



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 84 OF 2015

DAVID WAMBURA NAHASHON.....APPELLANT

-versus-

REPUBLIC RESPONDENT

(Being an appeal from the judgment, conviction and sentence of Hon. D.K. Kemei, Chief Magistrate in Migori Chief Magistrate's Criminal Case No. 124 of 2015 delivered on 9th December 2015)

JUDGMENT

Introduction:

DAVID WAMBURA NAHASHON, the Appellant herein, was charged, tried and convicted before the Chief Magistrate's Court at Migori with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, Chapter 63 of the Laws of Kenya.

2. He was subsequently sentenced to suffer death; a result of which he lodged an appeal which is the subject of this judgment.

The trial:

The appellant was separately charged and tried around one year after the alleged robbery since an earlier trial for some other suspects was at an advanced stage and the two trials could not have been reasonably consolidated.

4. The prosecution in a bid to prove its case called 6 witnesses. **PW1** was **the complainant** one **Samuel Ghati Mwita** whom I will henceforth refer to him as '**the complainant**'. **PW2** was the complainant's father and a neighbour to the appellant. **PW3** was the investigating officer who took over the conduct of the case from the original investigating officer who had since been transferred. **PW4** was a Clinical Officer from the Migori District Hospital whereas **PW5** was the owner of Motor Cycle registration number KMCX 516X make Boxer Bajaj (hereinafter referred to as '**the motor cycle**'). **PW6** was a gazetted officer attached to the Criminal Investigation Department at Migori.

4. The brief facts of the case were that on the 3rd day of March 2014, the complainant woke up quite early and proceeded to plough his farm in the company of his wife (not a witness). At around 5.00am. the appellant called the complainant and asked to be ferried to Kehancha town using the motor cycle which the complainant operated a taxi business by. The complainant informed the appellant, who was his neighbour, that he was instead busy on his farm. Surprisingly at around 6.00am the appellant called the complainant again and informed him that he had reached the complainant's home and was waiting for the

complainant to take him to Kehancha town. Resulting thereof, the complainant was then forced to leave his wife behind as he proceeded to take the appellant to Kehancha town as a pillion passenger.

5. The complainant then took the appellant to Kehancha town and on reaching there the appellant informed the complainant that he did not have the money to pay for the services rendered. The appellant instead asked the complainant to take him to a further place in Masaailand and assured him of his payment once they reach there. The complainant hesitated but eventually agreed and the two set off accordingly. While they were on the way, the appellant requested the complainant to pick another man by the name **Peter Sonko** whom, according to the appellant, was instrumental in ensuring that the complainant was paid his money at the intended destination. The complainant obliged and they were joined by the said Peter Sonko.

6. The three men then continued with the journey and after some distance the complainant saw two people approaching them from ahead. He became suspicious that all was not well and stopped the motor cycle claiming that the fuel in the motor cycle was not enough to take them to their intended destination. The appellant instead urged him to continue with the journey and assured him that the two people would not do them any harm. The two people hurriedly approached the complainant who was in the company of his two passengers and whom the complainant readily recognized them as the appellant's brothers. When the appellant's brothers reached where the complainant had stopped the motor cycle, they exchanged greetings and before the complainant could proceed on the journey, the appellant together with his two brothers and the said Peter Sonko instead viciously attacked him with sticks and knives and left him lying down unconscious and for the dead as they left with the motor cycle, the complainant's phone as well some cash.

7. The complainant was later taken to the Migori County Referral Hospital by a good Samaritan where he remained in a coma for two weeks. Upon recovery he reported the matter to the Migori Police Station where he was issued with a P3 Form. The motor cycle was also recovered accordingly.

8. When the complainant did not return home as usual in the evening of the fateful day, his wife became so concerned and worried. Early in the following morning the complainant's wife reported the matter to PW2 who was her father-in-law and the father to the complainant. Indeed the complainant's wife informed PW2 that the complainant had left their home the previous day with the appellant.

9. PW5 who owned the motor cycle and which he had given to the complainant to undertake the taxi business was equally concerned when he unusually did not hear anything from the complainant in the evening of the fateful day. He also decided to find out if there was any problem and went to the complainant's home early the following morning. On arrival at the complainant's home, PW5 met the complainant's wife and on inquiring the whereabouts of the complainant he learnt that the complainant had left the previous day with the appellant and he never came back in the evening. Since PW5 knew the appellant's home which was about 3 kms away he so decided and proceeded thereto. Unlucky as he was, PW5 did not find either the complainant or the appellant. He then went to the home of the complainant's parents and discussed the matter with PW2.

