



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRA NO.47 OF 2013

(Being appeal from the conviction and sentence by Hon. N. Shiundu in Malindi CM Cr. No.190 of 2012)

FESTUS MWALIMU.....APPELLANT

VRS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that the appellant with others, on the 4/3/2012 at Pepe Watamu in Malindi District within Kilifi County, jointly with another not before court while armed with offensive weapons to wit knives robbed Bertalola Franco cash 1,900 Euros, ksh.4,000/-, wallets, passport, one master card serial number 4255000006762166, belt and other personal documents and immediately before or immediately after the time of such robbery wounded Bertalola Franco.

The trial court convicted the appellant and sentenced him to suffer death. One of his co-accused was acquitted while the other two were found guilty of preparing to commit a felony and sentenced to serve 7 years imprisonment.

The grounds of appeal are that:

- a. The sentence is harsh.
- b. The evidence of recognition or identification was unsafe and the trial court failed to carefully examine that evidence.
- c. The trial court failed to apply section 169 of the Criminal Procedure Act.

Mr Gekanana, counsel for the appellant submitted that the offence occurred at 8.00 a.m in broad day light. PW2 alleged to have seen the robbers as she opened the gate but she could not identify them. Whereas PW2 was not under threat, she could not identify the robbers while PW1 who was the victim purported to have identified them. PW1 was not called to an identification parade. The trial court relied on dock identification. Further, the trial court did not comply with section 169 of the Criminal Procedure Act as she did not set out the points for determination.

Mr. Nyongesa, prosecution counsel, opposed the appeal. Counsel submitted that although there is no identification parade, the conviction is not based solely on identification. The appellant led the police to where he had kept the stolen items. The appellant did not give an explanation as to how he came across the stolen items. Counsel maintains that non-compliance with section 169 of the Criminal

Procedure Act can not be a ground for appeal.

The record of the trial court shows that 8 witnesses testified for the prosecution. **PW1, Bertalola Franco** was the complainant. On the 4/3/2012, at around 8.00 a.m he was in his house at Watamu waiting for PW2. He heard a motor bike coming and it stopped at his gate. PW2 came out and informed him that there were three people at the gate who wanted to talk to him. They said that they wanted to fix his water problem. He told them to go away but they pushed him forcefully and he fell down. They tied his hands with binding wire and covered his face with a piece of cloth. He was taken to his bedroom and asked him for money. The cloth covering his face came out and he was able to identify the appellant. The appellant took away his bag which contained several items including a pass port, master card, hospital card, residence card, photo albums, wallet, money and belts. The money was in both Euros and Kenya Shillings. The robbers left and the police arrived at the scene. Part of his property was later recovered by the police.

PW2, Margaret Kadii Mwilu, used to work for PW1 as a house keeper. On the 4/3/2012 at about 8.00 a.m she was reporting on duty when she met some people at the gate. They pushed the gate and stabbed PW1. She rushed inside the house and closed the door. He heard PW1 asking her to open the door which she did. She then ran upstairs. After sometime, she saw PW1 having been stabbed severally. They took him to hospital. She later attended an identification parade but was not able to identify anyone.

PW3, Gilbert Jira, informed the court that he lives in Watamu and works as a gardener. On the 16/3/2012, the appellant went with a motor bike with two sacks and a yellow paper bag. The appellant then said he was going to Malindi. PW3 was later called and informed that the appellant had been arrested and the documents for the motor cycle the appellant was using were required. He went to the police station and was told to go the following day. The police went with the appellant and took some documents. One of the sacks that had been brought by the appellant was also taken. PW3 was also arrested but was later discharged.

PW4, Albert Kazungu, testified against the 1st accused before the trial court. That accused was acquitted. He was his relative who had given him ksh.80,000/- on 5/3/2012 to purchase for him a motor cycle. **PW5, PC Simon Mutunga** was attached to Watamu Police Station. He got the robbery report on 4/3/2012 and went to PW1's house. PW1 had been rushed to hospital. They went to hospital and met PW1 who informed them that he had been attacked by 3 people.

PW6, Cpl Kariuki Njeru was stationed at Malindi Police Station. He learnt of the robbery on 16/3/2012. They were informed that one of the suspects had bought a motor cycle registration number KMCU 667F. They found the person who was operating it and that person was the appellant. They went with him to Watamu Police Station. The appellant then took them to his uncle's home where they conducted a search but did not find anything. The appellant then took them to his alleged cousin's home where they found in the kitchen some of the items stolen from PW1. They recovered the pass port, master card, a wallet and small sisal bag. The rest of PW6's evidence related to the 3rd and 4th accused before the trial court who were convicted over a different offence. The appellant was later charged with the offence.

PW7, Cpl George Ogola was based at Malindi Police Station. He went with PW6 to the appellant's house where they conducted a search and recovered some sorted items. They arrested the 1st accused who was an employee of the complainant. **PW8, Ibrahim Abdullahi** was a clinical officer at Malindi District Hospital. He produced the P3 form for PW1.

In his sworn defence, the appellant testified that on the 16/3/2012, he left his home and went to Malindi on a motor bike. He was looking for a vehicle to transport his goods to Adu. He got a vehicle but the driver told him it required repairs. He stayed at the garage until 2.00 p.m. Four people went and stood near his motor bike and arrested him. He was taken to the police station and was asked for ownership documents. He went to his house and gave all the documents. They searched his house but did not recover anything. At about 8.00 p.m he was taken to another house which he did not know and

was left outside. A stranger was taken from that house and taken to the police station. He was then charged with the offence.

The main issue for determination is whether the prosecution proved its case beyond reasonable doubt. PW1 was not called to attend an identification parade. PW1 identified the appellant at the dock. The appellant was arrested on 16/3/2012. this was after a period of two weeks. It could have been advisable for the investigating officer to have conducted an identification parade. The dock identification cannot assist the prosecution case.

The next issue is whether the appellant led the police to recover the stolen items. The prosecution evidence does not show in whose house the items were recovered. According to PW6, they went to the appellant's home and conducted a search but did not recover anything. **PW3, Gilbert Jira** informed the court that the appellant went with two sacks containing items. It is not clear whether the appellant went to PW3's house or his place of work. There is no clear connection between the recovery of the items and the appellant. The evidence does not show specifically in whose house those items were. The items were normal documents which need not be carried in even one sack. The exhibits produced included a master card, small travel bag, five albums, small sisal bag and a document bag. Some of the items were found in possession of the other accused who were convicted of a difference offence.

The police did not make an inventory of the recovered items. Such a document could have assisted the court to conclude positively that the items were recovered in the presence of the appellant. This could have been the case even if the appellant declined to sign the inventory. The appellant contends that the items were recovered from a house whose owner he did not know. That evidence raises doubt on the prosecution case. He also contends that he was kept outside and the police only came out with those items. PW3, does not come out clearly as to who was the owner of the house. The robbery occurred on 4th March 2012 and the recoveries were made about ten (10) days later.

Given the evidence on record, we do find that the conviction is not safe. The appellant was initially suspected as being the rider of a motor cycle that was bought from the proceeds of the robbery. There is no evidence that the motor cycle he was operating had been bought recently. The first accused who had bought his motor cycle after the robbery was acquitted.

In the end, we find that the appeal is merited and is hereby allowed. The appellant shall be set at liberty unless otherwise lawfully held.

Dated, delivered and signed at Malindi this 5th day of November, 2015.

SAID J. CHITEMBWE

M. MUYA

JUDGE

JUDGE