



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.125 OF 2014

DOUGLAS MWITI KIRIANKI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No.2282 of 2010 of the Senior Principal Magistrate's Court at Nkubu by Hon. S.M Githinji – Senior Principal Magistrate)

JUDGMENT

The appellant, **DOUGLAS MWITI KIRIANKI** , was Charged with an offence of robbery with violence contrary to section 296 (2) of the penal code.

The particulars of the offence were that on 5th December 2010 at Nkubu market in Imenti South District of Eastern Province being armed with a dangerous weapon robbed **LAWRENCE KIRIMI M'INOTI** of Kshs. 2500 and at or immediately before or after the time of such robbery injured the said **LAWRENCE KIRIMI M'INOTI**.

The appellant was found guilty of the offence and sentenced to life imprisonment. He now appeals against both conviction and sentence.

The appellant raised the following five grounds:

1. That the trial suffered some procedural irregularities.
2. That the learned trial magistrate erred in law and in facts in failing to note that the prosecution witnesses tendered contradictory and conflicting testimonies.
3. That the learned magistrate erred in law and in fact by failing to note that the prosecution did not summon vital witnesses mentioned during the trial.
4. That the learned magistrate erred in law and in fact by failing to make a finding that the alleged identification and or recognition was not free from possibility of error.
5. That the learned magistrate erred in law and in facts by failing to consider his defence.

The state opposed the appeal through Mr. Musyoka, the learned counsel.

The facts of the case were briefly as follows:

At about 8 pm, the complainant was going home from Mawira Gateway Club. When he got near Consolata road, a man who was behind him attacked him and he fell in a trench. His assailant walked away when assistance came. He was injured and on checking, he noted that his right pocket was cut and Kshs. 2500 was missing. They pursued the attacker to a bar where they arrested him.

In his defence the appellant contended that he was arrested in a bar together with other people while taking alcohol. The rest were subsequently released. He was not told the reason for his arrest. He denied any involvement in the offence.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC 1972 EA 32.**

I have carefully perused the record and found that all procedure was observed during the trial. The claim by the appellant in the first ground has therefore no basis.

On the issue of contradicting evidence, I find no material contradiction to warrant any comment. It is however worth noting that no two witnesses would testify exactly the same on an incident. Some are too detailed whereas others due to how they perceive an event may give slightly different evidence of the same incident.

Contrary to the contention by the appellant that some vital witnesses who were mentioned were not called, my perusal of the record does not reveal any.

the evidence of **Lydia Nkatha Kinoti (PW2)** is that after her intervention, she followed the appellant to Mawira pub where he was arrested. She said she never lost sight of him and that at the time of his arrest his clothes were muddy and had fresh blood stains from the complainant who had been injured. This was the gist of the complainant's evidence. The issue of an error in identification does not arise.

In his analysis of the evidence, the learned trial magistrate gave adequate consideration to the defence tendered by the appellant before dismissing it, contrary to his contention.

The accused was charged with the offence of robbery contrary to section 296 (2) of the penal code. The section provides as follows:

(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.

Having been satisfied that the offence the appellant was charged with was proved, the only sentence available to the learned trial magistrate was death sentence. This is a mandatory sentence. The sentence meted out was therefore illegal. I accordingly substitute the life sentence with the prescribed sentence of death.

The appeal is therefore dismissed.

DATED at Meru this 10th day of May, 2016

KIARIE WAWERU KIARIE

JUDGE