



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 41 OF 2012

(Appeal from the original conviction and sentence in criminal case No. 888 of 2010 at Malindi by Hon. D.W. Nyambu, Principal Magistrate)

NAHASHON MUTEMBEI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant was charged with the offence of Robbery with violence contrary to section 296(2) of the Penal Code.
2. The particulars of the offence were that on the 15th day of November 2010 at Sun Park Area, Malindi Location in Malindi District within Kilifi County, the Appellant, jointly with another person not before court robbed Boniface Katana Nzai a motorcycle registration number KMCK 534F and at or immediately before or immediately after such robbery used actual violence on the said Boniface Katana Nzai.
3. After the trial, the learned Magistrate reduced the charge from Robbery with violence contrary to section 296(2) of the Penal Code to that of a simple Robbery contrary to section 296(1) of the Penal Code pursuant to the provisions of Section 179 of the Criminal Procedure Code. The Magistrate proceeded to convict the accused. The learned Magistrate sentenced the accused person to serve five years imprisonment. The Appellant has appealed against the conviction and sentence.
4. In his grounds of appeal, the Appellant has stated that the case against him was malicious because no exhibit was recovered on him and that the learned Magistrate failed to analyse and evaluate the evidence that was adduced before her. The Appellant has further alleged that the learned Magistrate failed to consider that an identification parade was not conducted to link him to the alleged crime.
5. The state opposed the appeal and sought for the enhancement of the sentence. The state counsel submitted that PW2 and PW5 had sufficient time to identify the Appellant since PW2 wrestled the Appellant and PW5 came to his rescue. Counsel submitted that the prosecution evidence was consistent and the sentence should be enhanced because the offence of Robbery with violence was proved.
6. This being a first appeal, we are required to re-evaluate the evidence, assess it and make our own conclusion. (**Okeno V R [1972] EA 3 22.**)
7. Fredrick Kazungu Ngala, PW1, informed the court that on 15th November 2010, he was informed by his motor cycle driver, PW4, that his motorcycle had been stolen. The said motorcycle had been stolen from PW2 who was riding it by then because PW4 was unwell.

8. It was the evidence of PW1 was that PW2 picked two passengers, one of them being the Appellant. When they reached at a place called "Sun Park", one of the passengers dropped a bag. When PW2 stopped the motorcycle to allow his passengers pick the bag, the Appellant strangled him while the other passenger rode off with the motorcycle. PW2 raised an alarm and the Appellant, who had remained behind struggling with PW 2, was beaten up by the members of public who then arrested him and took him to the police station. PW1 produced the original log book of motorcycle registration number KMCK 534 F as exhibit number 1.
9. The evidence of PW1 was corroborated by the testimony of PW2 who stated that around 9.30 pm, he picked two men who requested to be taken to "Sun Park" area. When they were just passing "Sun Park" area, one of the two men dropped a bag and PW2 stopped the motorcycle to allow the passenger pick the bag. The one who was sitting next to him, the Appellant, started to strangle him while the other one drove off with the motorcycle. PW2 struggled with the Appellant and shouted for help. The members of public chased the appellant and arrested him. PW2 identified the Appellant in the dock during the trial. The motorcycle was never recovered.
10. PC Samwel Muturi, PW3, recalled the events of that day. He informed the trial court that the appellant was arrested by the members of the public for robbing PW2 a motorcycle registration number KMCK 534F, Bajaj Boxer. According to PW3, PW2 identified the Appellant as the person who strangled him on the same day he was arrested by the members of the public.
11. One of the members of public, PW5, stated that they heard PW2 shouting and chasing the Appellant who attempted to jump over the fence in the "Sun Park" area at around 9.30 pm. They arrested the Appellant who was beaten up until when the police came to his rescue and arrested him.
12. In his defence, the Appellant informed the trial Magistrate that on 15th November 2010, he was walking home when he was attacked at the "Sun Park" area by some people who assaulted him and then took him to the police station claiming that he had stolen a motorcycle.
13. In his Judgment, the learned Magistrate stated that PW2 was sure that the person who was arrested by the members of the public and handed over to the police was one of the robbers who had robbed him of the motorcycle. The Magistrate disbelieved the evidence of the Appellant that he was walking to his house when he was arrested by the members of the public and beaten up. The learned Magistrate found the prosecution witnesses truthful and accepted their evidence.
14. It was the evidence of PW2 that the Appellant was the passenger who was sitting next to him on the motorcycle and that he struggled with him while the Appellant's colleague rode off with the motorcycle. There was no evidence that there were other people at the scene and it cannot therefore be said that the person who strangled PW 2 while on the motorcycle and then started struggling with him after the motorcycle was taken was a different person from the Appellant.
15. Indeed, PC Samwel Muturi informed the trial court that the Appellant informed him that he hailed from Kisumu Ndogo and that that is where he was coming from before he was accosted by the members of public. However, the witness stated that where the Appellant was accosted, there was no road leading to Kisumu Ndogo where the Appellants house is situated. Instead, there is a wall which the Appellant tried to jump over before he was arrested by the members of the public who beat him up.
16. The Appellant was taken to the police station by the Police who happened to be passing by the scene. PW 2 identified the Appellant at the police station immediately he was arrested. PW2 also identified the Appellant in the dock. In view of the fact that the Appellant was identified immediately he was arrested and minutes after the robbery and at the scene of robbery, we are in agreement with the trial Magistrate that an identification parade was not necessary. PW 2 also informed the court that he knew the Appellant before the day he was robbed because he had seen him "around". Hence this was a case of recognition.
17. The Appellant at the time of arrest was trying to go over a wall. The Magistrate did not err in disbelieving the Appellant's evidence that he was arrested by the members of public while on his way to his house. PW2 did not lose sight of the Appellant from the time he strangled him while on the motorbike until when they started struggling while calling for help from the members of public, who responded almost instantly before the Appellant could escape. Even after the Appellant released PW 2, PW2 continued to chase the Appellant while shouting until when the members of public caught up with the Appellant while attempting to jump over a wall.
18. The learned Magistrate's analysis of the evidence was proper and he arrived at the correct

