



IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 293 OF 2010

BENSON MUSYOKA MUTISYA *alias* KARISH APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate H.M. Nyaberi delivered on 7/09/2010 in Mwingi Senior Resident Magistrate Criminal Case No. 453 of 2008)

(Before Beatrice Thurania Jaden J and L. Mutende J)

J U D G M E N T

1. The Appellant, **Benson Musyoka Mutisya** *alias* **Karish** 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 on the 13th day of January, 2006 at around 1.00 a.m. at **Soome village, Kavuta Sub-location, Itoleka Location** in **Kitui District** of the **Eastern Province**, jointly with others already before the court, while armed with dangerous weapons namely pangas and *rungus* robbed **Issack Kimeu Syengo** cash Kshs.1,100/=, 20 kilogrammes of maize, 10 kilogrammes of cooking oil, 2 jackets, one radio cassette make National, one pair of bed sheets all valued at Kshs.11,750 and at or immediately after the time of such robbery used actual violence against the said **Issack Kimeu Syengo**.

2. When The Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.
3. The case for the prosecution was that on the 13/1/2006 at 1.00 a.m., the complainant, PW1 **Isaac Kimeu Syengo** was in his house sleeping. He was awoken by some noise outside the house. He then heard a voice telling him to open. There were footsteps around the house going towards the bedroom window. The window pane was broken and torchlight flashed at the complainant. The complainant ran to the sitting room screaming. The sitting room door was banged open. Three people who were armed with a panga entered the house. The complainant was cut with the panga on the left hand and on the head and commanded to produce money. He showed the attackers a shirt that had Kshs.1,100/= in the pocket. The complainant was beaten and asked to produce more money.
4. The assailants then went to the room where the complainant's daughter, PW2 **Judith Kimeu Syengo** was sleeping. The daughter who had hidden in the bathroom was also attacked and asked by the assailants to show them where the father had hidden money. After about one hour the assailants left with the properties mentioned in the charge sheet and locked the door from outside. Neighbours who heard the commotion arrived at the complainant's house and opened for them.

- The matter was reported to the police and the complainant taken to **Kitui Hospital**. Some of the assailants who were identified were arrested and charged. The Appellant was traced and arrested after one year and subsequently charged with the offence herein.
5. The Appellant in his defence gave sworn evidence. No witnesses were called. The Appellant stated that on the night in question, he was at home with his family members sleeping. The following day he went to his farm then went back home later. That on 8/9/2007 at about 1.30 p.m. he was in his house resting when the police officers went looking for him and arrested him. He was then escorted to the police station where he was beaten and questioned then kept in police custody for thirteen (13) days. The Appellant was subsequently arraigned in court for an offence he knew nothing about.
 6. At the conclusion of the trial, the trial magistrate found the Appellant guilty. The Appellant was convicted and sentenced to death. The Appellant was dissatisfied with the conviction and sentence and appealed to this court on the following grounds:-
 - **That the charge sheet was defective.**
 - **That the evidence of recognition was not free from the possibility of error.**
 - **That the arresting officer was not called to testify.**
 - **That the medical officer who filled in the P3 form was not called to testify.**
 - **That the prosecution evidence was full of contradictions.**
 - **That the conviction was against the weight of the evidence.**
 - **That the defence case was not considered.**
 7. During the hearing of the appeal, the Appellant relied on his grounds of appeal which we have duly considered.
 8. The appeal was opposed by the State. The learned counsel for the State submitted that the evidence of recognition was free from any possibility of error and urged the court to uphold the conviction and sentence.
 9. This being a first appeal court, we have an obligation to re-evaluate all the evidence given during the trial and come to our own independent conclusions. *See Okeno –vs- Republic (1972) EA 32.*
 10. The evidence of the complainant (PW1) leaves no doubt that he was robbed of the properties mentioned in the charge sheet. The complainant's evidence was that the window panes of his bedroom were broken by the attackers who then broke the door of his house then attacked him with a panga before they eventually made away with the complainant's aforesaid properties. The complainant's evidence was that he was not able to identify the attackers except one **Mutisya Ngulu** but that he was later given the names of the others by his daughter (PW2) and a neighbour, PW3 **Simon Mutua**. It was then that the complainant realized that the attackers were people he knew as they hailed from the same sub-location.
 11. The complainant's evidence is corroborated by that of his daughter (PW2) who was with him in the house at the material time. Both the father (PW1) and the daughter (PW2) have testified that there was torch light and bright moonlight. PW2's evidence is that she was lead outside the house by the attackers and it was then that she saw the Appellant from a distance of about two (2) metres. According to PW2, she knew the Appellant as a distant neighbour. PW2 described the Appellant as having worn a white shirt and further testified that the Appellant was not carrying anything in his hands. PW2 also described the other attackers as people she knew and named them as **Kyalo** and **Mutisya**. According to PW2, the attack lasted about one hour. In our view, this gave PW2 the opportunity to observe the Appellant and in close proximity.
 12. PW3 the neighbour gave evidence that further corroborates the complainant's evidence. PW3 testified that he was attracted to the scene by the noise and went and stood at a fence about fifteen (15) metres away from where he saw the Appellant standing outside the complainant's compound. PW3 described the source of light as bright moonlight and stated that he also recognized the other attackers. PW3 further testified that when the attackers were leaving, they passed at a distance of about six (6) metres from where he was hiding. PW3 named the other attackers as **Mutisya Ngulu**, **Bernard Mulwa** and one **Kyalo**. PW3 described the Appellant as the one who was carrying something in a sack. PW3 explained in his evidence that although he stood behind a euphorbia fence which was about ten (10) feet high, he could see through the fence. PW3 described the Appellant and the other attackers as neighbours and specifically stated

