



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARISSA
CRIMINAL APPEAL NO. 23 OF 2014

TITUS WAMBUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**[An Appeal from the original conviction and sentence on 26th March, 2014 in Criminal Case
NO. 124 of 2012 in the Principal Magistrate's Court at Kyuso (Hon. B.M. Mararo – PM)]**

JUDGMENT

INTRODUCTION

1. The appellant was convicted for the offence of robbery contrary to section 296 (2) of the Penal Code and sentenced to death on 26th March 2014 by the Principal Magistrate's Court at Kyuso (Hon. B.M. Mararo – PM) in Criminal Case No. 124 of 2012. The charge and particulars of the Charge were set out in the Amended Charge Sheet dated 24th October 2012, as follows:

“Charge: Robbery with violence contrary to Section 296(2) of the Penal Code.

Particulars of the Offence: Titus Wambua – On the 7th day of July, 2012 at about 8.30p.m at Kitovoto village, Kitovoto Sub Location, Masyungwa Location in Tseikuru District of Kitui County, jointly with another not before court robbed Julius Muthengi Mulyungi of cash Ksh. 4,000/= and a mobile Phone Make Motorola valued at Kshs. 4,500/= and immediately before the time of such robbery beat the said Julius Muthengi Mulyungi.

A previous charge dated 9th July 2012 had pleaded that the appellant and the other person had been armed with a dangerous weapon namely a stick.

The prosecution's case

2. The prosecution's case was deceptively simple. The appellant had together with another person not before the court accosted the complainant on his way home from a bar at Kitovoto village of Kitui County at about 8.30pm on the 7th July 2012, beating the complainant and stealing from him cash Ksh.4000/- and a mobile phone. The complainant had during the robbery identified the appellant but not his co-assailant. The complainant had been hit by the appellant on the face and strangled by the other attacker until he lost consciousness. When he came to, he went back to the bar and, on finding the appellant in the bar, charged

him of having been part of the robbers leading to a fight between the two, which prompted the bar attendant to lock them up in the bar and call the police.

The Appellant's case

3. When placed on his defence, the appellant gave sworn testimony and called one witness, the general effect of his defence being that, he and the complainant who were both drunk had disagreed over a bar girl, Kathini, who the complainant wanted for himself but who would not leave the appellant's table. In the ensuing fracas – fight- the bar attendant had locked them in the bar and called the police.

4. In its judgment the trial court found that the charge had proved and that the appellant had been involved in the robbery with violence and, accordingly, went on to convict the appellant, stating that –

“In the present case I find the accused was properly identified by the complainant using moonlight which he claimed to be sufficient. Further the complainant recognized the accused having met him previously/severally. The accused also testified that he knew the complainant. I henceforth find that the complainant positively identified the accused as among the persons who robbed him of his Kshs.4,000/= and Motorola mobile phone on 7.7.2012 and in the process caused him to sustain injuries. As such I find the prosecution as having proved their case to the requisite standards and the accused person Titus Wambua guilty of Robbery with violence as charged and I convict him accordingly.”

5. The appellant filed appeal against conviction and sentence and in his amended grounds of Appeal enumerated the following grounds:

1. That the pundit trial magistrate erred in law and fact to convict me without considering that the charge sheet relied upon was fatally defective contrary to Section 134 of the Criminal Procedure Code.

2. That the pundit trial magistrate erred in law and fact to convict me without considering that there was no positive identification, hence prosecution's case was based on presumption inter alias

a. That the pundit trial magistrate failed to consider that the alleged identification was done in darkness hence the power to light was not established.

b. That the alleged identification was doubtful since the complainant was drunk and driven by intoxication, he did not give any description of the assailant to any witness before attacking the accused; leading to possibility of mistaken identity.

3. That the learned trial magistrate erred in law and fact to convict me without considering that the mode of arrest was poorly instigated.

4. That the pundit trial magistrate erred in law and fact to convict me without considering that the prosecution's evidence was contradictory and full of inconsistencies contrary to section 163 of the Evidence Act.

5. That the pundit trial magistrate erred in law and fact to convict me without considering that the prosecution failed to prove the case of robbery with violence contrary section 296(2) against me inter alias;

a. No exhibit recovered in connection with the alleged offence.

b. No evidence of me being armed with any dangerous or offensive weapon, since I was found and arrested in a bar sitted.

6. That the pundit trial magistrate erred in law to convict me without, considering that the

investigation officer failed to investigate this case to the requisite standard.”

6. The appellant filed written submission together with his amended grounds of appeal with additional oral submissions to which the Prosecution Counsel, Mr. Okemwa, at the hearing responded by oral argument and judgment was reserved.