10. PW2 and PW5 then decided to proceed to Kehancha Police Station to lodge a formal report of what had transpired. On reaching at the station, they were surprised to see the motor cycle parked within the station compound and they quickly thought that the complainant must have been arrested by the police. They however learnt that the motor cycle had indeed been detained by the police on a traffic offence and the rider had been asked to go and ask the owner thereof to report to the police station but neither the rider nor the owner had returned. They then left the station so as to embark on their search of the complainant.

11. PW2 and PW5 made further inquiries on the possible whereabouts of the complainant and the appellant and they later learnt that someone had been attacked and injured in Ogwethi area. As they knew the place, the two then proceeded thereto and met the Area Chief of the Ogwedhi area who asked them to make enquiries at the local Masurura Anti-Stock Theft Police Unit Camp. They obliged. On reaching there they learnt that a man had been injured and had been taken to the local health facility by a good

Samaritan. They then proceeded to the Ogwethi Health Centre where on arrival at the said hospital they saw some clothes which they both recognized as those belonging to the complainant. They then learnt that the injured man had been rushed to Migori County Referral Hospital as he was unconscious.

12. PW2 and PW5 did not tire and rushed to the Migori County Referral Hospital where they truly found the complainant still unconscious. They then reported the matter to the Migori Police station. The police later brought PW5's motor cycle to the Migori Police Station from Kehancha Police Station. The motor cycle was thereafter photographed by PW6 and later released to PW5.

13. When the complainant was eventually discharged from hospital he recorded a statement with the police and some suspects were arrested and charged in connection with the events in issue. However since the appellant had disappeared from his home into Tanzania, PW2 was determined to find the whereabouts of the appellant and traced him into Serengeti area in Tanzania where he had the appellant arrested and handed over to the Police. The appellant was then separately charged accordingly.

14. A P3 Form was eventually filled in for the complainant and was produced by PW4 before the trial court together with the treatment notes. Those documents confirmed that indeed the complainant sustained injuries which were classified as grievous harm.

15. At the close of the prosecution's case the appellant was put on his defence where he opted to give an unsworn statement and mainly explained how he was arrested. According to the appellant the charge remains false as when he was arrested on 3rd February 2015 he had just come to Kenya from Tanzania where his mother resides to work on their land on the Kenyan side. He maintained that he knew nothing about the charge.

16. By a judgment delivered on 9th December 2016 the trial court upon evaluation of the evidence was satisfied that the charge had been proved beyond any reasonable doubt. The appellant was then found guilty, convicted and accordingly sentenced to suffer death.

The Appeal:

17. Being aggrieved by the conviction and sentence, the appellant lodged an appeal in person on 16th December 2015 where he contended that the trial court had shifted the burden of proof and on an equal measure handed down a very severe sentence.

18. When the appeal came up for hearing before this Court, the appellant had then instructed a Counsel who argued the appeal on the following main grounds:

- a. That the appellant was not properly identified;
- b. That crucial witnesses were not called to testify;
- c. That there were glaring and unresolved contradictions; and
- d. Inadequate investigations.

19. The State opposed the appeal and relied on the evidence on record.

Analysis and Determinations:

20. As this is the appellant's first appeal, the role of this Court is well settled. It was held in the case of **Okemo vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

21. In discharging the above duty, this Court will consider each of the grounds of appeal by the appellant's Counsel and culminate with an exposition as to whether the charge of robbery with violence was proved as against the appellant.

I will therefore deal with each ground separately and as follows :

a. On the issue of identification:

22. It was the appellant's argument that the appellant was not properly identified as one of those who attacked the complainant since the attack was sudden and no identification parade was conducted.

23. I will therefore turn to the record. It is not disputed that the appellant and the complainant were neighbours and as such known to each other quite well. Further it remains undisputed that the complainant also knew the appellant's siblings as well. When the appellant called to ask the complainant to ferry him to Kehancha town, the complainant readily knew whom his caller was. When the complainant informed the appellant that he was busy working on his farm, the appellant in a sustained move went to the complainant's home and again called him to tell him that he was waiting for him at the complainant's home.

24. When the complainant eventually agreed to take the appellant to Kehancha using the motor cycle, it is still the appellant who gave the complainant the direction of travel, first to Kehancha town and then to Masaai land. During that period which lasted around 2 hours the appellant kept on talking with the complainant. It is equally on record that it was the appellant who asked the complainant to pick one Peter Sonko on the way as that person was instrumental in having the complainant paid his money on reaching their destination. While still on the way with his two passengers, the complainant came across two people whom he readily recognized as the appellant's brothers and became suspicious thereby stopping the motor cycle. Again the appellant asked the complainant to proceed on with the journey and assured him of his safety but instead the appellant was joined by his two brothers and the said Peter Sonko and viciously attacked the complainant with sticks and knives. That was around 8.00am.

25. Going through the evidence on record it is clear that this was a case of identification by recognition. I have not come across any issue which could possibly be said to have impeded such recognition of the appellant. From the background of the complainant and appellant there is no doubt that the complainant knew whom he was dealing with without any doubt and that it was the appellant. Further the two had spent about two hours travelling together and that the attack occurred at day light.