that he had known the Appellant for about fifteen (15) years. PW3 further testified that he also recognized the voice of the Appellant at the scene. As stated in **Dishon Litwaka Libambula –vs- Republic (C.A Criminal Appeal No. 140 of 2003 (Kisumu)** unreported;

“Normally evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure it was the accused person’s voice, that the witness was familiar with it and recognized it and that conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”

13. Both PW2 and PW3 mentioned the name of the Appellant to the complainant. The complainant’s evidence confirms that PW2 and PW3 gave him the names of the attackers. PW5 **Cosmus Ngei**, a brother to the complainant also gave evidence which establishes that PW3 gave him the name of the Appellant and the other attackers on the night of the attack. It is noteworthy that one of the attackers the complainant identified as **Mutisya Ngulu** was also mentioned by both PW2 and PW3. Both PW2 and PW3 gave corroborative evidence that identified the other attackers. We are therefore satisfied that the witnesses from the scene (PW1, PW2 and PW3) were able to see and identified some of the assailants including the Appellant without any possibility of error.
14. The complainant went to the police station on 19/1/2006 after treatment. The evidence of the Investigating Officer, PW6 **PC Joseph Karanja** shows that on the day the complainant went to the police station, he appeared to be in pain and had bandages. However, the report of the attack had earlier on been made promptly at the police station and the complainant issued with a P3 form and referred to hospital for treatment. The Investigating Officer’s evidence further establishes that the Appellant was looked for at his home severally but was nowhere to be found and was later arrested in **Kitui town** where the Investigating Officer fetched him from and had him charged. There is no dispute that the Appellant was arrested. Our view is that although the arresting officer did not testify, his evidence would not have made any difference to the case. There was therefore no miscarriage of justice.
15. PW7 **Peter Wambua**, a Clinical Officer from **Kitui Hospital** produced the complainant’s treatment notes and the duly completed P3 form. The evidence of the Clinical Officer confirmed the complainant’s injuries. The evidence of the Clinical Officer shows that the P3 form was filled in by **Mr Kamwea**, a fellow Clinical Officer at **Kitui Hospital** who had since been transferred to **Mbooni Hospital**. Attempts made to bond **Mr Kamwea** and were not successful. However, PW7 who produced the P3 form knew **Mr Kamwea** and had worked with him for two years and knew his hand writing and signature. PW7 was duly cross-examined. There was no irregularity in the manner that the P3 form was produced. The entries in the P3 form were made in the ordinary discharge of professional duty and the P3 form was admissible. (See **section 33** of the **Evidence Act Cap 80 Laws of Kenya**).
16. The Appellant in his defence talked about his arrest on 8/9/2007. He denied the offence and stated that on the night in question he slept in his house with the rest of his family members. In our view this alibi defence did not dislodge the strong prosecution case.
17. Having evaluated the evidence on record in its entirety, we are of the view that the Appellant’s conviction was based on sound evidence. We have found no reasons to differ with the finding of the trial magistrate who had the benefit of seeing the witnesses testify and observing their demeanour. The offence of robbery with violence was proved. (See, for example, **Ganzi & 2 Others versus Republic [2005] 1 KLR 52.**)
18. We have scrutinized the charge sheet and have seen no defects in the same. The particulars of the offence are supported by the evidence.
19. We find no merits in the appeal and dismiss the same. The conviction and sentence are upheld.

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B. THURANIRA JADEN

L.MUTENDE

JUDGE

JUDGE

Dated and delivered at Machakos this 16th day of July 2014.

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B. THURANIRA JADEN

JUDGE