ISSUES FOR DETERMINATION

7. The issues for determination are –

- a. Whether the offence of robbery with violence was committed; and
- b. Whether the appellant was properly identified as having taken part in the alleged robbery with violence, if proved.

DETERMINATION

8. In determining whether the ingredients of the offence of robbery with violence are proved, the evidence on the theft, the number of attackers, appellant being armed with a dangerous weapon and the beating of the complainant are determinant. The ingredients of robbery with violence are as set down in section 296 (2) of the Penal Code, as follows:

“296. Punishment of robbery

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

*(2) If the offender is armed with any **dangerous or offensive weapon or instrument**, or is **in company with one or more other person or persons**, or if, at or immediately before or immediately after the time of the robbery, **he wounds, beats, strikes or uses any other personal violence to any person**, he shall be sentenced to death.”*

9. In the Charge Sheet dated 24th October 2012 the Prosecution relied on the appellant being in the company of another person and beating the complainant as the ingredients of robbery with violence rather than being in possession of a dangerous weapon. While a stick may in common use not be a dangerous weapon, it may be an offensive weapon if it is put to such use of beating a victim of the robbery. The Court of Appeal in the case of ***Odhiambo & Another v Republic*** (Omolo, Githinji & Deverell JJA) (2005) 2 KLR 176 explained the ingredients of the offence of robbery with violence as follows:

“The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under section 296(2) and the one defined under section 295 of the Penal code. Other ingredients or elements under section 296(2) include being in the company of one or more persons or wounding, beating etc the victim and since all these are modes of committing the offence under section 296(2), the prosecution must choose and state which of those elements distinguishes the charge from the one defined in section 295.”

10. In the present case the prosecution could also have relied on either ingredient of being in the company of one or more persons and beating or wounding the victim, if the particulars of the charge were proved. However, the only testimony that the appellant was in the company of one other person during the attack is from the complainant as there were no eye-witnesses to the attack, and it may not be taken to have been proved beyond reasonable doubt that the attacker was in the company of one or more persons.

11. As regards beating or wounding of the victim of the robbery, the clinical officer from Kyuso District Hospital (PW3) testified that he had on 9/7/12 examined the complainant who had injuries on the left side of the face and left shoulder with painful bruises on the left face, injuries which were 12 hours old and which had been caused by a blunt weapon which he suspected to be a stick. This evidence corroborates the complainant’s testimony that he had been assaulted. On account of the beating, the offence of robbery

with violence would be proved, even if the prosecution were not able to prove that the attackers were two, if the prosecution proved theft to the required standard.

Was theft proved?

12. The complainant testified that he was attacked by two people one of whom he recognized as the appellant and robbed of his money in the sum of Ksh.4,000/- and his mobile phone valued at Ksh.4,500/- . The substance of his evidence in chief was as follows:

“PW1 Male adult Christian duly sworn and states in Kiswahili

*I am Julius Muthengi Mulyungi from Mivukoni Location. I am a mason. On 7.7.2012 at 8.30p.m I left lakeside bar and was on my way home. I met two people coming fast after me. I went aside. One came to my side. [He] hit my right hand and the other strangled me. I recognized the accused from the bar and by use of the moonlight. I told the bar attendant that the accused was responsible. Accused jumped at me. Customers intervened. Caretaker closed door and put off light. Police came. I went to the station the next day. **I recognized Wambua. I did not recognize the other. Wambua hit me. The other strangled me until I lost consciousness.** I returned back to Hospital. I lost Ksh. 4,000/=, loose change and a Motorola mobile (C118). It is worth Kshs. 1,500/=. I returned to bar. I found the caretaker Wambua was sitting at a corner. He attacked me when I pointed him out. Police found us in the dark. We were with one Kavita and caretaker. Accused was among those locked in bar. I injured face, eye, neck, shoulder. I was treated at Masyungwa Dispensary. P3 form filled at Kyuso District Hospital. I went to hospital on 8th (the next day). Police came on that day to the bar.... I was wearing a black trouser. I can identify it. It was torn left side was very torn. Accused was wearing a white T-shirt. I knew him previously. There was sufficient moonlight.”*

13. During cross-examination, PW1 stated that he and the appellant had been taking alcohol at Lakeside Bar on the material evening of 7/7/2012 and that he had found the appellant at the bar at 7.00pm and he did not know how many Tusker beers he had taken but that he had planned to spend ks.2,000/- . He denied that he and the appellant were fighting over a lady (Kathini) and asserted that he had recognized the appellant as having attacked him at 8.30pm injuring him on the neck and eye and that he had remained unconscious until 11.00pm. He also confirmed that he had told the doctor who examined him that the appellant had ‘injured me with another’ and that the appellant had been arrested at about midnight.

