



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CRIMINAL APPEAL NO.144 OF 2011

(Appeal originating from the conviction and sentence by Hon L. W. Gitari in Malindi CM Cr. No.326 of 2011)

LAI MOHAMED MWANGO *alias*

MZOGAH 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 on the 15/5/2011 at Majengo Mapya in Malindi District within Kilifi County, being armed with a dangerous weapon namely a knife robbed Benson Mumo David of his four (4) loaves of bread and cash ksh.7,000/- all valued at ksh.7,180/- and at or immediately before or immediately after the time of such robbery threatened to harm the said Benson Mumo David using the knife.

The appellant was convicted and sentenced to serve 15 years imprisonment. The grounds of appeal are that the conviction was based on the evidence of a single witness, that the trial court did not properly analyze the evidence, that the burden of proof was shifted, that the appellant's defence was no considered and that the arresting officer did not testify.

The appellant filed written submissions in support of his appeal and entirely relied on them. It is submitted that the complainant did not scream when he was allegedly being robbed yet there were people in the neighbourhood. The incident took place in a busy area and it was difficult for someone to commit the offence without being arrested. From the evidence of PW1, it was alleged that the appellant had in the past went to PW1's shop and assaulted a boy. That evidence showed that the complainant was not in good relationship with the appellant. The complainant knew the appellant and it was difficult for the appellant to commit the offence where he is known. The appellant's defence was that the complainant was moving around with the appellant's wife but that is not considered. The arresting officer was not also called to testify.

The State opposed the appeal. Mr. Monda, prosecution counsel, submitted that the trial court properly evaluated the evidence. The complainant knew the appellant and the conditions for identification were conducive as there was electricity light. PW1 was robbed of Ksh.7,000/- and he led the police to arrest the appellant. PW2's evidence corroborated the evidence of PW1. The defence was considered. There was no need for identification parade as the appellant was known in the neighbourhood.

Being the first court to handle the appeal, it is our duty to evaluate the evidence of that court. The record shows that four witnesses testified for the prosecution. **PW1 Benson Mumo David** was the complainant. He testified that on the 15/5/2011, he was at his shop at Majengo Mapya area in Malindi when the appellant whom he knew entered while holding a knife. He aimed the knife at him and asked him to remove what he had. The appellant opened the drawer and took ksh.7000/- and four loaves of bread worth ksh.180/-. The appellant then left. It was his evidence that there were people standing outside the shop including **Festus Mwaka (PW2)** and **Charo Kazungu (PW3)**. There was electricity light. PW1 reported the matter to the police the following day. He then led the police to arrest the appellant. The appellant is his neighbour and his home is less than a kilometre away.

PW2, Festus Mwaka Daudi testified that he sells at PW1's shop. On 15/5/2011 at about 9.00 p.m he was outside the shop with Kazungu Charo. He saw the appellant entering the shop while armed with a knife. He saw the appellant picking some money and four loaves of bread. There was electricity light inside the shop. He knew the appellant. He could not talk to the appellant as he was armed with a knife. The appellant aimed the knife at PW1. He was standing next to the door and could see inside. PW3, Kazungu Charo is a neighbour who was standing outside the shop of PW1 while talking to PW2. He saw a customer whom he did not know entering the shop and remove a knife aiming it at PW1. He then saw the customer walking out with four loaves of bread. The owner of the shop came out and said the customer had robbed him of ksh.7000/-. He advised him to report to the police. It is his evidence that there was electricity inside the shop. When the customer aimed the knife at PW1, PW1 moved backwards.

PW4, PC Caleb Otieno was based at he Malindi Police Station. The incident was reported at the station on 16/5/2011 by PW1. He investigated the case and went to the appellant's home but could not trace him. On 27/5/2011 the appellant was arrested by inspector Matheka who took him to the police station. The appellant was then charged with the offence.

In his sworn defence, the appellant denied committing the offence. He stated that he is a shoe maker based in Malindi and Watamu. The complainant is from the Kamba community while he is a Giriama. He is married to a Kamba wife. One day he went to his house and as the door opened, he felt something like a gun touching his back. He turned and realized that it was a knife. He held the knife and the complainant injured him on his shoulder, left wrist and back. He was unconscious and taken to hospital for treatment. PW1's father went to the hospital and paid the hospital bill. The issued was resolved out of court and PW1 was penalized to pay a fine called "*malu*" under Giriama customs for moving around with the appellant's wife. The complainant was to pay him ksh.30,000/- on 5/7/2011. He was surprised when he was arrested and charged with this offence.

The main issue for our determination is whether the prosecution proved its case beyond reasonable doubt. The incident occurred at 9.00 p.m. Both PW1 and PW2 as well as PW3 testified that there was electricity light inside the shop. The appellant was known to both PW1 and PW2. According to PW1 he saw the appellant entering the shop while armed with a knife. He was robbed of ksh.7000/- and four loaves of bread. The appellant is his neighbour. The evidence of PW2 is that he was standing outside the shop, near the door, when he saw the appellant. The appellant entered the shop and robbed PW1 of ksh.7000/- and four loaves of bread. The defence evidence was that the original issue involved a complaint by the appellant against the complainant in relation to his wife. We do find that evidence to be an after thought. The appellant never raised this issue when he was cross examining PW1. The only issue he raised is that the complainant informed the appellant's wife after the appellant in court that the appellant will be sentenced to death.

From the evidence on record we do find that the appellant was properly identified. He was known to both PW1 and PW2. There was electricity inside the shop. PW3 who was just a customer also witnessed the incident. His evidence corroborates the evidence of PW1 and PW2. The defence evidence did not raise any doubt on the prosecution case. We find that the prosecution proved its case beyond reasonable doubt. The appellant was known to the complainant and there was no need for an identification parade.

In the end, we do find that the appeal lacks merit and the same is disallowed.

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

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SAID J. CHITEMBWE

JUDGE

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M. MUYA

JUDGE