



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL APPEAL NO. 104 OF 2012

JOHN GIKUNDI MURUU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From Original Conviction and Sentence in the Criminal Case No. 333 of 2011 of the Chief Magistrate's Court at Malindi – N. Shiundu)

JUDGEMENT

The appellant was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence are that the appellant, on 2nd May, 2011 at about 8.00 pm at St. Peter's Hospital in Malindi Location, Mallindi District within Kilifi Count, jointly with another one not before court while armed with a dangerous weapon namely a knife robbed Wyclife Osumba a motorcycle Registration No. KMCG 057M Bajaj Boxer Red in colour engine No. DUMBSF66029/Chasis No. MDZDDDMZZSWF 25380 valued at Kshs.85,000/= and immediately before or immediately after such robbery used actual violence to the said WYCLIFE OSUMBA.

The trial court convicted the appellant and sentenced him to suffer death. The grounds of appeal are that the prosecution evidence was insufficient and contradictory, that the appellant's arrest had no connection with the charge and that the appellant's defence was not considered. The appellant submits that the trial court held that the complainant knew and recognized the appellant during the robbery. However, mistakes can be made on the alledged recognition as held in the case of **CLEOPHAS OTIENO WAMUNGA V REPUBLIC C.A. Criminal appeal No. 20 of 1989.**

It is further stated that the appellant did not tell the police that he had recognized the person who had robbed him. The appellant contends that the first report to the police did not have the description of the suspected robber. The appellant requested for the occurrence book but it was not produced. The trial court had ordered for the production of the occurrence book (O.B). This, according to the appellant, made the trial not to be fair. The appellant contends that he was not found with any stolen property. There is also no evidence that he had disappeared.

The state opposed the appeal. Mr. Fedha, learned counsel for the state, submitted that the complainant knew the appellant before the robbery. The prosecution evidence proved the ownership and existence of the stolen motor bike. The ingredients of robbery with violence were met.

The record of the trial court show that four witnesses testified for the prosecution. PW1, WYCLIFF

OSUMBA was the complainant. He is a boda boda operator in Malindi. On 2nd May, 2011 at about 8.00 pm he dropped a client at Casuarina area in Malindi. On his way back after the Malindi General hospital, he was beckoned by a man and a woman. They asked him to take them to St. Peters Clinic. He recognized the man as someone he had seen. He was directed to go downhill then turn left. The man then stopped him and asked PW1 if he had a change for Kshs.100/=. As PW1 was checking in his pocket for the change, the man held him on his neck and held a knife. He told him not to speak. Other men appeared and held PW1. They took the motor bike. PW1 did not struggle with them. His mobile phone and Kshs.3,000/= was also taken.

It is PW1's evidence that he called the owner of the motor bike (PW4) and informed him. He know the appellant used to work at "*blackie's shop*" at Majengo. The matter was reported to the police. On 25th May, 2011, he saw the appellant at the shop. He informed his fellow motor bike operator (PW2). They went to report to the police that they had seen the suspect. They were told to arrest him. They went back to blackie's shop and found the appellant surrounded by members of the public. The appellant was arrested and taken to Malindi police station. The motor bike was not recovered. It is PW1's evidence that from the date of the robbery until the date the appellant was arrested, he was looking for the appellant but he had gone into hiding.

PW2, GEORGE OCHIENG ODUOR is a boda boda operator in Malindi. On 26th May, 2011 at about 7.30 pm PW1 informed him that he had seen the suspect who had robbed him of his motor cycle. They notified other boda boda riders. He went with PW1 to Malindi police station and made a report. There were no enough officers at the station and were told to arrest the suspect. They went back and found the suspect had been surrounded. Shortly, an AP officer's vehicle passed by. The officers stopped and re-arrested the appellant who was escorted to Malindi police station. It is his evidence that he used to see the appellant in the neighbourhood.