14. PW2 was the arresting Officer testified that he had been awoken at 10.00pm by Cpl. Wachira who informed him that some robbers had been locked up in a bar whereupon he proceeded to the bar and arrested the appellant. On cross-examination he said he was awoken by CPL James Wachira on 8/7/12 at 12.15am. He confirmed that there were no recoveries of the alleged lost items.

15. PW4 (erroneously shown as PW5 on the record of proceedings) was the bar attendant at Kitovoto bar who at the application by the Prosecution was declared a hostile witness testified that the complainant who had been drinking at the bar had left for home at 8.30pm after which the appellant then came into the bar and started drinking: *“After 30 Minutes complainant returned and said he was robbed by people including the accused. They began fighting. I locked them in the bar and I went for the police. We returned and I showed them accused [and] complainant. Accused handcuffed and taken to Police station.”*

16. On cross examination, PW4 said the complainant was drunk and that the appellant had come into the bar at 8.00pm and did not leave, that the complainant had left at 8.00pm before the appellant came in and that he had returned at 8.30pm claiming that there were some people who had robbed him leading to the fighting. He confirmed that the complainant had returned with injuries having left without injuries. He, however, could not say whether the complainant had met the appellant on his way home.

17. PW5, a patron at the bar where the complainant and the appellant were drinking on 7/7/12 testified

that the complainant had come in at 8.30pm and found them with the appellant and others and claimed that he had been robbed and that the appellant was one of the robbers. The witness said that the two began fighting and the barman switched off the lights and locked them in and later came with the police. On cross-examination, the witness confirmed that he had gone to the bar at 7.30pm and found the appellant there and that there were no Tusker beers, only Keg beer. On re-examination by the prosecution, the witness said that he had left the bar 'after 8.30pm after chaos' and that he was drunk and the complainant was also drunk. If he left after the chaos, he could not have been there when the police came.

18. In his defence, the appellant (DW1) testified that he had gone to the Kitovoto bar at 7.00pm accompanied by his uncle and they had continued drinking Keg beer with other patrons and in the company of a lady called Kathini for about 2 ½ hours when the complainant who was drunk came and ordered for a mug of beer. The complainant was upset that Kathini was talking to the appellant and he then caused chaos by attacking the appellant whereupon the bar attendant closed the bar and came with the police. DW2, a bar patron confirmed the appellant's story that he had left the bar and that the chaos was about a lady who was sitting with the appellant to the annoyance of the complainant.

19. PW4 and PW5 and DW2 were in the company of the appellant at the bar and while all claimed that the appellant did not leave the bar could not testify on what had transpired outside the bar, when according to the testimony of the PW1, PW3, PW4 and PW5 the complainant left for home at 8.00-8.30pm. PW4 confirmed however that the complainant PW1 had left the bar without injuries but returned with injuries. This corroborates the complainant's claim that he was attacked on his way home from the bar. The barman PW4 also confirmed that the complainant had his mobile phone at the bar, and it is reasonable to find that the complainant had at least lost his mobile phone during the attack

20. On the basis of the finding of loss of the complainant's mobile phone which the witness PW4 confirmed that he had seen the complainant with and the injuries sustained by the complainant confirmed by his own testimony and that of the barman PW4 and the clinical officer PW3, the court finds the ingredients of robbery with violence of theft and the wounding of a person during the theft proved.

Whether the appellant was identified as being one of the robbers

21. While the defence was categorical that the appellant did not leave the bar after coming in at 7.00pm, the prosecution witnesses PW4 and PW5 could not say what had happened between the time when the complainant left the bar and shortly thereafter when the appellant came in and the court cannot rule out the involvement of the appellant in an attack on the complainant before the appellant came into the bar.

22. The question must be resolved by the view the court takes of the identification by the complainant as one of the robbers. At the outset, the court must examine the conditions that existed at the time and place of the robbery and their favourableness or otherwise to positive identification or recognition as alleged by the complainant in this case, as well as the state of mind of the complainant which would determine whether he had capacity to identify the appellant.

The complainant's state of mind

23. From the evidence, it was clear that the complainant had drunk alcohol, although it was not clear whether it was Tusker beer or Keg beer. By his own testimony, although he could not say how many beers he had taken, he said he had planned to use Ksh.2000/-. That must be a lot of beer whether it be Tusker beer or Keg beer as claimed by PW5. PW4 said the complainant was drunk. It is reasonable to assume that the complainant was drunk as he admits having been drinking with a budget of Ksh.2000/- and could not remember how many beers he had taken and who by the accounts of PW4 and PW5 was drunk. We think that a person of the complainant's state of mind resulting from his being drunk may have had his ability to identify a person impaired to some significant extent.

