attempted robbery with violence and set aside the death sentence passed against the appellant. In place thereof, I substitute the charge with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code, which was proved beyond reasonable doubt. I hereby sentence the appellant to 4 years imprisonment. The said sentence shall run as from the date when the earlier sentence was imposed, specifically from **28th November, 2016**.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 5<sup>th</sup> day of April, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Appellant present in person

Ms. Ocholla for the respondent

Mr. Oliver Musundi - Court Assistant