



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 51 OF 2013.

MAXWELL MINYATTA.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(Being an appeal from original conviction and sentence of J.K. Ng'arng'ar - SPM. in Criminal Case No. 423 of 2012 delivered on 19th March, 2013 at Hamisi.)

JUDGEMENT

Introduction.

1. The appellant MAXWELL MINYATTA faced a charge of robbery with violence contrary to section 296 (2) of the Penal Code; that on the 3rd day of July, 2012 at Cheptulu village, Cheptulu sub-location in Hamisi District of Vihiga County. While armed with an offensive weapon namely a panga, he robbed MARY INGANJI of her bag containing Ksh. 12,000/= and medicine (assorted tablets) and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said MARY INGANJI.

2. The appellant denied the charge and after a trial in which 5 witnesses testified in favour of the prosecution and the appellant was the only defence witness, he was convicted and sentenced to death.

The appeal.

3. The appellant was aggrieved by both the conviction and sentence and filed the appeal herein on the following amended homemade grounds:-

(1) That the learned trial magistrate erred in both law and facts by failing to observe that the appeal during the pre-trial period and the whole trial was not given the statement of the prosecution witnesses hence contravened article 30 (2) (J) of the Constitution of Kenya 2010;

(2) That the trial magistrate made an error of law on the face of the record and law made on error of the fact by making a blatant disregards to the law by failing to observe that there was identification parade conducted as per Cap 46 of the Force Standing Orders in order to erase any possibility error of mistake hence bad in law;

(3) That the pundit magistrate made a fundamental error of law by failing to observe that the appellant correcting officers PW4 and another APC Moses Nyaigah who was not called to testify failed to comply with Article 49 (1) (a) (i) of the Constitution of Kenya 2010 as they failed to

inform the appellant of the reason of arrest hence the appellant was fundamentally prejudiced;

(4) That the trial magistrate erred in law and by failing to observe that the prosecution failed to tender evidence to sustain a conviction the standard required in law to prove the case beyond reasonable doubt was wanting to convict due to lacuna's material contradictions hearsay and the PW1 a single witness without corroboration identification done in a fleeting glance of the subject hence had no guarantee to any degree of accuracy hence failure by trial court to warn itself with caution led to a miscarriage of justice;

(5) That the trial magistrate misdirected himself to appreciate that the prosecution had established a case against the appellant notwithstanding that the prosecution had failed to summon their vital witnesses to testify and/or the witnesses testified of the bad character of the appellant negated by the prosecutor hence bad in law leading to a mistrial and occasioned an injustice;

(6) That the trial magistrate erred in law and fact by failing to exhaustively evaluate and examine the appellant alibi defence which the prosecution failed to comply with section 212 CPC to call for a rebuttal evidence and/or section 169 (1) of the C.P.C. secure an acquittal hence failure the appellant was fundamentally prejudiced. He prays that the appeal be allowed, conviction quashed and sentence set aside and that he be set at liberty.

Submission

4. The appellant filed written submissions which he wholly relied on in canvassing his appeal.

5. Mr. Oroni from the O.D.P.P opposed the appeal. He submitted that the prosecution proved its case as required by law and the appeal had no merit. He supported the conviction and relied on the evidence on record.

6. This being a first appeal, the court has a duty to re-evaluate and analyse the evidence afresh and come up with its own conclusion bearing in mind that it never saw the witnesses testify to see their demeanor. See the case of **DAVID NJUGUNA WAIRIMU VS REPUBLIC [2010] E KLR** where the court relying on the holding of the court in **OKENO VS. REPUBLIC [1972] E.A. 32** held that:-

“The duty of the first appellant court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision” (Emphasis mine)

Prosecution case.

7. The prosecution called five (5) witnesses. PW1 the complainant told the trial court how she was attacked by the appellant by the appellant on 3rd July, 2012 as she was walking home from the hospital at Kaimosi. It was about 11.00 a.m., she had her purse and a phone. She had taken medicine from the hospital and as she walked home she saw the accused cutting some vegetable at a fence and she bypassed him. The appellant who had a panga then followed her pointing the panga at her. He held her hand and took her bag and ran away. She reported the incident back to the hospital staff who did some search and who noted that such incidents had become rampant in that area.

