



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL APPEAL NO. 90 OF 2015

SAMMY SAFARI NOTI.....1ST APPELLANT

KALUME BALOZI BULUSI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 587

of 2013 of the Chief Magistrate's Court at Malindi – Mbogo C.G., CM)

JUDGEMENT

The appellants were charged with offence of attempted robbery with violence contrary to section 297 (2) of the Penal Code. The particulars of the offence were that the appellants on 10.9.2013 at Kakuyuni area in Malindi District within Kilifi County while armed with a dangerous weapon namely a knife, attempted to rob Said Wanje Charo of his motor cycle registration No. KMCU 790Z valued at Kshs.83,000/= the property of Kenneth Mwambaru.

The trial court convicted the appellants and they were each sentenced to death. The grounds of appeal are that the evidence on recognition was from a single witness. The appellants' arrest was not connected to the case. Crucial witnesses were not called to testify. The prosecution did not prove its case beyond reasonable doubt. Section 389 of the Penal Code was not complied with and that the appellants' defence was not considered. The grounds of appeal are similar for each appellant. The same applies to the submissions.

Mr. Ogeto appeared for both appellants. Counsel submitted that the complainant, PW4, testified that he was called by one of the appellants and asked to take him to the destination where an attempt to rob him was made. The phone number was given but it was not investigated as to whether it belonged to the 1st appellant as well as the time of the call. The witness was stepped down on the ground that the communication from the mobile phone provider, safaricom, was to be produced. When the witnesses resumed to testify no information on the communication was produced. The communication was the vital link between the complainant and the 1st appellant. Counsel further submitted that APs went to the scene after being called by members of the public. The complainant alleged that he kept on riding the motor cycle after fighting off the robbers. The distance he rode the motor cycle is not given. It was state that the appellants alleged that they were from the Noti family. Someone called a member of that family and the family denounced them. No one from that family or the caller was called to testify. The 1st appellant

submit that his name is Sammy Safari Noti. An identification parade was done yet the complainant alleged that he knew the appellants. The parade was unnecessary. The complainant was unconscious and it is not clear for how long he was in that state. The complainant was not armed yet he alleged that the robbers who had a knife ran away because he warned them. The appellants are entitled to the benefit of doubt.

The State opposed the appeal and relied on the record.

Before the trial court PW1 KENNETH MWAMBARU KALUME was the owner of the motor cycle registration No. KMCU 790Z. He produced ownership documents to that effect. He gave the motor cycle to his son Shukrani Karisa (PW5) to operate it. On 10.9.2013 Shukrani informed him at about 11.00 pm that an attempt was made to steal the motor bike. The motor cycle was taken to Malindi police station. He went there and identified it.

PW2 P.C. GEORGE MWITHIA was stationed at the Malindi police station. A report was made on 10.9.2013 at about 11.00 pm that someone had been found unconscious and was taken to the station. Police officers from Kakuyuni police station informed him that the driver of the motor cycle was rescued by some people. On 11.9.2013 the appellants were taken to the Malindi police station. PW2 investigated the case and had the appellants charged with the offence. He requested Inspector Kibowen (PW3) to conduct a parade. A knife was recovered from the 1st appellant but it had no blood stains. The complainant sustained injuries.

PW3 Inspector MOSES KIBOWEN SANG was stationed at the Malindi police station. He conducted identification parade on 18.9.2013 at the station. PW4 was the witness and he identified the appellants.

PW4 SAID WANJE CHARO was the complainant. He testified that he knew the appellants. On 10.9.2013 at about 4.00 pm the 1st appellant called him at 4.00 pm asking him if he had a motor bike. He also called him again at 6.00 pm asking to be taken to Jilore. He carried him and arrived there at about 7.58 pm. The 1st appellant started making a phone call then went to a shop and bought three bottles of soda. The 2nd appellant was there and sat on a log. The 1st appellant told him to take them back to Malindi as the person whom they were visiting was drunk. On their way, the two jumped off the motor cycle. He was then cut with an object. They demanded that he surrender the motor cycle to them or else they kill him. He told them that he was going to fight back and they ran away. He drove off the motor cycle. He later found himself on the ground unconscious as he had lost a lot of blood. He saw a passing motor vehicle and informed its occupants that he had been attacked by thugs. He found himself in hospital in Mombasa. He was then discharged. He later attended identification parades and identified the appellants. The 1st appellant used to be his customer. He knew his name after he was arrested.

PW5 SHUKRUNI KARISA is a motor cycle rider. On 10.9.2013 he was in his house when he got information that PW4 had been attacked by thugs with pangas. He went to Kakuyuni area and found PW4 with injuries on his head. He took him to Malindi hospital and was later transferred to Coast general hospital. PW6 ROBERT KARISA knows PW4. On 10.9.2013 at about 9.00 pm he was at home when he got a call informing him that PW4 had been slashed with a panga. He went to Kakuyuni area and found PW4 surrounded by many people and unconscious. He was bleeding a lot on the head. He came with him to Malindi police station and later took him to Malindi District hospital. PW4 was transferred to Mombasa hospital and gained consciousness after about three days.

PW7 AP Corporal ERNEST MWENDA was based at the Kakuyuni Administration police post. On 10.9.2013 at about 10.00 pm they got information that an incident had occurred near Kakuyuni secondary school. They went to the scene and found a young man bleeding from the head. There was a motor cycle next to him. He used PW4's phone to call his relatives. a relative went with a vehicle and took the injured person. At a distance of about 200 metres they met two young people whom they stopped. They told them that they were on their way to Watamu from Jilore. They said they are from the Noti family. A member of the public called the Noti Family and they learnt that the two young men were not from that family. They searched them and recovered a knife from the 1st appellant. They arrested them and took

them in their pick up and later were taken to the Malindi police station. The knife had no blood stains. PW8 IBRAHIM ABDULAHI was stationed at the Malindi Sub-County hospital. On 5.3.2014 he filled the P3 form for PW4. PW4 had a healed cut wound on the left temporal region of the scalp.