24. The circumstances in which the alleged identification was done must be considered. In this case, the incident allegedly occurred at night about 8.30pm and without proper lighting, which circumstances make

identification difficult. No description of the intensity of the lighting – it was claimed to have been moonlight - by which the complainant saw and recognized the appellant. There was no evidence that the recognition was based on voice or other means. Moreover, the drunken state of the complainant posed dangers of mistaken identification because of drink-impaired cognitive capabilities of the complainant.

25. The situation is exacerbated by the fact that the robbery happened in the night and the only source of light whose intensity was not described was moonlight. We think that the circumstances of this case did not afford favourable circumstances for the positive and accurate identification of the appellant. It was not suggested that recognition was on the basis of voice so that lighting was not an important factor. The assertion was that the complainant was able to recognize the appellant having seen him by the source of light from moonlight. Being drunk would naturally make the identification more difficult.

26. As observed by the Court of Appeal in **Karanja & another V Republic** (2004) 2 KLR 140, 147 (**Githinji JA, Onyango Otieno & Deverell Ag JJA**) -

“The law as regards identification under difficult conditions is now well settled. In the case of **Cleophas Otieno Wamunga vs Republic** Court of Appeal Criminal Appeal No. 20 of 1989 at Kisumu, this Court states as follows:-

*“We now turn to the more troublesome part of this appeal, namely the appellant’s conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude(PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them..... What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well known case of **R vs Turnbull** [1976]3 All ER 549 at page 552 where he said:-*

‘Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.’”

27. In the later case of **Kiilu & another v Republic**, (2005) 1 KLR 174, the Court of Appeal (Tunoi, Waki & Onyango Otieno JJA) reiterated the position as follows:

*“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. **In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.**”*

28. We did not find any other evidence linking the appellant to offence of robbery. We are, accordingly, not convinced that the identification of the appellant by the complainant in the circumstances of this case was free from possibility of error. That the complainant could not recognize the other of the two alleged assailants is telling of the possibility of error: in the same way he was unable to identify the other attacker, he could be mistaken of his recognition of the appellant. Moreover, no basis of recognition, by way of long association and dealings with appellant was adduced to support the claim to recognition.

Inconsistencies in the timing of the offence

29. In addition, there were inconsistencies in the Prosecution witnesses' evidence of the timing of alleged commission of crime was varied between the prosecution witnesses, which create doubts as to the commission by the appellant of the alleged offence which must given to the benefit of the appellant. While the complainant testified that he was upon attack unconscious upto 11.00pm when he went back to the bar and identified the appellant leading to the fighting, every other witness placed the happening of the fighting at about 8.30pm when the complainant came back about 30 minutes after leaving the bar at 8.00pm. Indeed in his examination in chief PW2 gave the time of his being woken by the Cpl. Wachira at 10.00pm, which might account for the time difference between the fighting, the closure of the bar and the report at the Police station. Could it be that in his drunken state, the complainant had lost sense of time, and, if so, what else did he lose track of, and could his purported identification by recognition be trusted.

The findings of the appellate court

30. Upon evaluation of the evidence presented by the prosecution, while the court finds proved that the complainant was attacked as he went home on the evening of the 7th July 2012 at around 8.00 -8.30pm and he lost his property being money and mobile phone, it was not proved to the required standard of proof that the appellant was the attacker or one of the attackers, because the alleged identification of the appellant by the complainant PW1 was done in difficult circumstances of his inebriation, at night and using moonlight as the only source of lighting.

The judgment of the trial Court

31. In his judgment of 26th March, 2014, the trial magistrate Hon. B.M. Mararo – held:

“In the present case I find the accused was properly identified by the complainant using moonlight which he claimed to be sufficient. Further the complainant recognized the accused having met him previously/severally. The accused also testified that he knew the complainant. I henceforth find that the complainant positively identified the accused as among the persons who robbed him of his Kshs. 4,000/= and Motorola mobile phone on 7.7.2012 and in the process caused him to sustain injuries. As such I find the prosecution as having proved their case to the requisite standards and the accused person Titus Wambua guilty of Robbery with violence as charged and I convict him accordingly.

CONCLUSION

32. Having found that the circumstances of the identification of the appellant as one of the attackers who robbed the complainant were difficult for accurate identification without a possibility of error and there being no evidence of corroboration of the identification evidence, we think that the conviction of the appellant was unsafe; and the conviction by the trial court cannot, therefore, be supported and it must be, and is hereby, quashed.

ORDERS

33. Accordingly, the court quashes the conviction of the appellant for the offence of robbery with violence contrary to section 296 (2) of the Penal Code, sets aside the sentence of death and, therefore, directs that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED THIS 1ST OF MARCH 2016.

GEORGE DULU

JUDGE

EDWARD M. MURIITHI

JUDGE

In the presence of:-

Appellant present in person.

Mr. Okemwa - for the Respondent.

Martin – Court Assistant