8. On her way back after reporting, she saw the accused crossing the road and she pointed at him. People who were standing nearby chased him but he escaped. Since the appellant was known in the area they tried to trace him at his home in the company of police after she reported to the police. They didn't arrest him that day. He was arrested some few days later and her hospital card and tablets were recovered (see

PEXh. 1 and PEXh. 2). The money she had was not recovered. She pointed the appellant as the one in the dock. She identified him by face.

9. PW2 and PW3 were on duty at Kaimosi Hospital when PW1 was attacked on 3rd July, 2012. They saw the appellant running carrying a panga and a bag. When the appellant saw them he disappeared into the bush. PW1 went to them and told them that she had been robbed of medicine and money. They then tried to search for the appellant upto his home but didn't find him. They both knew him and even PW3 knew his nickname "**Daddy.**"

10. PW4 No. 2008118962 APC Harun Washiali arrested the appellant on the 7th July, 2012 after they got a tip off of his whereabouts. They recovered some of the items that had been stolen from the complainant (PW1) PEXh. 1 and PEXh. 2. PW5 No. 83936 PC. Michael Otieno investigated the incident after he received report of the robbery. He visited the scene and after concluding his investigations he charged the accused.

Defence case.

11. At the close of the prosecution case the trial court placed the appellant on his defence. He gave an unsworn statement. He claimed that he was a cyclist (bodaboda rider) and that on the 7th July, 2012 as he carried a police officer at Cheptulu he was arrested and taken to the police station at Cheptulu. The trial court in its judgment found that it is the accused who robbed the complainant and that the complainant properly identified his face.

12. PW2 and PW3 also identified the accused who they saw running into the forest. It is after the accused escaped that they also met the complainant who told them that she had been robbed. Accused was also found to have in his possession the complainant's hospital card and her medicine. The trial court found that indeed the case against the accused had been proved beyond any reasonable doubt.

Determination.

13. To prove an offence of robbery with violence, the prosecution must prove one of the following:-

(1) The offender is armed with any dangerous and offensive weapon or instrument; or

(2) The offender was in the company of one or more other persons; or

*(3) That immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or used other personal violence or threatens to wound, beat, strike or use personal violence. See **Oluoch vs. Republic [1985] KLR 549.***

14. In the case of **Dima Denge Dima & Others vs. Republic C.R.A. 300/2007** it was held that one only needs to prove one of the above ingredients. The court of appeal stated thus:-

"The elements of the offence under section 296 (2) are there in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

15. In this particular case, it is clear that the complainant was robbed during the day at 11.00 a.m. in the morning. He was seen by the complainant when she was walking going home and when he attacked her and escaped. The complainant had time to see the accused who was also recognised by PW2 and PW3 as a person who they knew. Three days after the incident the appellant was found to be in possession of the complainant's hospital card and her medicine. He didn't rebut this evidence of the prosecution in any way or even set an alibi. The prosecution's evidence was consistent and the events leading to the accused being seen and identified were clear. The complainant arrived immediately after PW2 and PW3 saw the appellant who escaped into the forest.

16. Having analysed all the evidence on record and having considered the grounds raised by the appellant and all the submissions, it is my finding that the prosecution adduced sufficient evidence to find a conviction and the conviction is well founded. The court cannot interfere with the sentence because the death sentence is the only legal/lawful sentence available to the court under section 296 (2) of the Penal Code. The appeal has no merit and it should be dismissed.

SIGNED, DATED and DELIVERED at KAKAMEGA this 10TH day of NOVEMBER, 2016.

C. KARIUKI

JUDGE.

In the presence of:-

In personfor the Appellant.

Ng'etichfor the Respondent.

Anunda Court Assistant.