The appellants gave unsworn evidence. The 1st appellant testified that he comes from Lango Baya area. He sells clothes in a stall. On 11.9.2013 at about 5.30 am he was on his way from Mere to the bus stage heading to Mombasa to buy fresh stock. He was stopped by Administration police officers who had arrested other people. They interrogated him and he was arrested. They were all taken to the camp at Kakuyuni where they remained until 9.00 am. The police asked for money from him but he refused to bribe them. They were five arrested people. Three managed to give out money and were released. At about 11.00 am he was put in a tuk tuk together with the other appellant and taken to Malindi police station. He remained in the cells from 11.9.2013 up to 17.9.2013 when the investigating officer called to see them. They were taken to the crime office where somebody was brought whom they did not know. They were meant to sit on a bench. The investigating officer asked the person to look at them clearly so that he could not forget their faces again. They were then taken back to the cells. On 18.9.2013 their names were called out at about 10.30 am and were paraded with other people. They were taken back to the cells. On 19.9.2013 they were charged with the offence. He denied committing the offence.

The 2nd appellant testified that he comes from Madunguni area in Malindi. He was on his way to the farm when he was stopped by police officers. He was told to produce his identity card which he did not have. He was taken to the police station together with other people. He was later taken to Malindi police station where he stayed for eight days before he was charged in court.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. The direct evidence against the appellants is that of the complainant. It is his evidence that he took the appellants on a motor bike from Malindi to Jilore. It was about 7.00 pm. On their way back the two attacked him and they ran away. The complainant sustained serious injuries and lost consciousness. There is also the evidence of PW7 to the effect that the appellants were arrested about 200 metres from the scene. The rest of the witnesses like PW5 and PW6 were called to the scene after the incident.

There is the evidence of PW3, Inspector Moses Kibowen. He conducted a parade on 18.9.2013. Since PW4 alleged that he knew the appellants, I do find that the appellants were arrested on the same date of the accident. Had they been brought to court within the constitutionally provided period the parade could not have been conducted. The parade was done eight days after their arrest. It is also not clear where the other parade participants came from. The parade form indicates that the participants were found within the station. It cannot be by coincidence that people go to a police station for other business and they all look similar to two accused with different physical features and appearance. From the two parade forms, it is evident that the parade was attended by the same participants for each accused. Those who attended the first parade also attended the second one. That is improper as the witness would have seen the participants in the first parade. Further, a police officer, P.C. James Kimani, also attended both parades as a participant. I can't tell if the officer's appearance resembles that of the appellants. In any case, it is alleged that PW4 knew the appellants. I do hold that the parade was improper.

The complainant's evidence is that he communicated with the first appellant on phone. It appears that the first appellant denied that allegation and the complainant was stood down so that communication from the mobile phone provider, safaricom, could be produced. When the complainant resumed his testimony, that evidence was not produced. Counsel for the appellant maintains that the evidence on communication was quite crucial.

The complainant testified that he was first hit on the thigh and then on the head. The evidence is to the effect that the two appellants were his passengers. When the appellants jumped off the motor cycle, he stopped and confronted them. He threatened them that he would fight back. The complainant then drove off. It is not clear to me how the incident occurred. The complainant drove off but it's not clear for how long. In the process, he became unconscious. He told people who were in a vehicle that he had been attacked. When the police reached the scene, it appears there was no vehicle. The complainant's relatives went with a vehicle to the scene. The distance from the first place of attack to where PW4 fell

off the motor cycle is not clear. It is also not established as to why PW4 did not drive off after the appellants jumped off the motor cycle. He had been hit and knew that he was in danger. I do find that the evidence on record raises some doubt. The investigating officer alluded to the fact that the appellants told the police that they are from the Noti family and that was found to be false. The first appellant is also called Noti. These could be two different families.

The complainant became unconscious after he drove off from the first attack. He didn't tell the trial court that he started bleeding after the first attack. It could be possible that he fell off from the motor cycle and lost consciousness. The P3 form indicate that he sustained a cut wound on the temporal area of the head. The appellants were passengers sitting at the back. If they intended to rob the complainant, how did they hit him on the front part of the head while seated at the back. They could have just stabbed him from the back. Further, they could have taken the motor bike and drive off as they were two and armed.

The manner in which the appellants were arrested is not clear. It could not be possible that for all that time from about 8.30 pm upto about 10.00 pm, the appellants just stayed within 200 metres of their victim. They had nowhere to go and had themselves arrested within the vicinity of the scene. Their evidence is that they were arrested at around 5.00 am. The defence evidence raises doubt on the prosecution case. They were taken to the A.P Camp and in the morning at about 11.00 am were taken to Malindi police station. The manner in which they were arrested is doubtful.

PW4 lost consciousness for about three days. When he recovered, the appellants had already been arrested. It is not the complainant's evidence which led to the arrest of the appellants. If the complainant gave his attackers names and description to the police, how then was the parade conducted? There is no evidence that he gave the appellants' names to the police. The appellants' arrest merely coincided with their arrest and they were charged with the offence.

From the evidence on record, I do find that the prosecution evidence does not prove the case beyond reasonable doubt. The appellants are entitled to benefit from that doubt. The conviction is not safe. The appeal is merited and is hereby allowed. The appellants shall be set at liberty unless otherwise lawfully held.

Dated and delivered in Malindi this 6th day of February, 2017.

S.J. CHITEMBWE

JUDGE