PW3, P.C. JOTHAM CHEMORE, was based at the Malindi police station. He testified that he received a report that a motor cycle registration number KMCG 057M, bajaj had been stolen on 2nd May, 2011. He was given the receipt acknowledging the purchase of the motor cycle dated 2nd December, 2009. On 27th May, 2011 PW1 saw the suspect and he was assisted by members of the public to arrest him. The suspect was then taken to the police station. PW3 was not the one at the O.B. desk when the initial report was made.

PW4 Corporal SHADRACK OPONDO was based at Lango Baya district office. He was the one who had been given the responsibility of the motor bike by the owner. He gave the motor bike to PW1 to operate it. On 2nd May, 2011 at around 10.30 pm PW1 informed him about the theft of the motor bike. On 27th May, 2011 he got a phone call that the suspect had been arrested. The motor bike had been bought for Kshs.85,000/=. It was about one month old.

In his sworn defence, the appellant testified that he is a business man in Malindi. On 26th May, 2011 he was at the market. He went home in the evening. At about 7.30 pm five people went to his home and asked him if he knew a person they were with. He said he knew him. It was alledged that he owned some money. The people started assaulting him. He was then taken to the police station and later charged with the offence.

The appellant was charged with the offence of robbery with violence and was convicted of that charge. Previously, such appeals used to be handled by a bench of two Judges of the High Court. Section 9 of the High Court (organization and Administration) Act No. 27 of 2015 provides that a high court shall be properly constituted for the purposes of any proceedings before it by a single Judge. The schedule to the Act amends section 359 (1) of the Criminal Procedure Act, Cap 75 Laws of Kenya which section required that appeals from the subordinate courts should be heard by two Judges. The two Judge benches used to hear capital appeals only. With the amendment of section 359 of the Criminal Procedure Code, a capital sentence appeal can be heard by a single Judge.

Turning back to the appeal, the issue for determination is whether the prosecution proved its case beyond

reasonable doubt. The robbery occurred on 2nd May, 2011 at about 8.00 pm. The charge sheet does indicate that the case was reported on the same day under O.B number 65/2/05/2011. The appellant was arrested on 27th May, 2011 as per the evidence of PW3, the investigating officer. According to pw1, he had seen the appellant before the incident. He did not know his name or place of residence. He had seen the appellant at “*blackie’s shop*.” He went there but was told he had left.

It is clear from the prosecution evidence that PW1 had a suspect in his mind. It is not clear whether he gave the description of the suspect to the police. PW3 was not at the O.B desk when the matter was reported. He did not tell the court that PW1 had indicated that he knew the suspect or could identify the suspect if he saw him again.

Being a criminal case, it was required that the case be proved beyond reasonable doubt. It could be true that PW1 could identify the appellant if he were to see him again. PW1 only went to blackie’s shop once. The second time he visited the shop he saw the appellant. The court has to be clearly satisfied that PW1 knew his attacker. The incident occurred at 8.00 pm. The motorbike was using a feeder road as per PW1’s evidence. There were two passengers on the motor bike. Other robbers appeared at the scene. The evidence of PW1 on the identification of the appellant is not full proof. It could be a case of mistaken identity. PW1 could have formed an opinion in his mind that the appellant was one of the robbers who robbed him of the motor cycle. The police never went to blackie’s shop to look for the appellant. The identification of the appellant by PW1 is doubtful. This was not a person known very well to the appellant.

Given the prosecution evidence I do find that the prosecution did not prove its case beyond reasonable doubt. There was no clear and proper investigation. PW1 could recall seeing the appellant. He didn’t know him by name. The evidence raises doubt which should benefit the appellant. It is established that PW1 was robbed of the motor cycle. However, the evidence is not sufficient to conclude that the appellant was one of the robbers. PW1 could have gone with the police to blackie’s shop. The police could have enquired about the appellant and be directed to his residence. There is no concrete evidence that the appellant disappeared after the robbery.

In the end, I do find that the conviction is not safe. The appeal is merited. The conviction is set aside. The appellant shall be set at liberty unless otherwise lawfully held.

Dated and delivered in Malindi this 14th day of September, 2016.

S.J. CHITEMBWE

JUDGE