



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D. S. MAJANJA J.

CRIMINAL APPEAL NO. 32 OF 2017

BETWEEN

ENOCK MOMANYI OMBATI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J. Mwaniki – SPM dated 12th April 2016 at the Principal Magistrate’s Court at Keroka in Criminal Case No. 132 of 2014)

JUDGMENT

1. The appellant, ENOCK MOMANYI OMBATI, was charged, convicted and sentenced to fifteen (15) years imprisonment 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 charge were as follows;

On the 2nd day of February 2014 at [particulars withheld] Sub-location in Masaba South District within Kisii County jointly with others not before court being armed with offensive weapon namely pangas and knives robbed TRUPOSA NYABOKE SIKU of Kshs. 13,200/=, Motorola and Forma cell phones, Post Bank and Kenya Women Finance Trust ATM cards all valued at Kshs. 17,500/= and immediately before or immediately after the time of such robbery used actual violence to the said, TNS.

2. The appellant has now appealed against the conviction and sentence based on the petition of appeal filed on 30th January 2017 and the written submissions. He contended that the trial magistrate erred in convicting him on the evidence of a single witness without corroboration and that there were no exhibits found in his possession to link him to the offence. He also complained that the trial magistrate did not give his defence any consideration and that no exhibits were found in his possession linking him to the offence.

3. The respondent through its counsel submitted that the appellant was identified by two witnesses hence there was sufficient evidence to support the conviction.

4. TNS (PW 1) testified that she knew the appellant as he was from the village but she did not know his full names. She recalled that on the night of 1st February 2014 as she was sleeping with her child, she heard a noise. She put on the electric lights and opened the door to the bedroom. She was confronted by many people, one of whom was the appellant carrying a knife in his right hand. He pushed her back into the house and switched off the light. The other assailant put off the other lights outside. She started struggling with the appellant who was demanding money and threatening to rape her as she pleaded with him. He took one of her phones and handed over Kshs. 12,500/= from her wallet which also contained her ATM cards and ten cards. The assailants left and locked her in the house until they were rescued by a neighbour who also came with police officers.

5. AM (PW 2), a child, recalled that she was sleeping with PW 1 when someone came into the house with a torch. She testified that she knew him as he was from the area and she used to see him while going to school. The appellant had a knife and he demanded money. She recalled that the appellant took money, her identity card and slapped her.

6. PC Gideon Mutua (PW 3), testified that on 2nd February 2014 at about 3.00am while he was on duty at Ramasha Police Station, a robbery was reported and when he went to the scene, he found PW 1 had been attacked and her money stolen. He told the court that PW 1 gave a description of the assailant to members of the public whereupon the appellant was arrested. PW 1 was taken to the hospital for treatment.

7. When put on his defence, the appellant denied the charge and in his unsworn statement, he stated that PW 1 had a grudge with him and

vowed to finish him because his chicken had trespassed onto her shamba and eaten her maize. The appellant's brother, Ombati Tumbo (DW 2) recalled that he knew PW 1 who was their neighbour. He testified that he never heard any alarm being raised from PW 1's home on 2nd February 2014.

8. The offence of robbery with violence under section 296(2) of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see *Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, *Oluoch v Republic* [1985] KLR 549 and *Ganzi & 2 Others v Republic* [2005] 1 KLR 52).

9. Having re-appraised the entirety of the evidence as required by the first appellant court, I am satisfied that the offence of robbery was committed on the night of 2nd February 2014. Both PW 1 and PW 2 recalled that they were attacked by a gang of people. One of the assailants had a knife and he stole her phones and money.

10. The key issue in this case is whether the appellant was identified as the assailant. The incident took place at about midnight in circumstances that were difficult for positive identification. 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.

11. 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."

12. PW 1 knew the appellant, a fact that was confirmed by the appellant and his brother DW 2. Thus this was not a case of identification of a stranger but a case of recognition. PW 1 gave evidence that she was able to see the appellant clearly because he arrived when the electric lights were on and even after he switched them off, the length and proximity of interaction when he demanded money from, threatened her and as they struggled was sufficient evidence to support positive recognition. Further and according to PW 3, PW 1 gave a description of the appellant to the public when he arrived at the scene immediately after the incident was reported and the appellant arrested thereafter.

13. There is also the evidence of PW 3 who testified that she saw the appellant when he came into the house. She however testified that she saw him with a torch when he threatened PW 1 and took her money.

14. Although PW 1 did not mention a torch, I do not think her testimony and that of PW 2 is inconsistent because PW 1 was first to see the appellant when he first stormed in and that was the basis of her identification while PW 2 saw him after.

15. I wish to point out at this stage that the quality of the *voire dire* was wanting in so far as the child was not asked about the nature of the oath or affirmation. The record of the *voire dire* shows as follows;

QUESTIONS BY THE COURT

Who are you?

I am A

How old are you?

I am 6 years.

Where do you go to school?

I go to [particulars withheld] School. I am in pre-unit.

COURT: The witness is a minor. She can give affirmed evidence. I find her diligent although young.

16. Under section 19 of the *Oaths and Statutory Declarations Act (Chapter 15 of the Laws of Kenya)*, the examination of the child is two-fold. First, to determine whether the child is intelligent enough to testify and second whether the child understands the nature of the oath. In *Johnson Muiruri v Republic* [1983] KLR 445 and *Kinyua v Republic* [2002] 1 KLR 256, the Court of Appeal has held that, after the *voire dire* examination, the trial court is satisfied that the child understands the nature of the oath, the court proceeds to swear the child and receives the evidence on oath. But if the court is not so satisfied, the unsworn evidence of the child may be received if, in the opinion of the court, the child is possessed of sufficient intelligence and understands the duty of speaking the truth. In this case, the *voire dire* did not proceed to the second stage. PW 1 should not have been sworn or affirmed. This error though, does not detract from the prosecution case. Even if I disregard PW 2's testimony, that of PW 1 is sufficient to support a conviction.

17. As regards the defence of a grudge, I find that this was really an afterthought as the nature of it was not put to PW 1 or PW 2 in cross examination. Further, DW 2 may not have heard the alarm being raised for any reason. Since the appellant was identified as the assailant who attacked and stole from PW 1, it was not necessary to produce any further exhibits. As the appellant is the one who stole PW 1's items, he is

the only one who could tell where they are. I find that the conviction of the appellant was safe and I therefore affirm it.

18. Following the decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic* SCK Pet. No. 15 OF 2015 [2017] eKLR and that of the Court of Appeal in *William Okungu Kittiny v Republic* KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR declaring the mandatory death sentence for murder and robbery with violence unconstitutional, the court had discretion in imposing an appropriate sentence. The trial magistrate took into account the fact that the appellant was a first offender, the manner in which the offence was committed and that he had been in custody since he was arraigned. The trial magistrate therefore took into account the relevant facts and it has not been shown that he took into account irrelevant facts or failed to take into account material facts. I do not think the sentence of 15 years' imprisonment to run from 5th February 2014 was harsh and excessive. I affirm the sentence.

19. I dismiss the appeal.

DATED and DELIVERED at KISII this 1st day of NOVEMBER 2018.

D.S MAJANJA

JUDGE

Appellant in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of

Prosecutions.