



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 8 OF 2014

JOSEPH KIVUTI NDWIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Sentence and Conviction of Ag. Principal Magistrate Embu in Criminal Case No. 1062 of 2012 on 6/6/2014)

J U D G M E N T

1. The appellant was charged and convicted by Embu Ag. Principal Magistrate on 2 counts of robbery with violence contrary to Section 296(2) of the Penal code and sentenced to suffer death in the manner authorized by the law. He was aggrieved by the judgment of the learned trial magistrate giving rise to this appeal.
2. The grounds of appeal relied on in the petition may be condensed as follows:-
 - a. *That the prosecution did not prove the case against the appellant beyond any reasonable doubt.*
 - b. *That his defence was improperly rejected by the trial court.*
 - c. *That his constitutional rights were violated.*
 - d. *That the proceedings of the subordinate court were invalid.*
3. In his submissions the appellant submitted that the magistrate did not address the issue of contradictory evidence of PW1, PW2 and PW4 regarding the weapons the suspects were armed with and the way they were dressed. He contended that the evidence of the complainant on how he found the appellant at the hospital was contradicted by the evidence of PW7. The maize stalk samples collected from the scene were different from the ones taken to Government Chemist for analysis and that the blood sample on the maize stalks was matched with the blood sample of PW4 one Jackson Muriithi and not with the one of the appellant. He further submitted that he was arraigned in court more than 24 hours from the date of arrest.
4. The State opposed the appeal on various grounds including the submission that the case was proved beyond any reasonable doubt. Ms. Matere submitted that the complainant was able to identify his attackers assisted by electricity light at the scene. PW1 the complainant saw the appellant holding and attacking him with a weapon at the time of the robbery. The following day he identified him in the hospital as they both sought treatment for injuries sustained during the incident.
5. The blood sample collected from the maize stalks matched that of the appellant from the results of the DNA analysis. PW1 described how the appellant was dressed during the incident and that his evidence was corroborated by that of PW7 the investigating officer. The State further submitted that PW1 testified that he had cut the attacker (on the head) and when he saw him the following morning with a cut wound on the head he was able to identify him.
6. The State Counsel argued that the defence of the appellant was considered by the trial court and

found not plausible. On the violation of his constitutional rights, the State opined that the appellant did not raise the issue during the trial thereby denying the prosecution the right to explain the delay. It was contended that the evidence of the prosecution was overwhelming and proved the charges against the appellant beyond reasonable doubt.

7. The duty of the 1st appellate court was explained in the case of **OKENO VS REPUBLIC [1972] EA 32** where it was stated as follows:-

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic [1957] EA 336) and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424).”

8. The report of the Government analyst also corroborated the evidence of PW1, PW2 and PW4. The contention of the appellant that the blood on the leaf matched that of PW4 is not in dispute. However, the blood on maize stalk matched the sample of the appellant's blood. The appellant did not explain in his defence how his blood came to be on the maize stalks collected at the scene by the investigating officer.
9. It was the testimony of PW1 that on 2/8/2012 at around 9.00 p.m. he was in his shop cum residence at Majimbo Estate within Embu town talking to his two employees PW2 and PW4. He then entered his house and shortly afterwards heard a commotion within the plot. He armed himself with a slasher and went outside the house towards the shop. The security lights were on in the premises.
10. The complainant spotted a person standing on the main door armed with an axe whom he was to later identify as the appellant. At that time, he saw many other people in the shop. The appellant aimed the axe at the head of PW1. However, PW1 managed to block the axe with his slasher thereby seizing the attacker and cut him on the head causing him to fall down. He cut him a second time and continued struggling with him while PW2 and PW4 were being attacked by the other members of the gang.
11. The attackers later disappeared to a nearby maize plantation. PW1 raised alarm and his neighbours came to the scene where she discovered that PW2 and PW4 were lying down on the floor of the shop premises with serious injuries. The two shop attendants were taken to Embu Provincial General Hospital for treatment. PW1 reported the matter to Embu police station and proceeded to hospital for treatment. As he waited to be attended to, he saw the appellant wearing a blood stained jacket and had an injury on the head. Police later came to the hospital and arrested the appellant.
12. PW2 and PW4 testified on how they were attacked at the shop by a gang of robbers. PW2 said he did not identify the robbers. It was the testimony of PW4 that one of the robbers who was armed with a metal rod and a panga and that ordered them to lie down. The electricity lights were on and he was able to identify his assailant whom he later identified in court as the appellant. When PW4 was taken to hospital where he saw the appellant, he identified the jacket the appellant wore as the same one he was dressed in the previous night. During cross-examination PW4 told the court that electricity lights in the premises were on at the material time and lighted the scene.
13. The investigating officer PW7 visited the scene and collected blood stained maize stalks which he later sent to the Government Chemist for analysis together with the blood samples of the appellant and that of PW1 Jackson Muriithi. The DNA profile of the blood stained maize stalks and leaves marked as Item T in the report matched the blood sample of the appellant. The blood on the leaf marked Item C matched the blood sample of PW1 according to the report signed by PW6 on 28th May, 2013.
14. In his defence the appellant said he was injured during a robbery attack by people he did not know at Majengo primary school. He said he was accompanied by his girlfriend one Karimi as he was walking home. PW7 testified that he interrogated the appellant in connection with the robbery

