REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 38 OF 2010

BETWEEN

ISAAC MUCHESIA..APPELLANT

AND

REPUBLIC...RESPONDENT

(Being an appeal from the original conviction and sentence of the Chief Magistrate's

Court at Kakamega in Criminal Case No. 1053 of 2009 made on 29.10.2010

by Hon. J.M.Githaiga, PM)

J U D G M E N T

Introduction

1. The appellant herein was arraigned before the Chief Magistrate's Court at Kakamega on one count of robbery with violence contrary to Section 296(2) of the Penal Code, the particulars of which were that on the 16th day of May, 2009 at Ivakhale village Mtamba Sub-location in Kakamega East District within Western Province, jointly with others not before court and while armed with dangerous weapons, namely pangas robbed Jafred Musula of his bicycle make Raley, one iron box, one jack plane, one radio Philips, mobile phone make Erickson one pair of shoes, cash kshs.500/= and assorted shop goods all valued at kshs.57,995/= and immediately before the time of such robbery, threatened to use actual violence to the said Jafred Musula.

2. The appellant denied committing the offence when he appeared for plea before the then Chief Magistrate, Hon. Hedwing Ong'udi(Now Judge of the High Court) on 25.05.2009. Thereafter, the prosecution called 3 witnesses. At the close of the hearing, the trial court was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt. Judgment in the case was delivered on 29.01.2010 and immediately thereafter, the appellant was sentenced to suffer death as by law established.

The Appeal

3. Being dissatisfied with both conviction and sentence, the appellant filed the instant appeal premised on the following homemade grounds.

1. That I pleaded not guilty to the above appended charges

2. That the learned trial Magistrate grossly erred in law and facts in basing my conviction on the doubtful evidence of PW1

3. That the learned trial Magistrate erred in law and in fact by upholding my conviction overlooking the fact that the case was marred by contradictive (sic) evidence of the prosecution side.

4. That the learned trial Magistrate erred in law and facts by convicting me the appellant when the ingredients of the charge were not established by the prosecution.

5. That the trial Magistrate erred in law and fact by convicting the appellant without medical report (P3 form) and investigation officer. These two witnesses were important prosecution failed to prove the case

6. That the trial court violated my fundamental rights by not furnishing me prosecution statement. It is a doctrine entrenched in Section 70 and 77 of the CPC.

7. That the learned trial Magistrate erred in law and facts by failing to consider the failure of the prosecution to avail some of the essential witnesses e.g. neighbours who first visited the scene and those members of the public who arrested me. The appellant did not testify and no exhibit to connect me to them.

8. That the learned trial Magistrate erred in law and facts by rejecting and dismissing my defence without evaluation as required under Section 169 of the Criminal Procedure Code.

Because of the above reasons, the appellant prays that the appeal be allowed, conviction quashed and sentence set aside.

First Appeal

4. As this is a fist appeal, this court is under a duty to subject the whole evidence adduced during the trial to a fresh evaluation with a view to coming to its own conclusions as to whether the findings of the learned trial Magistrate should stand. In this regard, this court finds support in the court of Appeal decision in **Mark Oiruri Mose vs. Republic [2013] eKLR** where the court expressed itself on the duty of the first appellate court. "The court is under a duty to revisit the evidence tendered before the trial court, afresh, evaluate it, analyze it and come to its own conclusion on the matter, but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that."

5. In the earlier case of **Mwangi – vrs – Republic [2006]2 KLR 28**, the Court of Appeal stated inter alia, that "an appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to afresh and exhaustive examination." And in the now well known case of **Pandya – vrs – Rex[1957]EA 336** the then Court of Appeal for East Africa held that 'An appellate Court ought to treat the evidence as a whole to that fresh exhaustive scrutiny which the appellant is entitled to expect …………after a conviction on evidence that has been received."

6. The above are therefore the guiding principles as I deal with this appeal, and it is only after applying these principles that I can safely say whether or not I support the trial Magistrate's findings. I now proceed to reconsider the evidence on record.

