REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 31 OF 2017

THOMAS MOKUA MEMBA.....APPELLANT

=VRS=

REPUBLIC.....RESPONDENT

[Being an Appeal from the Judgement and Decree of Hon. J. Mwaniki – Principal Magistrate delivered on the 28th day of September 2016 in Keroka PM CR Case No. 1027 of 2015]

JUDGEMENT

The appellant in this case was the 2nd accused in the case in the court below wherein they were charged with four counts of robbery with violence contrary to Section 296 (2) of the Penal Code. It was alleged that on the night of 31st July 2015 the appellant, his co-accused and other persons who were not before court raided the homes/shops of the respective complainants in the four counts while armed with crude weapons and robbed the complainants of personal items, money and shop merchandize and that immediately after the time of such robberies they used actual violence on the complainants. The appellant and his co-accused denied the charges. However, after hearing and considering the evidence of the six witnesses called by the prosecution and the testimonies of the appellant and his co-accused the trial magistrate came to the conclusion that the charges had been proved beyond reasonable doubt. She convicted both of them and sentenced each of them to imprisonment for 15 years on each count but ordered that the sentences would run concurrently starting from 31/7/2015 which was the date from when the appellant had been held in custody.

The trial magistrate gave the appellant and his co-accused liberty to appeal within 14 days but apparently they did not do so. The record however shows that on 2nd May 2017 the appellant was granted leave to appeal out of time.

The appeal was canvassed by way of written submissions on the part of the appellant and oral submissions on the part of the State.

I have considered the rival submissions but as the first appellate court I also have a duty to reconsider and re-evaluate the evidence before the trial court so as to arrive at my own conclusion. I have done so bearing in mind that I neither saw nor heard the witnesses give evidence. At first I seemed to be convinced that the charges against the appellant and his co-accused person were proved beyond reasonable doubt. This is because in their testimonies all the four complainants testified that there was electricity (electric light) in their rooms in which the attacks took place. They were also certain that they had seen one or the other of the attackers before and in fact knew him as he was a frequent customer in their shop. The conditions one would say were therefore conducive to a positive identification of the attackers who can say were the robbers. However, and that is why I have used the words "one or the other" of the robbers a closer consideration of the testimony of the complainant in count 1 (Pw1) raises doubt as to whether the complainants identified the appellant during the robbery at all. In his evidence Pius Amonga (Pw1 – the complainant in count 1 stated: -

> ***"…..Among the people who invaded my home/shop was YUVENALIS Accused 2. Accused 2 has reddish lips. He has been my customer for some time….***
>
> ***He was wearing a Muslim cap……. I don't know accused 1."***

In the charge sheet Yuvenalis was the 1st accused person. The appellant – Thomas Mokua Memba – was the 2nd accused. Clearly therefore the 2nd accused identified by Pw1 was not Yuvenalis. The other complainant in count 2 (Pw2) attributed the Muslim cap to the person he identified in the dock as the 2nd accused who though it was the appellant was referred to by Pw1 as Yuvenalis – the 1st accused. This confusion creates doubt in my mind as to whether the appellant is guilty of this offence. This is more so because the complainants in counts 2 and 3 never saw him during the robberies in their premises. I lump the robberies and the evidence of the four complainants together because these were offences committed in the same transaction. If Pw1 and Pw2 mistakenly referred to the appellant as (YUVENALIS) the 1st accused yet he was the 2nd accused the doubt created thereby ought to have been given to the appellant and he should have been acquitted. It behoved the trial magistrate and the prosecution Counsel to ensure that the accused persons were seated in the order in which their names appeared in the charge sheet. This is in case the confusion on the identification of the accused persons arose from the position in which they were sat in the dock. It could also be that the witnesses were not truthful or if they were truthful they were mistaken. Either way I would rather give the accused the benefit of doubt. In his evidence the appellant told the court that his arrest could have ben as a result of a land dispute. The prosecution's case however was that it was because he was found in possession of some shop merchandize. However apart from the prosecution's failure to call the chief and two assistant chiefs to confirm that it was true that merchandize was not put to the complainants for identification. I do therefore agree with the trial magistrate that the said goods were not proved to have any connection to this case. I do however go further to find that the explanation given by the appellant for his arrest may very well have been true. The same could have been negated by those who arrested him but they were never called to testify.

I find merit in the appeal and accordingly it is allowed and the convictions of the appellant on all 4 counts are quashed and the sentences are set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Signed, dated and delivered in open court this 18th day of October, 2018.

E. N. MAINA

JUDGE