



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 5 OF 2014
TARATISIO MUTEMBEIAPPELLANT
VS
REPUBLIC.....RESPONDENT
JUDGEMENT

Taratisio Mutembei, the appellant herein was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge were that on 1/9/2010 at Nkanda Village, Antuambui Location in Igembe District, while armed with a dangerous weapon i.e. *panga*, robbed Naftali Gikundi of Kshs.2,500/= and immediately after the said robbery, wounded the said Naftali. He denied the offence, was tried by the CM, Maua Court and on 16/1/2014 was convicted of the said offence and was sentenced to death. He is dissatisfied with the said conviction and sentence and preferred this appeal. The grounds of appeal are contained in the memorandum of appeal filed in court on 23.1.2014 and he seems to have filed further grounds together with the submissions. At the hearing of the appeal on 26/5/2015 the appellant relied on the written submissions in their entirety. He appeared in person.

From the petition of the appeal, the grounds of appeal can be summarised as follows:

- 1. That the prosecution failed to call some material witnesses;**
- 2. That the evidence on identification and recognition was insufficient;**
- 3. That the conviction went against the weight of the evidence adduced by the prosecution;**
- 4. That the trial court failed to comply with Section 169 (1) of the CPC.**

The appellant therefore, urges this court to allow the appeal by quashing the conviction, set aside the sentence and set him at liberty.

Mr. Musyoka, Learned Counsel for the State opposed the appeal when he argued that the prosecution adduced overwhelming evidence devoid of any contradictions; that the appellant attacked PW1 in his house and robbed him. As regards identification, Mr. Musyoka argued that PW1 told the court that there was light in the house from a bulb. Further, that the appellant was well known to them; the appellant had a conversation with them and he was also seen by the neighbours PW3, 4 and 6 upon hearing the screams. He urged the court to dismiss the appeal.

This being the first appeal, it behoves us to examine in detail and analyze the evidence that was adduced before the trial court to enable us arrive at our own independent findings on both the facts and the law. We shall, however, always bear in mind that we did not have the opportunity to see the witnesses in order to ascertain that demeanour. See **Kiilu & Another V Rep (2005) 1 KLR 174** where the Court of Appeal held thus:

“an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision in the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions..”

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding 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..”

Before evaluating the evidence, it is proper that we recap the evidence adduced in the trial court.

The prosecution called a total of 10 witnesses. The complainant, Naftali Gikundi (PW1) was asleep in his house with his wife and children on the night of 1/9/2010 at about 2.00 a.m. when a loud voice called out “Muthoni, Muthoni”. PW1’s wife is Stella Muthoni (PW2). The person asked PW2 where PW1 was and she replied that he was not in. He asked her to open so that he could come in. When PW2 declined, the door was hit with a stone and the door opened. The house is one roomed and they had lit a battery charged bulb; that the appellant had a torch and *panga*, he cut PW1 on the right foot and head as he demanded for money. PW1 had KShs.2,500/= in the jacket pocket which the appellant took. A struggle ensued between PW1 and the appellant during which the appellant’s jacket came off. The appellant dragged PW1 out of the house towards Kithure’s house, he met Kithure and alleged that he had found PW1 stealing *miraa*, which PW1 denied. After PW1 explained to Kithure, he was released and after PW1 left, he fell near Pauline’s (PW4) home, called her and informed her he was injured and asked her to call Kaberia, PW8. Next morning they took him to Hospital where he was admitted for over a month. PW1 told the court that he had been paid 2,500/= that day for digging a latrine and PW8 did confirm that he had indeed paid the appellant that sum. PW1 said that the appellant had seen him buying soda on that day. PW1 told the court that when the appellant attacked him, his neighbours woke up to witness the incident and they included PW3 Pierina Kanyua, PW4 Juliet Kauro, PW6 Michubu Mnada.

PW2, PW1’s wife reiterated what PW1 told the court, that the appellant woke them up, broke the door open with a stone, entered and assaulted PW1 as he demanded for money which he took from the jacket; that the appellant then dragged PW1 away leaving behind his jacket which was later taken by the police. PW3, Pierina Kanyua and Japhet Kauro (PW4) both neighbours of PW1 and 2 responded to the screams of PW2 on the fateful night. They witnessed the appellant pulling PW1 from his house and when they tried to intervene, the appellant chased them away with a *panga*. They also witnessed the injuries that had been inflicted on PW1.