The Prosecution Case

7. From the evidence of the 3 prosecution witnesses, the case for the prosecution is as follows;- on 16.05.2009 at about 1.00am, the complainant in this case, Joseph Musuli who testified as PW1, was asleep inside his shop at Ikavale area. He had closed the shop around 7.00pm, before retiring to bed at

8.00pm, at 1.00am, he was woken up by knocks on the wooden door but before he could respond, the door was forced open and he was cut on the face with a panga. He was ordered to lie down. The intruders then took his bicycle, an iron box, a radio make Philips, weighing scales, a mobile phone, one pair of shoes and an assortment of shop goods.

8. According to PW1(Muruli) 3 people entered the shop while 2 remained outside. The attackers had bright torches and with the light from those torches, he was able to identify the appellant when he looked up. He was able to see the appellant's shoes clothes and face. The appellant was someone well known to Muruli.

9. Muruli then screamed for help as the attackers fled, and members of the public, one of whom was Patrick Salamba, PW2 (salamba), responded to Muruli's screams by going to his home. At that time too, Salamba heard whistles being blown from the home of Jafred Musula (not called as a witness).

10. On arrival at Muruli's home, Muruli informed Salamba that he had been attacked by a group of people, among who was Isaac Muchesia the appellant herein. Salamba also noticed that the door to Muruli's shop was broken down. Other people also came to the scene. Since there was only one Isaac Muchesia in the village, Salamba and other neighbours went to the appellant's home but found his house locked from outside. Salamaba and the other neighbours woke up the appellant's father and informed him that they were waiting for the appellant. The group decided to wait for the appellant.

11. At about 7.00am, the appellant arrived home. His clothes were wet. Members of the public wanted to beat him up but Salamba and other likeminded neighbours apprehended him to the AP camp, later Salamba recorded a statement at Malava Police Station. While testifying, Salamba told the court that he had known the appellant for over 5 years and that he had no grudge with him throughout the 5 years. During cross examination, Salamba testified that Muruli told him on arrival that he had recognized the appellant as one of the people who broke into the shop and stole from him and also injured him by cutting him with a panga. Muruli told the court during cross examination that he had known the appellant from the time he (appellant) was born and that they were neighbours. He also stated that he did not have any grudge with the appellant. Muruli also testified that when the appellant returned home at about 7.00am, he was wet and muddy like somebody who had been walking in the bush at night.

12. Number 63866 Police corporal Jacob Cherotich of CID office Kakamega Police Station testified as PW3. He recollected that on 19.05.2009, he was on duty with one police officer by the name Oduoli from Kabras who informed him that he had brought suspect to the police station. That suspect was the appellant. That the appellant had broken into Musula's home and stolen items which were never recovered. PW3 visited the scene at Musula's home and confirmed that the shop had been broken into and various shop goods stolen. PW3 also stated that the shop door had been violently broken down. During cross examination, PW3 stated that Musula told him when he visited the scene that he (Musula) had identified the appellant as being among the 5 people who attacked him during the night of the robbery. The prosecution then closed its case.

<u>The Defence Case</u>

13. At the close of the prosecution case, the trial court ruled that the prosecution had established a prima facie case requiring the appellant to defend himself. The appellant gave a brief unsworn statement in which he stated that on 15.05.2009, while he was at his home around midnight, he heard people walking outside the house. They knocked on his door, and told him they were vigilantes of the village. When he opened the door, he saw his village elder and vigilant. They then took him around looking for stolen items before taking him to Kambiri AP Camp and later to Kabras police post. He was later taken to Kakamega police station and charged with the offence for which he stood denial. He denied committing the offence. The appellant had no witnesses to call.

<u>Judgment of the trial court.</u>

14. After a careful analysis of the evidence on record, and after considering the law, the learned trial

Magistrate was satisfied that the appellant had been properly identified at the scene of crime and that the ingredients of the offence of robbery with violence had been proved. He accordingly found the appellant guilty as charged and convicted him and sentenced him to suffer death as by law provided.

