



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 122 OF 2016

DAVID MAINA MURUGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in **Thika Chief Magistrate's Court Criminal Case No. 650 of 2014** by **Hon. Ireri P M** on 28/01/16)*

J U D G M E N T

1. **David Maina Muruga**, the Appellant, was charged with the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. Particulars of the offence were that on the **8th** day of **February, 2014** at around **2200 hours** at **Ndunyu-chege Location** in **Gatanga District** within **Muranga County**, robbed **Geofrey Maina** of **Kshs. 300/=** and immediately before the time of such robbery wounded the said **Geofrey Maina**.

2. He was subjected to full trial, convicted and sentenced to death.

3. Being aggrieved by the conviction and sentence he appealed on grounds that:

- Proper investigations were not carried out.
- Prevailing circumstances could not have enabled the Complainant to recognize the Appellant as the attacker.
- Plausible defence presented was dismissed.
- The Appellant's conduct exonerated him from commission of the crime.

4. Brief facts of the case were that PW1 **Geofrey Maina Kamau**, the Complainant, was the Appellant's second cousin. On the **8th February, 2014** at about **10.00 p.m.** though drunk he was on his way home when he encountered a person he identified as the Appellant and another. The Appellant accosted him and took **Kshs. 300/=** from him. He sustained a cut wound on the head. On recognizing him, the Appellant took the Complainant to his house and sought the assistance of PW2 **Samuel Migwi Maina** and PW2 **James Njue Maina** their relatives. By then the Complainant was unconscious. They took him to **Karwara Sub-District Hospital** but were referred to **Thika Hospital**. Prior to going to hospital they reported the matter to the police station when the Complainant regained consciousness and identified the Appellant who was with them as his assailant. He was arrested.

5. The Complainant was treated at **Thika Hospital**. Subsequently a P3 form was filled. The injury sustained was classified as harm. Investigations were carried out that culminated into the Appellant being charged.

6. When put on his defence, the Appellant made an unsworn statement. He stated that on the material date having returned the motorcycle he had hired to the owner he was on his way home when he encountered a person lying by the roadside. He flashed the torch and recognized the person. He called him by name and sought to know what had happened. The Complainant told him that he had been beaten and robbed. He was injured. He took him home and looked for a person who could take him to hospital. They took him to hospital. They went to report the incident to the Police Station, Thika. He was shocked to be arrested.

7. The learned trial Magistrate considered evidence adduced and found that the Complainant was robbed by the Appellant a close relative who had no rivalry or a personal dispute with him. He ruled out a question of mistaken identification and found him guilty as charged.

8. The Appellant canvassed the Appeal by way of written submissions. He stated that the Complainant was drunk, and it was at night therefore, circumstances that prevailed did not favour correct identification. He mistook him for his assailant. He concluded by stating that he was denied the right to mitigate.

9. The State (Respondent) through the learned State Counsel **Ms. Maundu** opposed the Appeal. She submitted that the Complainant recognized the Appellant as there was moonlight and after he robbed him he uttered words which made him recognize his voice. With regard to the issue of the Appellant having not been accorded an opportunity to mitigate, she admitted that it was an error and called upon the Court to refer the matter back to the Lower Court for mitigation.

10. This is a first Appeal. My duty is to re-evaluate, re-assess and re-analyze evidence adduced before the trial Court bearing in mind I had no opportunity of seeing and hearing witnesses who testified at trial then come up with my own conclusions.

(See Okeno vs. Republic (1972) EA 32).

11. Ingredients of the offence of Robbery with Violence were set out in the case of **Oluoch vs. Republic (1985) KLR** where it was held that:

“Robbery with Violence is committed in any of the following circumstances:

(a) The offender is armed with any dangerous and offensive weapon or instrument; or

(b) The offender is in company with one or more person or persons; or

(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.”

12. The Complainant testified that he had **Kshs. 300/=** that was taken away. PW2, PW3 and even the Appellant confirmed that he was wounded. Subsequently he was treated at **Thika Hospital**. A P3 form filled proved that he sustained a cut wound on the head. This was undisputed evidence of having been robbed.

13. The evidence against the Appellant as the perpetrator of the crime is that of visual and voice identification. The Complainant stated that after the Appellant attacked him he realized that he was the one and he used words to the effect that:

“Nimempiga Maina wa Cucu.”

14. In the case of **Wamunga vs. Republic (1989) KLR 424** it was held that:

“It is trite law that where 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 circumstances or identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.”

15. In the case of **Kariuki vs. Republic (1985) KLR 290** the Court of Appeal dealing with the evidence of voice identification stated that:

“Identification by voice nearly always amounts to identification by recognition. Yet here as in any other case care has to be taken to ensure that the voice was that of the Appellant, that the Complainant was familiar with the voice and that he recognized it and that there were conditions favouring safe identification.”

16. In his examination in chief the Complainant stated that he was attacked at **10.00 p.m.** and it was dark. He was drunk having drunk one bottle. He did not state the kind of intoxicant he absorbed/indulged and its alcoholic content. The question begging would be what effect the drink had on him. Did he have the ability to make a sound judgment? What was his state of mind at the point of hearing the Appellant utter the words that he allegedly uttered?

17. In his testimony the Appellant stated that he found the Complainant already injured and on recognizing him as his relative took him to his house and later sought assistance from their relatives. They took him to hospital and then the police station.

18. The Complainant pointed him out as the person who attacked him. It is on record that the Complainant lost consciousness and when he regained it he identified the Appellant. Having been drunk it may not be clear if he remembered him as his attacker or as a person who went to the scene soon thereafter as he believed he had attacked him.

19. This is a case where the learned Magistrate should have appreciated the doubt created.

20. Having reconsidered the case I am satisfied that evidence of visual and voice identification was not free from error.

Accordingly the Appeal is meritorious. It is allowed. The conviction of the Appellant is quashed and the sentence meted out is set aside. The Appellant shall be set at liberty unless otherwise lawfully held.

21. It is so ordered.

Dated and Signed at Kitui this 25th day of April, 2017.

L. N. MUTENDE

JUDGE

Dated, Signed and Delivered at Kiambu this 12th day of June, 2017.

PROF. J. NGUGI

JUDGE