PW5, Pauline Inokobia recalled that she was asleep on 1/9/2010 at about 3.00 a.m. when she was woken up by Gikundi’s (PW1) screams, and he was saying that Mutembei had cut him. PW5 found PW1 bleeding, and called PW8, Kaberia who came and took PW1 to hospital. PW6 Michubu Mnade, also a neighbour of PW1 and 2 heard noises (screams) from PW1’s house and went to the scene and found the appellant trying to remove PW1 from his house and led him away; that the appellant threatened him when he tried to intervene. PW6 said he found PW1 at PW5’s house the next day.

PW7, Gerald Kithure told the court that on 1/9/2010, Julius Kauro went to his house at 6.00 a.m. and informed him that a man was lying by the road side. He went to the scene and found it to be PW1 who had injuries on the head and the leg and PW1 was taken to hospital.

PW8, Kaberia M’Imathiu was informed by Juliet Kauro (PW4) that Gikundi had been injured and was at Kathure’s *shamba*, and he went to the scene; talked to PW1 who told him how the appellant had robbed him. PW8 said that he had paid PW1 Kshs.2,500/= for digging a latrine the day before. PW8 said that

the appellant was claiming that PW1 was a thief but was not able to substantiate.

PW9 Catherine Mankula is a Clinical Officer from Nyambene District Hospital produced the P3 that had been filled by Mr. Ntogai Imathiu another Clinical Officer whose handwriting and signature she knew. It was found that PW1 had sustained a wound to the right leg, wound on the occipital region and cut wound on the left thigh. The injuries were classified as harm.

PC Daniel Kiptanui of Laare Police Station recalled that on 6/9/2010, he went to the scene after a report of robbery had been made. He saw the door that had been broken by a stone. He recovered the appellant's jacket at PW1's house where it was left during the confrontation and that PW1 led them to the appellant's house which was about 300 metres away and he was arrested while armed with a *panga*.

The appellant testified on oath when he said that he was at his home on 6/9/2010 when he saw Kaberia with two policemen, they arrested him; that they were with his former girlfriend, who had a grudge with him. In cross-examination, he said that he had been married to PW2, Stella before she married the complainant; that on 1/9/2010 at about 3.00 a.m. he was in his house with his wife Veronica Kawiria. DW2 Veronica Kawiria told the court that indeed on 1/9/2010 night, she was at home with her husband with their children. She denied knowing Stella Muthoni, PW2.

We have carefully considered the grounds of appeal, the evidence on record and submissions.

According to the prosecution evidence, the offence was committed at night about 2.00 a.m. The question we have to consider is whether the circumstances were conducive for proper identification. Both PW1 and 2 told the court that their house is one roomed and there was light from a battery charged bulb when they were attacked. PW3, PW1 and 2's neighbour told the court that on hearing PW2 screaming, she went out with a torch. She also saw the battery powered bulb in the complainant's house when she went to PW1 and 2's door. PW4 Juliet also told the court that she had a torch when she went out of her house on hearing PW2's screams. PW6 Michubu Mnade who responded to PW2's screams said that he went to the scene with a *panga* and torch. He also said that there was moonlight. All the three witnesses who responded to PW2's screams i.e. PW3, 4 and 6 went to the scene armed with a torch. These are people who lived in one plot with their houses next to each other. All of them knew PW1 and 2 and even the appellant. From the evidence of the witnesses, this is not an incident that took a few minutes but involved the appellant dragging PW1 from his house and took him a distance from the house. Their efforts to intervene were thwarted by the fact that the appellant was armed and threatened them. We find that there was overwhelming evidence that the witnesses recognized the appellant as the person who attacked and injured PW1 on the said night. There was ample light at the scene and the circumstances were conducive to proper recognition.

Whether an offence of robbery with violence was committed:

In **Johana Ndungu V Rep CRA 116/1995**, the Court of Appeal set out the ingredients that constitute the offence of robbery with violence under Section 296 (2) of the PC. The court said:

“In order to appreciate properly as to what acts constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved will constitute the offence under the subsection:

- 1. If the offender is armed with any dangerous or offensive weapon or instrument; or***
- 2. If he is in company with one or more other person or persons; or***
- 3. If at or immediately before, or immediately after the time of the robbery, he wounds,***

beats, strikes or uses any other violence to any person.”

