



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL APPEAL NO. 60 OF 2011

BENARD SAFARI CHRISTOPHER APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 1486 of 2009 of the Chief Magistrate's Court at Malindi – L.W. Gitari, CM)

JUDGEMENT

The appellant was charged with two counts of offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence in the first count were that the appellant and co-accused on the 26.10.2009 at Alaskan grounds near Barani Secondary School in Kilifi County while armed with offensive weapons namely a panga, knife and iron bar jointly with another not before court robbed Jacob Hinzano Ngonyo of one mobile phone make Nokia 5300 valued at 8000/= and immediately before and during the robbery threatened to use actual violence to the said Jacob Hinzano Ngonyo. The particulars of the offence on the second count were that the appellant and his co-accused on 26.10.2009 at Alaskan grounds near Baran Secondary School in Kilifi County while armed with offensive weapons namely a panga, knife and iron bar jointly with another not before court robbed Lillian Dancan Mugambi of her hand bag containing Kshs.8,000/=-, two Samsung mobile phones valued at Kshs.11,000/=-, one Nokaia phone of unknown value and immediately before and at the time of the robbery threatened to use actual violence to the said Lilian Dancan.

The trial court convicted the appellant on both counts and sentenced him to suffer death. His co-accused was not put on his defence and was acquitted as he had no case to answer. The grounds of appeal are that: -

- i. The conviction is based on the evidence on identification of PW1 and PW3 yet the circumstances were not conducive for such identification.
- ii. The appellant's arrest is not related to the case.
- iii. The trial court erred in law by holding that the appellant was found with a knife which evidence was not true.
- iv. The trial court erred in law and fact by failing to consider his defence which was reliable.
- v. The prosecution did not prove its case beyond reasonable doubt.

The appellant filed written submissions in support of his case. I have read the submissions and the same mainly deal with the issue of identification. It is submitted that PW1 and PW3 gave different account on how they identified the appellant. There was no mention of the type of light at the scene or the quality of the light. The proximity of the witnesses to the appellant was also not indicated. PW3 testified that there was moonlight but did not explain how bright that light was. The witnesses alledged that a knife was placed on their necks. That would mean that they were undergoing stress during the robbery. Where the incident occurred has many buildings and there are many people. None of the stolen properties was recovered from him yet it was alledged that he was arrested near the scene.

The appellant further submit that PW2 who said he was the village elder went to the scene and took the appellant to the police station. PW2 testified that he did not see any knife at the scene. PW1 and PW3 testified about a knife that was produced in court. There was evidence that members of the public assisted in arresting the appellant but none of them was called to testify. There was no evidence that the knife produced in court belonged to the appellant. The knife was alledged to have been recovered by members of the pubic but they did not testify. The burden of proof was on the prosecution and it was not discharged. The appellant's defence was reasonable but it was not considered.

The state opposed the appeal. Mr. Fedha, prosecution counsel, submitted that the conviction was safe and the sentence is proper. The appellant was positively identified at an identification parade. There was enough light that enabled the witnesses to identify the appellant. PW1 testified on how he was robbed by the appellant using a knife. He saw the person who placed the knife on his neck. PW4 produced a P3 form showing the injuries suffered by PW3. All ingredients of robbery with violence were proved.

Being the first appeal, this court is duty bound to re-evaluate the evidence on record and make its own conclusion while noting that it did not see the witnesses. Before the trial court PW1 JACOB HINZANO NGONYO was the complainant in the first count. He testified that on the 26.10.2009 at about 7.00 pm he was on his way home with PW3. They reached Alaskan area where there is a church. There was flood water and saw three men ahead. He wanted to jump over the water and as he was folding his trouser one man placed a knife on his back and told him to lie down. He was told to give all that he had. He had Kshs.200/=. He turned and pushed one of them on the ground. The man had a knife and placed it on his neck. The knife fell in the flood water and as he was looking for it PW1 ran away. He ran for a distance and started screaming "thief, thief". He ran after them and held the appellant. The appellant had a knife hidden under the waist. Members of the public assisted in arresting the appellant. PW3 was also at the scene and she was also injured. She was robbed of her passport, cash and three mobile phones. There was security light from the church. The appellant was also shouting thief as he was running away.

PW2 SHABAN SALIM MOHAMED was the village elder at Barani area in Malindi town. On 26.10.2009 he was at home when he received a call informing him that there was a scuffle at Alaskan area and members of the public were beating someone. He rushed to the area and found a mob beating the person. He took action and told them to stop beating the man. He took the suspect and the complainants in a tuk tuk and took them to the police station. Members of the public informed him that the suspect had a knife but he did not see it.

PW3 LILIAN DUNCAN MUGAMBI testified that she was with PW1 on 26.10.2009 at about 7.00 pm coming from Kisumu Ndogo. On reaching Alaskan area they met three men. As they were waiting to cross some flood waters PW1 was pushed on the ground where there was water. She was robbed of her bag which contained Kshs.8,000/= and two phones. She tried to resist but was beaten. One of the robbers tried to touch her breast and she told him that she did not put money in her breast. One of the robbers had a panga while the other one had a knife. There was street light. PW1 ran away while screaming thieves. Members of the public went to the scene and found two men still struggling with her. Those who went to the scene gave chase and managed to arrest the appellant a short distance from the scene. There was also moonlight. A knife was recovered from the appellant. As the members of the public were beating the man someone went to the scene saying he was the village elder. They stopped beating the man. She was later taken to hospital as she had a swollen hand.