<u>The Submissions</u>

15. At the hearing of the appeal, the appellant relied on his written submissions duly received by the court on 27.10.2016. The appellant contended that the charge against him was not adequately proved. That the evidence on record was flimsy, inadequate and doubtful in nature and finally, that critical witness were not called to testify against him. He urged the court to make a finding that the conviction was unsafe and to quash it and set aside the sentence of death.

16. In response, Mr. P. Oroni, Senior Prosecution Counsel, for the respondent opposed the appeal arguing that the complainant clearly recognized the appellant as one of the 5 attackers who robbed him on the material night. Counsel also submitted that the complainant gave the appellant's name to both Salamba and PW3 and that according to Salamba, the only known Isaac Muchesia in the village was the appellant. Counsel submitted that the ingredients of the offence of robbery contrary to Section 296(2) of the Penal Code were proved and that the trial court rightly Sentenced the appellant to suffer death as by law prescribed in reply, the appellant contended that Musula's averment that there was light from torches was not true.

17. He also said that the complainant's name was Joseph Musula and not Joseph Mutuli.

18. Regarding the complainant's name the handwritten record gives the name as Japheth Musula though the typed proceedings give the name as Joseph Musuli. The error is thus typographical.

<u>Issues for Determination</u>

19. After a careful analysis of all the evidence on record, three major issues arise for determination, namely.

> a. Whether the appellant was properly identified/recognized as one of the attackers who robbed the complainant, and
>
> b. Whether the prosecution proved the ingredients of the offence
>
> c. Whether the appellant's defence was rejected without a reason.

<u>Analysis and Determination</u>

20. There is no doubt in this case, that the identification/recognition of the appellant during the robbery is at the centre of the prosecution case. If the evidence shows that the appellant was properly identified, then the findings of the learned trial Magistrate will stand subject to proof of the ingredients of the offence. I now proceed to consider the twin issues that are due for determination.

a. **<u>Whether the appellant was properly identified/recognized</u>**

21. It is common ground in this case that the appellant and Musula were neighbours and that Musula had known the appellant from birth. In this regard therefore this is a question of recognition as opposed to identification of a stranger. There are many cases that have come before the courts where the issue of identification has arisen. The courts are generally of the view that where the prosecution case against an accused person rests entirely on identification, especially in those cases where the circumstances of identification are known to be difficult, then there is need for caution because a court can convict on such evidence. This was the holding in the case of **<u>Odhiambo –vs-Republic[2002]IKLR 241</u>**. It was also held in this case of Odhiambo and in the case of **<u>Nzaro –vs – Republic [1991]KLR70</u>** that where the evidence rests on a single witness and the circumstances of identification are not so easy, there must be

other evidence either direct or circumstantial pointing to the guilt of the accused person from which the court may reasonably conclude that identification is accurate and free from the possibility of error. Also see Wamunga –vs – Republic [1989]KLR ……. For this and for the further proposition that it is easier to identify someone who is known than a total stranger though mistakes could still be made even when identifying someone who is known to the complainant.

22. In the instant case, Musula was alone at 1.00am when the attack took place. He was cut on the face as soon as the assailants entered the shop, and the only light available in the shop was from the “bright torches,” the assailants had. He testified thus, I looked up and I was able to identify the face of one of the attackers. They were pointing torches at each other. I could recognize Isaac Muchesia from the light of their torches who is the accused I could see his shoes, clothes and face I recognized his face because I know him very well. ----------- I know accused very well. He is a neighbour. I know him from birth. I have never had a grudge with him”

23. From the above testimony, I am fully satisfied that Musula clearly and positively recognized the appellant with the help of torch light coming from the “bright torches.” Of course I am aware of the dangers that arose from evidence of identification of one witness, but in this case, I have no reason to doubt the testimony of Musula with regard to the presence of the appellant at the scene of crime. Musula knew the appellant from the time the appellant was born and he had never had any grudge that would make him frame the appellant.