Again in **Dima Denge Dima & Others V Rep CRA 300/2007** the Court of Appeal stated thus:

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

In this case, the evidence is that the appellant was alone. He forced his way into PW1’s house by hitting the door open with a stone. All the 5 witnesses who were at the scene saw the appellant armed with a *panga*. He was arrested with the same *panga* the next morning. Ordinarily, a *panga* may not be a dangerous and offensive weapon but it depends on what use it is put to. Not only was he armed but the appellant visited actual violence on PW1. All the 5 witnesses who witnessed the incident saw the injuries inflicted on PW1. PW5 Pauline, who heard PW1’s scream saying he had been cut by Mutembei, said she saw that he was injured on the toes. PW8 who was PW1’s employer and who took PW1 to hospital said that PW1 was injured on the leg and head.

According to PW1, he had Kshs.2,500/= which the appellant took from his jacket pocket. PW1 said he had just been paid that sum that day and the appellant had seen him buying something earlier in the day. PW8 confirmed having paid PW1 Kshs.2,500/= together with another that day for digging for him a latrine. From an evaluation of the evidence of all the prosecution witnesses, we are satisfied that an offence of robbery with violence was committed because two of the ingredients listed above were satisfied.

The appellant denied having robbed PW1 and claimed to have been in his house on 1/9/2010 at 2.00 a.m. His wife (DW2)also said that indeed her husband was in the house that day. In effect the appellant was raising the defence of an alibi. Firstly, the appellant claimed to have been framed by his former girlfriend, PW2. The allegation of being framed is an afterthought having come too late in the day. In any event, the nature of the grudge between him and PW2 was not disclosed. We dismiss the allegation of being framed as an afterthought and not plausible.

As regards the alibi, it is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi, lies on the prosecution. This is because the general rule of law is that the burden of proving the guilt of a person beyond any reasonable doubt never shifts whether the defence set up is one of alibi. Ordinarily, for one to avail himself of defence of alibi, he should raise it at the earliest instance so that the prosecution can have an opportunity to call evidence to rebut it. In **Karanja V Rep (1983) KLR 501** the Court of Appeal held:

“1. The word “alibi” is a Latin verb meaning “elsewhere” or “at another place”. Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant’s story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, ie when he was initially charged.

2. In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought.

Under Section 309 of the CPC, the prosecution can still seek leave to adduce further evidence in reply to rebut the appellant’s defence of alibi. The Section reads:

“If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the

court may allow the advocate for the prosecution to adduce evidence in reply to rebut it”.

The prosecution did not invoke the above section to call further evidence to rebut the alibi. That notwithstanding, we find that there is overwhelming evidence adduced by the 5 prosecution witnesses who placed the appellant at the scene of crime on that same night. They were people well known to the appellant. We dismiss the alibi as an afterthought and untrue.

On the allegation that some crucial witnesses were not called, the appellant never alluded to any person who should have been called and was not called. In any event, it is the duty of the prosecution to call all witnesses relevant to the case and can only be faulted if they fail to call a witness for an ulterior motive, e.g. if the evidence would be adverse to the prosecution case.

Whether the trial court complied with Section 169 CPC on the contents of a well-structured judgment, we find that the trial court did comply. The trial magistrate reviewed the evidence adduced before the court, analyzed it and made his findings.

In his submissions, the appellant challenged the production of the P3 form by PW9 who was not the maker. We do agree with the submissions by the appellant because, before PW9 could produce the P3 form, the prosecution should have made an application to have the P3 produce it by PW9 and give reasons why the maker could not produce it and the appellant should have been given an opportunity to oppose or agree with the application. Such production would have been made pursuant to Section 33 and 77 of the Evidence Act. We find that the medical evidence was irregularly admitted. However, even without the medical evidence of PW9, there was ample evidence adduced by all the 5 prosecution witnesses that the appellant injured PW1 and that he was arrested with an offensive weapon. The Ingredients required to prove the offence of robbery with violence were still established.

All in all, we find no reason to fault the judgment of the trial court. We find that the prosecution adduced sufficient evidence that goes to prove that the appellant attacked the complainant, injured him, stole his money in the process and the offence of robbery with violence was proved beyond any reasonable doubt. The conviction is sound, and we find no reason to interfere. The sentence for the offence of robbery with violence is one, that is death. The appeal is devoid of merit and we dismiss it in its entirety.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF JULY, 2015.

R.P.V. WENDOH

J. A. MAKAU

JUDGE

JUDGE

PRESENT

Mr. Musyoka for State

Faith/Ibrahim, Court Assistants

Appellant, Present-in-person