



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 8 OF 2015

MUTHAMI MWANZI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo

Senior Resident Magistrate's Court Criminal Case No. 85 of 2013

by Hon. S. K. Mutai Ag. P M on 16/07/13)

J U D G M E N T

1. **Muthami Mwanzi**, the Appellant, was charged with two (2) counts:

1. **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. Particulars of the offence were that on the **10th** day of **May, 2013**, at about **8.00 p.m.** at **Kibwea Village, Kibwea Location** in **Mutomo District** within **Kitui County**, jointly with another not before court, robbed **Kanza Makau** of cash **Kshs. 2,200/=**, torch, 1kg Sugar, 1kg Rice all valued at **Kshs. 2,400/=** and at or immediately before or immediately after the time of such robbery, used actual violence to the said **Kanza Makau** by hitting her with rungus.

In the alternative he was charged with the offence of **Handling Stolen Goods** contrary to **Section 322(1)(2)** of the **Penal Code**. Particulars of the offence were that on the **11th** day of **May, 2013**, at about **11.00 a.m.** at **Kinakoni Market, Voo Location** in **Mutomo District** within **Kitui County**, otherwise than in the course of stealing, dishonestly retained or received one torch valued at **Kshs. 150/=** the property of **Kanza Makau** knowing or having reasons to believe it to be stolen or unlawfully obtained.

2. **Assault Causing Actual Bodily Harm** contrary to **Section 251** of the **Penal Code**. Particulars of the offence were that on the **10th** day of **May, 2013**, at about **8.00 p.m.** at **Kibwea Village, Kibwea Location** in **Mutomo District** within **Kitui County**, jointly with another not before court, assaulted **Onesmus Makau** thereby occasioning him actual bodily harm.

2. Having denied the charges he was tried, found guilty and convicted on the two counts and the alternative. He was sentenced to serve **life imprisonment** on count 1 and **three years imprisonment** on court 2. Being aggrieved by the conviction and sentence thereof he appealed on grounds that:

- Evidence relied on was inconsistent and contradictory.
- The trial Magistrate relied on selective bits of evidence and disregarded exonerating evidence.
- The charge sheet was faulty and defective.
- Doubts were not resolved in favour of the Appellant.

3. The case as presented by the Prosecution was that PW2 **Onesmus Makau Kavaku** and PW1 **Kanza Makau**, a husband and wife respectively closed down their business at **8.00 p.m.** PW1 carried a bag that contained rice, sugar, tealeaves, cash **Kshs. 2,000/=** and a torch. They used a motorcycle as means of transport. They were waylaid along the way by two (2) men who hit them and they fell off the motorcycle. They assaulted them and took away the bag that PW1 had. Having sustained injuries they went home. The following morning they reported the incident to the Administration Police Camp. They went to the scene of the incident with PW3 **Sammy Kavaku** and found a broken Helmet, a radio and a torch. PW3 went to **Kinakoni Market** and found the Accused wearing a black jacket with stripes that had been mentioned by the victims and a torch. He caused him to be arrested and taken to the AP Camp. PW5, **APC Sebastian Komu (No. 2005018341)** rushed to the scene and found the Appellant injured, he was bleeding from the head. He re-arrested him. He was taken to **Mutomo Police Station**. PW4, **No. 69408 P C Benjamin Maundu** booked the report, placed him in custody, took possession of exhibits recovered and subsequently charged him.

4. When put on his defence the Appellant denied having committed the offence. He stated that on the **10th May, 2013** he was sent by his father to buy sugar at **Kinakoni Market**. He encountered PW3 who asked him to accompany him to the Chief's Camp. He was later taken to **Mutomo Police Station**. He lost consciousness. He regained it to find himself in hospital. He called his father, **Mwanthi Mutambuki** who confirmed having sent him to the market to purchase sugar. He stated that he learnt of his arrest the following day from the Area Assistant Chief.

5. The learned trial Magistrate analyzed evidence adduced and concluded that the Appellant had committed both offences and the alternative hence convicting him.

6. The appeal was canvassed by way of written submissions. The Appellant's Counsel submitted that:

- There was no sufficient lighting that would enable the Complainant to either identify or recognize the Appellant without a high magnitude of error.
- The black jacket identified was not a preserve of only one person.
- Footprints were followed but none was arrested on the material night.
- The Appellant was arrested the following morning because he allegedly wore a black jacket like the one worn by the robbers.
- The allegation that the Appellant was found with a torch of the Complainant cannot be true in light of evidence of PW3 who was amongst the first people to go to the scene of the attack who stated that they found a radio, and a torch at the scene.
- Exhibits produced by the Investigating Officer were found at the scene of the incident but not with the Appellant.

The appeal was opposed by the State through learned State Counsel **Ms. Amojong** who stated that the Complainants identified their attacker, the Appellant herein as the person who wore a black jacket with white stripes. The lighting from the motorcycle enabled her see the person. The Prosecution's witnesses' statements were consistent and corroborative. Admitting that the charge sheet had an error she argued

that it was not prejudicial to the Appellant.

7. This being a first appellate court, I am duty bound to conduct a fresh and exhaustive re-assessment and analysis of evidence adduced at trial and come to my own conclusion bearing in mind that I had no opportunity of hearing and seeing witnesses who testified. (**See Okeno vs. Republic (1972) EA 32**).

8. The offence in question was committed at night. It was dark. The light emanating from the headlamp of the motorcycle enabled PW1 to see two (2) men who hit them and they fell down. They assaulted them. She did not state anything about having identified the persons. However she identified a jacket as one that had been worn by the Appellant at night. Her evidence was vague. PW2 on the other hand stated that one of the persons was wearing a black jacket with white stripes. None of these two (2) Complainants was present when the Appellant was arrested. On cross examination, PW2 alleged that the Appellant was found with his torch.

9. PW3 who arrested the Appellant at the outset on the other hand stated that he found the torch, broken helmet and radio at the scene of the incident. When he arrested the Accused he had a black jacket with white stripes and a torch. Seemingly two (2) torches were recovered. One was recovered at the scene of the incident while the other was recovered in possession of the Appellant. However, only one torch was adduced in evidence.

10. PW4 **No. 69408 P C Benjamin Maundu** who arrested the Appellant stated that he was taken to the police station by **APC Ndolo of Kinakoni AP Camp** with a broken helmet, black jacket, radio, black open sandals and a torch with the Complainant's initials. The Administration Police Constable who testified was PW5 **No. 2005018341 APC Sebastian Komu of AP Post, Kinakoni** who stated that he heard shots and rushed to the scene with a colleague where they found the Appellant bleeding from the head. They found him with a radio. They took him to the Camp for interrogation. On cross examination he said that he found him with a torch of the Complainant which he did not bring to court. His evidence contradicts that of PW3. If the torch that he recovered was not produced in court then it is questionable as to which torch the Appellant was found with if indeed he had it. Had the trial court taken into consideration this particular fact he could have resolved the doubts established in favour of the Appellant.

11. Having re-considered evidence it is apparent that the appeal is meritorious and is allowed. The conviction against the Appellant is quashed and the sentence imposed is set aside. The Appellant shall be set at liberty unless otherwise lawfully held.

12. It is so ordered.

Dated, Signed and Delivered at Kitui this 7th day of September, 2016.

L. N. MUTENDE

JUDGE