24. I am also satisfied that Musula recognized the appellant during the robbery because when Slalambaand other neighbours came to his rescue, Musula told Salamba that he had recognized Isaac Muchesia, the appellant, as the one who had the panga. Musula also told PW3 when he went to the police station that he had recognized the appellant as one of the 5 people who had entered the shop and robbed him of a number of personal items.

25. It is also clear from the appellant’s cross examination of the witnesses that there is no indication of that any of the witnesses had a reason for framing the appellant. Having reached the above conclusion on the issue of identification/recognition of the appellant during the robbery, I do find and hold that the appellant’s contention that PW1’s evidence was doubtful to be without basis. I also find no merit in the appellant’s contention that the prosecution evidence was contradictory. The appellant also complained vide ground 5 of the Petition of Appeal that the prosecution did not call the Investigating Officer. This contention cannot be correct because PW3 clearly told the court that he was the investigating officer. Ground 7 of the Petition of appeal regarding failure of the prosecution to call vital witnesses to be devoid of merit.

26. In the case of **Odeyo-vs-Republic [2006]2 EA 255(CAK)** it was held, inter alia that “the prosecution has the discretion to call or not to call someone as a witness. Where it did not call a vital reliable person with a satisfactory explanation the court could presume that the person’s evidence would have been unfavourable to the prosecution.” In the instant case, there was no suggestion during the trial that the prosecution failed to call a witness or witnesses for the reason that the evidence of such witness (es) would have been unfavourable to the prosecution.

b. **Whether the prosecution proved the Offence of violent robbery**

27. Under Section 296(2) of the Penal Code, the offence of robbery with violence is established if the prosecution proves any of the following;-

i. That the attackers were more than one; or

ii. That the attackers were armed; or

iii. That they used actual violence or threatened to use actual violence on their victim.

28. The appellant’s contention is that the prosecution did not prove the ingredients of the charge.

However, from the evidence on record, this ground of appeal has not basis, the evidence is clear that the appellant was in the company of 4 other people when they unleashed terror on Musula in the middle of the night on the fateful day. The robbers were armed with a panga which the appellate was carrying. Although no medical evidence was adduced to show that Musula was injured during the attack, he stated that he was cut on the face. It is however immaterial that no medical evidence was adduced because the first ingredient of the offence was proved, and that alone is sufficient for purposes of a conviction.

C) Whether the appellant's defence was rejected without a reason

The appellant raised this ground underground 8 of the petition of Appeal. In his judgment, the learned trial Magistrate said the following about the appellant's defence;-

> " I have considered the defence advanced. It is in respect of 15th May, 2009 night when a group of vigilantes led by the village elder arrested accused from his home for an offence he did not commit. The evidence before me far overwhelms this line of defence. I have warned myself approximately and ruled out the possibility of mistaken identity."

29. From the above, it is clear that the trial court fully considered the defence of the appellant, but found it wanting in the face of overwhelming prosecution evidence of recognition. I have myself carefully reconsidered and evaluated the appellant's defence and find no weight in it to counter the prosecution case against him. In any event, the defence of alibi only came up when the appellant was called upon to defend himself. He made no suggestion of it whatsoever when he was cross-examining the prosecution witnesses. That ground of appeal therefore fails.

Conlusion

30. In conclusion, I find and hold that this appeal on both conviction and sentence has no merit and the same is dismissed in its entirety. The appellant has a right of appeal to the Court of Appeal within 14 days from the date of this Judgment.

Orders accordingly.

Judgment delivered, dated and signed in open court this ……19th …..day of …January….2017

RUTH N. SITATI

JUDGE

In the presence of;-

…………Present in person………………for Appellant

…………Mr. Oroni (Present)………………..for Respondent

…………Mr. Polycap….……………………Court Assistant