26. As this is a case of identification by recognition aforesaid I find that there was no need of an identification parade. That however does not lessen the duty on this Court to treat the evidence of visual identification with caution more so given that the complainant remains the sole identifying witness.

27. The principles to guide this Court when faced with the foregone issue are well settled. The Court of Appeal in the case of **Wamunga Vs Republic (1989) KLR 426** stated as under:-

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

28. In **R -vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... 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.”

29. The foregone does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

“On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-

“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...”

30. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** had this to say on the evidence of recognition at night:-

“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”

(emphasis added).

31. Closely related to the foregone issue of identification was the Counsel's argument that there was no corroboration of the complainant's evidence. It was therefore further submitted that no safe conviction could be sustained in the circumstances of this case.

32. Whereas the evidence of the complainant on the issue of identification of the appellant was that of a single witness and which was not corroborated, there can still be a legal conviction in such circumstances. This issue has been a subject of consideration in various cases including one before the Court of Appeal of Uganda in **Obwana & Others v. Uganda (2009)2 EA 333** where the Court presented itself thus:

“It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it.This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such

evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence."

33. Going by the above legal guidance and by taking into account the totality of the circumstances under which the attack took place, this Court reiterates the position that the identification of the appellant by way of recognition was free from error. The ground therefore fails.

b. Crucial witnesses not called to testify:

34. The appellant's Counsel contended that the police officers who arrested and detained the motor cycle were not called to testify and as such it is not clear under what circumstances the motor cycle came into the possession of the police. According to the Counsel the failure to avail those witnesses created a doubt which was to be resolved in favour of the appellant.

35. I have carefully perused the record and it true that the police officers who allegedly arrested and detained the motor cycle and the rider were not called to testify. The evidence on how the motor cycle found its way to the Kehancha Police Station was by PW2 and PW5 who were civilian witnesses and who only saw the motor cycle at the said Station when they had gone to lodge a report on the disappearance of the complainant. Needless to say such evidence remains hearsay.

36. **Section 143** of the Evidence Act, Chapter 80 of the Laws of Kenya gives discretion to the prosecution to call any numbers of witnesses it desires in proof of any fact which is in dispute in a trial. It is however settled that whenever the prosecution fails to call a crucial witness without any justification then an adverse inference is made against the prosecution that the witness(es) would have been adverse to the prosecution's case. (See the cases of **Bukenya & Others -versus- Uganda (1972)EA 549** and **Nguku -versus- Republic (1985)KLR 412**).

37. Although the evidence of the police officers who arrested and detained the motor cycle was not adduced, such lack of it cannot be said to have jeopardized the prosecution's case in such a significant manner as to raise the inference that such evidence would have been of an adverse nature. I have taken such a position upon looking at the entire body of evidence in totality. It is on record that the complainant identified the motor cycle as the one he was riding when he was attacked. The evidence of how the motor cycle found its way to the police station cannot therefore be said to be able to vitiate the complainant's evidence on how the entire episode unfolded even if that evidence was to reveal the commission of other and further offences. Respectfully, the lack of that evidence does not create any doubt which cannot be reconciled as to be said to compromise the prosecution's case. That ground also fails.

c. Glaring and unresolved contradictions:

38. It was vehemently submitted that the prosecution's evidence was riddled with contradictions on the actual registration number of the motor cycle in issue such that it was not clear if the same was number KMCC 516X or KMCZ 516X and that the learned Magistrate erred in not resolving that anomaly in favour of the appellant.

39. The complainant stated that he was in the possession of motor cycle registration number KMCC 516X whereas the other witnesses talked about motor cycle registration on KMCZ 516X. However the complainant went further and made reference to a photograph (MFI- 1) which had a picture of the motor cycle which the complainant confirmed to be one he was riding on the material time and day. That motor cycle was the same one which was referred to by PW3, PW5 and PW6. Further the complainant confirmed that the motor cycle he was riding belonged to PW5 and the record has no indication that the complainant had likewise been contracted by another owner of a different motor cycle to manage it.

40. On evaluation of the foregone evidence, this Court is not in doubt that the contradiction on the registration number of the motor cycle was of a minor nature and was resolved by reference to other

relevant and admissible evidence on record. In any event such a minor discrepancy is readily curable under **Section 382 of the Criminal Procedure Code**, Chapter 75 of the Laws of Kenya given that the same did not occasion any failure of justice to the appellant. I once again echo what **Makhandia, J.** (as he then was) stated in the case of **R vs Pius Nyamweya Momanyi, Kisii HCRA No. 265 of 2009 (UR)** that-

“...It is trite law that minor discrepancies and contradictions should not affect a conviction.”