PW4 IBRAHIM ABDULAHI was a clinical officer at Malindi District hospital. On 30.10.2009 he

examined PW3 and filled a P3 form. The right middle fore arm was tenderness and was swollen. There were no other injuries. He classified the injuries as harm. PW5 P.C. JOHANES NYAMBATI was based at the Malindi police station. On 26.10.2009 at about 8.00 pm he was at the station when the appellant was taken there alongside two complainants and members of the public. He was told that the appellant had robbed the two complainants at Alaskan area and attempted to run away. He investigated the case. He was given a knife that was recovered from the appellant. He referred PW3 to hospital. He went to the scene and found that there was electricity light from Bahati Secondary School which could have helped the complainants to identify the appellant. No identification parade was conducted as the appellant was brought to the police station together with the complainants.

The appellant gave sworn testimony. He told the court that he sells clothes at a kiosk which belongs to his sister. On 26.10.2009 at about 7.30 pm he was going to his sister's place at Kisumu Ndogo. He reached Alaskan area and saw a group of people who were armed. They asked him if he had seen some people running. He told them that he had seen many people. The people started struggling with him and one of them started saying that he was one of them. He had money in his pockets which he was taking to his sister. As he was struggling with the people an elderly man emerged and said he was the village elder and wanted to know what was happening. The group of people told him that some people had been robbed at Alaskan and the thieves had run away. As they were looking for the thieves they met the appellant who they suspected that he was one of the robbers. Since the crowd was angered the village elder decided he be taken to the police station as people could kill him. The village elder searched him and he did not recover anything. He was taken to the police station and the village elder was there. He was put in the cells. The complainants went there and alledged that they had been robbed of their phones and cash. It was his evidence that he saw the knife for the first time in court. He was beaten by the mob. He was arrested at a footpath and not on the main road.

The issues for consideration by this court are whether the appellant was positively identified and whether prosecution did prove its case beyond reasonable doubt. The evidence on record does prove that pw1 and PW3 were attacked on 26.10.2009 at about 7.00 pm at Alaskan area in Malindi. From the evidence of PW1 and PW2, it is established that one of the robbers was with PW1 while two robbers were engaging PW3, Lilian Duncan. According to PW1, the robber who was with him placed a knife on his neck. He pushed the knife and it fell in the flood water. PW1 ran away. It is PW3's evidence that PW1 ran towards Kisumu Ndogo direction.

According to PW3, one of the two robbers who robbed her was the appellant. The appellant checked her breast to find out if she had money in her breast. The two robbers then ran towards Malindi town. PW3 did not ran after the robbers. It is the evidence of PW3 that there was moonlight as well as street light. According to PW1, there was light from a church's security lights. PW5 testified that he went to the scene and confirmed that there was light from Bahati secondary School.

The evidence shows that the appellant was arrested near the scene. The defence evidence is that the appellant was heading to her sister's place at Kisumu Ndogo when he saw many people running. He was arrested by members of the public. Although PW1 testified that he arrested the appellant, he was quick to add that the members of public assisted him in arresting the appellant. The time taken during the robbery and the arrest of the appellant is not given. It is not clear that given the circumstances of the case PW1 and PW3 could positively identify the appellant. Indeed, as per the evidence of PW3, the appellant was with her. PW1 ran towards Kisumu Ndogo. It is not clear how the same PW1 ran after the appellant and arrested him. PW1 did not ran very far. He testified that he ran at a distance. While running, the robbers were robbing PW3 and they also ran away. I find it difficult to believe that PW1 knew whom he was running after.

There is the evidence relating to the light. It is not clear whether the investigating officer went to the scene during the night or during the day. His evidence does not show that he went to the scene with PW1 or PW3. The two witnesses did not testify that they went to the scene again. The sources of light was from electricity lights. It is not clear whether the light was from street lights as per PW3, from a church's security lights as per PW1, from lights form Bahati Secondary School as per PW5 or form moonlight as per PW3. The time taken for the robbery is also not given. At least that could have assisted in knowing

how long it took during the robbery. This can inform the court that at least the identifying witnesses were able to see the robbers for some time and identify their faces or physique. The appellant's defence is that he was just at the scene heading to his sister's place. The type of clothes the appellant was wearing is also not given. This could have assisted PW1 when running after the robbers.

Apart from the above, there is the evidence of PW3. It is her evince that the appellant was one of the two robbers who robbed her of her three mobile phones, handbag and cash. The appellant was arrested just immediately after the robbery. He had no money or stolen phone. Indeed, it is the appellant's defence that members of the public stole his money. Can't it be conclusively held that it was the other robber who took the handbag which had the cash and pones.

From the evidence of PW2, it is clear that when he went to the scene the mob was still beating the appellant. PW2 was not shown the knife recovered from the appellant. It is his evidence that he did not see the knife.

The appellant was charged with two serious counts of robbery with violence. The law requires that a criminal case be proved beyond reasonable doubt. This does not mean that conviction must be 100% free from doubt. However, there should be the absence of reasonable doubt. In this case, it is doubtful as to whether PW1 arrested the appellant or it was the members of public who arrested him. According to PW3, it is members of public who gave chase and arrested the appellant. It is doubtful if members of the public arrested the correct person. The defence evidence is that those members of public asked the appellant if he had seen the people running. They arrested him. Further, the evidence on the source of light raises doubt as to the exact place where the robbery took place. Was it near the church, near Bahati Secondary School or on the street.

From the evidence on record, I do find that the prosecution did not prove its case beyond reasonable doubt. The appellant is entitled to the benefit of doubt. The appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated and delivered in Malindi this 15th day of November, 2016.

S.J. CHITEMBWE

JUDGE