conclusion that the Appellant was one of the persons who robbed PW2 a motorcycle registration number KMCK 534F.

19. Although the Appellant was charged with the offence of Robbery with violence contrary to section 296(2) of the Penal Code, the learned Magistrate reduced the charges to simple Robbery under section 296 (1). According to the learned Magistrate, the people who attacked PW2 were not armed. However, the Magistrate found as a fact that PW2 sustained injuries on his neck after being strangled by the Appellant. The Magistrate reduced the charge to that of simple Robbery solely because the Appellant together with his accomplice were not armed with dangerous or offensive weapon.
20. The prosecution has asked us to enhance the sentence to life imprisonment because the Appellant used violence during the robbery.
21. Section 296(1) and (2) of the Penal Code provides as follows:

“296 (1): Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

296 (2): If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company of one or more other person or persons, if, at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

22. It has been held by this Court and the Court of Appeal that a charge for Robbery under section 296 (2) must specify the essential ingredients of the offence. In the case of **PATRICK & ANOTHER VS R, (2005) 2 KLR 162**, the court of Appeal held as follows:

“The act of being armed with a dangerous offensive weapon is one of the element or ingredients which distinguishes an offence under section 296(2) of the Penal Code from a robbery under section 295. Consequently, where the prosecution is relying on the element or ingredient of being armed, it must be stated in the particulars of the charge that the weapon or instrument with which the accused person was armed with was dangerous or offensive.

23. The Court in the above case, while quoting with approval the case of **JOHANA NDUNGU VS R, Criminal Appeal Number 116 of 1995** stated as follows:

“If any of these are proved, it will constitute the offence of robbery with violence:

(i) if the offender is armed with any dangerous or offensive weapon, or

(ii) if he is in the company of one or more other persons or

(iii) 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.”

24. It was the opinion of the Court of Appeal in the **Patrick** case (supra) that the court is not required to look for the presence of either of the other two set of circumstances.
25. The particulars of the charge in this particular matter are that the Appellant was, firstly, in the company of another person while robbing PW2 of a motorcycle Registration Number KMCK 534F and secondly, at or immediately before or immediately after such robbery he used actual violence on PW2.
26. In our view, the charge as framed clearly specified the ingredients of the offence of Robbery with violence under section 296(2) of the Penal Code.
27. The Prosecution availed evidence and proved beyond reasonable doubt that the Appellant was with another person when they robbed PW2 of the Motorcycle. According to PW2, the Appellant's colleague is the one who rode off with the motorcycle when the Appellate strangled

- him and then started struggling with him. It was the act of strangling and struggling that enabled the Appellant's accomplice to escape with the motorcycle.
28. The prosecution therefore proved to the standards required by law the ingredients of Robbery with violence as provided for under section 292(2), and more specifically that the appellant was with another person when they robbed PW 2. There was therefore no basis for the learned Magistrate to substitute the offence of Robbery with violence under section 296(2) of the Penal Code with a lesser offence of Robbery under Section 296 (1) as he did in this case, notwithstanding the fact that the Appellant or his accomplice were not armed with dangerous or offensive weapons.
29. Consequently and for the reasons we have given above, we find and hold that the Appellant was properly charged for the offence of Robbery with violence contrary to Section 296(2) of the Penal Code. We also find and hold that the prosecution proved beyond reasonable doubt at least one of the ingredients of the offence of Robbery with Violence as provided for under section 296(2).
30. We therefore agree with the prosecution's submissions that the Appellant should have been convicted for the offence of Robbery with violence. We hereby quash the conviction of the Appellant by the learned Magistrate for Robbery contrary to section 296 (1) of the Penal Code and in substitute convict the Appellant for the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code.
31. The only sentence provided for in the Penal Code for the offence of Robbery contrary to Section 296(2) of the Penal Code is death. Consequently, we set aside the sentence of five years imprisonment that was meted out by the learned Magistrate and substitute it with the sentence of death as provided for in the law.

Dated and Delivered in Malindi this 7th day of **March**, 2014.

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C.W. MEOLI

JUDGE

O. A. ANGOTE

JUDGE