41. I therefore find that this ground is equally not holding and is hereby disallowed.

d. Inadequate police investigations:

42. Counsel for the appellant further argued that no adequate investigations or at all were carried out so as to connect the appellant with the commission of the offence before court and that had the investigator been diligent enough he would have realized that the complainant was attacked by group of strangers and not the appellant and that the appellant was indeed a co-victim as opposed to an accomplice.

43. This ground of appeal calls me to once again to reiterate that the police have a duty to properly investigate any complaint once lodged so as to ascertain whether or not any offence was committed and if so, by whom. The investigator(s) should urgently gather all evidence and make an informed decision on the way forward.

44. In this case the police recorded statements from several witnesses. They also gathered medical evidences as well as recovered the motor cycle. It therefore appears to this Court that the investigations carried out by the police yielded the evidence which was tendered before the trial court by the six witnesses and on a wholesome examination of the said evidence one cannot be reasonably heard to say that such evidence was a product of inadequate or no investigations at all.

45. This Court therefore, and with utmost respect, disagrees with the learned Counsel's submission that the appellant was a co-victim and not an accomplice. That finding is buttressed by the conduct of the appellant which is not in consonance with that of an innocent victim. From the way the appellant procured the complainant to ferry him to Kehancha town and thereafter changing the destination to Maasailand, picking a person on the way and later meeting the appellant's brothers reveal a well calculated move and design as to attack and rob the complainant of the motor cycle and his other property.

46. Further **Section 20 of the Penal Code Chapter 63 of the Laws of Kenya** places the appellant as a principal offender whereas **Section 21** thereof makes the appellant a joint offender since he was prosecuting a common purpose with other three persons.

47. Before I came to an end on this ground, my attention was further drawn by the conduct of the appellant immediately after the incident. It is on record that the appellant disappeared from Kenya into Tanzania and that he was only arrested about one year later. In fact that arrest was a result of the sustained effort of PW2 who had to trace him from Serengeti, had him arrested and brought back to Kenya where he was handed over to the police. The inference which this Court can reasonably make is that the appellant ran away after taking part in the commission of the offence.

48. Having therefore dealt with all the grounds raised in arguing the appeal, it remains for this Court to determine whether the charge facing the appellant was proved as required in law.

Was the charge proved in law?

49. The starting point on this discourse is what the law provides on the offence of robbery with violence. The offence of robbery with violence is a creation of **Sections 295 and 296(2)** of the Penal Code and for clarity purposes I shall reproduce them as tailored:-

“295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

296(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

50. From the foregone legal provisions it can be seen that the offence of robbery with violence is made up of two parts. The first part is the **robbery** and the other part is the **violence**.

51. Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: **Theft** and **the use of threat to use actual violence**.

52. On the other hand the offence of **robbery with violence** is committed when robbery is proved and further if any one of the following three ingredients are established:-

(a) The offender is armed with any dangerous or offensive weapon or instrument, or

(b) The offender is in the company of one or more other person or persons, or

(c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

53. The record is clear that when the complainant was attacked aforesaid he lost the motor cycle, his phone and some money. Apart from the recovery of the motor cycle none of the other items were recovered. Since the complainant did not consent to the taking away of the items which were in his possession by the appellant and his accomplices, those acts on the part of the appellant constituted theft.

54. The issue of use of actual violence on the complainant was equally demonstrated. The record is alive to the fact that the attackers pounced on the complainant with sticks and knives so as to overpower him to be able to commit the theft. The complainant's evidence on that aspect was corroborated by PW4 who was a Clinical Officer and who produced the P3 Form and treatments from the Migori District Hospital. The complainant sustained severe head injuries as well as injuries on the ears and both limbs. A CT Scan revealed the presence of multiple skull fractures and an acute inter-cerebral bleed. The complainant was also admitted for about two weeks. The degree of injury was assessed as grievous harm and the probable weapons used were blunt. That therefore settles the issue of the use of actual violence on the complainant and hence proves the offence of robbery.

55. There is no doubt from the record that the attackers were more than one, were armed with such dangerous weapons and they struck, beat and used personal violence on the complainant. That settles the requirements under **Section 296(2)** of the **Penal Code**.

56. This Court hence comes to the finding that the offence of robbery with violence was proved as against the appellant and that the learned trial Magistrate was merited in finding the appellant guilty as charged. The decision of the trial court is hereby affirmed.

Conclusion:

57. As I come to the end of this judgment I wish to personally tender my heartfelt apologies to all the parties for the delay in the delivery of this judgment which was on account of ill-health on my part that

necessitated some medical intervention abroad for a couple of months.

58. The upshot of the above is that the appeal is not meritorious and is hereby dismissed in its entirety.

It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 1st day of November, 2016.

A.C. MRIMA

JUDGE