- report and visited the alleged scene of robbery but found no blood at the scene. The alleged scene appellant showed PW7 was at Embu Motel on the tarmac road but not near any primary school as he had earlier told PW7. Further investigations by PW7 revealed that the appellant had gone to Tenri health Centre the previous day to seek treatment but was turned away and asked to report to the police first. It was after this unsuccessful venture that the appellant went to Embu Provincial General Hospital where he was arrested.
15. The appellant was identified by PW1 and PW4 as one of the assailants. The witnesses told the court that the scene was well lighted and that the appellant had not covered his face. The evidence of PW1 on identification was therefore corroborated by that of PW4. This evidence was further strengthened by the encounter of the two witnesses with the appellant at Embu Provincial General Hospital the following morning. The appellant was still wearing the same jacket he wore during the incident and which was blood stained from the cut wound sustained by the appellant on the head. In our view the conditions for identification were favourable considering that there was sufficient light.
16. The ingredients of the offence of robbery with violence contrary to Section 296(2) of the Penal Code were explained in the Court of Appeal case of **JOHANA NDUNGU VS REPUBLIC Criminal Appeal No.116 of 1995** as follows:-
- (i) *If the offender is armed with an dangerous or offensive weapon or instrument;*
 - (ii) *if he is in company with one or more other person or persons; or*
 - (iii) *if, at all or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person”.*
17. The prosecution have adduced evidence that the appellant was in the company of one or more persons, that they were armed with axes, pangas and iron rods which are dangerous weapons and that they used violence on the complainants during the incident.
18. The report of the Government analyst also corroborated the evidence of PW1, PW2 and PW4 on the injuries and the identity of the appellant. The contention of the appellant that the blood on the leaf matched that of Jackson Muriithi PW1 was not in dispute. PW1 had been injured and it was expected that his blood could be found on the exhibits collected at the scene. However, the blood on the maize stalks matched the sample of the appellant's own blood. He did not explain in his defence how his blood came to be on the maize stalks collected at the scene by the investigating officer. This circumstance pointed at the appellant as having taken part in the robbery. There was no expert evidence produced to rebut that of the Government analyst.
19. The alibi defence was dislodged by the investigating officer's evidence on the visit to the alleged scene of crime. He was taken to a different place by the appellant as opposed to Majengo primary school where he found no evidence of blood. The injury the appellant suffered spilled blood on his jacket and it was expected that blood would have been found at the alleged scene if his robbery report was true.
20. We reach a conclusion that identification in this case was positive and places the appellant at the scene where PW1 and his shop attendants were attacked and robbed. The trial court made inquiries into the presence and the nature of the light and reached the finding that the appellant was positively identified. The gang to which the appellant belonged is the one which attacked PW1 and PW4 each of the victims was robbed of property named in the charge sheet. Based on the evidence on record, we find that the magistrate's finding on positive identification was correct.
21. The appellant argued that there were discrepancies in the evidence of PW1, PW2 and PW4 regarding the weapons with which he was armed and the manner in which he was dressed. PW1 said the appellant was wearing a blue jacket during the incident and which he identified at the hospital when he met the appellant there. PW4 said it was a grey jacket which he also identified at the hospital as the one the appellant wore. The appellant wore only one jacket at the hospital. Both PW1 and PW4 identified the jacket in court. The said jacket was taken by PW7 as an exhibit who confirmed that it was blue in colour. The discrepancy in the color as blue and grey by the two witnesses is negligible when the two witnesses identified the said jacket as the one the

- appellant wore at the material time, it left the court with no doubt as to which jacket PW1 and PW4 were referring to.
22. We take note of the fact that there were several assailants at the scene who attacked PW1 and his workers and who were armed with various weapons. These included pangas, iron rods and axes. Any discrepancy as to what weapon the appellant was armed with is negligible considering the overwhelming evidence supporting positive identification including the report of the Government analyst.
 23. PW1 testified that he saw the appellant at the hospital theater where he was receiving treatment when police officers arrived, PW1 pointed out the appellant who was still in the theatre. PW7 the investigating officer who was among the said officers at the hospital, testified that he arrested the appellant when he was walking out of the theatre. The appellant had just picked his jacket at the door and worn it before he was arrested. I do not find any discrepancy in the evidence of PW1 and PW7 as claimed by the appellant.
 24. The appellant argued that the proceedings by the trial court were a nullity in that those of 6th June 2014 did not indicate who the presiding magistrate was or what his/her rank was. The trial was conducted by Honorable D.A Ocharo Ag principal magistrate fixed the date for judgment on 6th June 2014 when he delivered it and convicted the appellant. The magistrate signed the judgment after delivery as shown in the hand written proceedings. It is in the typed proceedings that the typist omitted typing the name and rank of the magistrate. We find that the omission does not render the judgment null and void. The handwritten judgment is evident that the magistrate complied with section 169 of the Criminal Procedure Code. The appellant's attack on the judgment has no basis.
 25. The appellant contended that the maize stalks collected at the scene were not the ones taken to the Government chemist for analysis. PW7 testified that he is the one who collected the exhibits from the scene and sent them for analysis vide exhibit memo dated 29th May, 2013. The appellant did not rebut this evidence in his defence and neither has he explained the basis of his contention. We find no merit in this claim.
 26. The appellant said that his constitutional rights were violated by remanding him in police custody for more than 24 hours. The issue was not raised during the trial and can only be regarded as an afterthought. In the Court of Appeal case of *JULIUS KAMAU MBUGUA VS REPUBLIC Criminal Appeal No. 5 of 2008 at Nairobi* it was held that prolonged remand in police custody has no bearing on the criminal charges facing an accused person and that the remedy lies in civil law where upon proof of the alleged violation, the court may give an award of damages. The prolonged remand alone does not justify declaring criminal proceedings a nullity.
 27. It is our finding that the case against the appellant was proved beyond any reasonable doubt and that the convictions were safe, both the convictions and sentences hereby upheld.
 28. The appeal is hereby dismissed and it is hereby so ordered.

DELIVERED, SIGNED AND DATED AT EMBU THIS 12TH DAY OF MAY, 2015.

F. MUCHEMI

J. BWONWONGA

JUDGE

JUDGE

In the presence of:-