



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 134 OF 2012

EVANS WAMAE KARUKU..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An Appeal arising from the conviction and sentence imposed by Hon. L. MUTAI, Senior Principal Magistrate Karatina in Criminal Case No. 424 of 2011)

JUDGMENT

1. The Appellant **EVANS WAMAE KARUKU** was charged with three counts of Robbery with violence contrary to section 296(2) of the Penal code the particulars of which were that on 14/5/2011 at Gathithi village in Mathira East District within Nyeri County jointly with another not before the court being armed with offensive weapon namely stones robbed Peter Mbui Wanga Kshs. One thousand eight hundred (Kshs.1800/-, mobile phone Nokia 1208, one pair of sports shoe, one jacket, one shoe, one long trouser and one T-shirt all valued at Kenya shillings six thousand three hundred and forty nine (Kshs6349/-) and immediately before or immediately after the time of such robbery used actual violence to the said PETER MBUI WANGA.
2. He pleaded not guilty, was tried, convicted and sentenced to death. Being aggrieved by the said conviction and sentence he filed this appeal.
3. When the appeal came up for hearing before us the appellant who was unrepresented filed an amended grounds of appeal and written submissions which he relied upon while Miss Kitoto appeared for the state and opposed the appeal.
4. On behalf of the appellant it was submitted that the prosecution's case was not proved beyond reasonable doubt. It was submitted that the prevailing circumstances was not favourable for the identification of the alleged attackers. It was submitted that it was not possible for the PW 1 to identify the alleged attackers using moonlight and that during the second trial PW 1 changed his evidence to include moonlight and electricity. It was submitted that PW 1 did not tell the court the intensity of the moon light and the electric light and in support thereof the case of SAID BAKARI ALI & 2 OTHERS V R CRIMINAL APPEAL NO. 900 OF 2003 COURT OF APPEAL was submitted.
5. It was further submitted that PW 1 did not include the description of his attackers or the clothes worn by them so as to exclude out any possibility error in his identification. It was further submitted that the charge against the appellant was never proved since his alleged confession to PW 2 and PW 3 was not supported by any documentary evidence such as cautionary statements or inventory of the recovered

items. It was further submitted that the appellant's defence was rejected yet no DNA was conducted to show that there was Nexus between the two blood groups on either the clothes of PW 1 and the appellants.

6. Miss Kitoto for the state submitted that PW 1 evidence was that he met two men whom he had earlier seen and that there was sufficient light from nearby shop so he was able to recognize the appellant. The two attacked him and dragged him to the home where the appellant worked and robbed him and that he managed to flee from them into the home of PW 3 and that PW 1 who was able to recognise the appellant the next day and his clothes were found in PW 1's home.

7. It was further submitted that the appellant's defence was properly dismissed as an afterthought.

8. This being a first appeal the court is required to reevaluate all the evidence tendered before the trial court and to come to its own conclusion though taking into account the fact that we did not have the advantage of seeing and hearing witnesses as the trial court.

9. For record purposes we must state that this matter proceeded from before Hon. L. Mbugua then PM where three witnesses testified. On 8/3/2012 the matter was placed before L. Mutai then SPM who upon compliance with section 200 CPC directed that the matter start de novo.

10. PW 1 PETER MBUI WANGA testified that on 14/5/2011 at 9.30p.m. Was attacked by two people with stones on the face before being dragged into nearby home and robbed of all his clothes, Kshs.1800/- cash, Nokia phone 1208 all valued at Kshs.6349/-. He managed to free himself and entered to a nearby homestead of one Wanjohi who assisted him with clothes. In the process of his attack the complainant managed to bit the hand of the appellant and was able to identify the same.

11. The complainant's evidence was corroborated by that of PW 2 Milka Njeri Kamau the area assistant chief who was called to the scene where members of the public wanted to lynch the appellant who subsequently led them to the house where the items stolen from the complainant were recovered. PW 3 JOSEPH WANJOHI testified that the complainant went to his house naked and he helped him with clothes and accommodation. The following day he met the appellant who was bleeding from the hand and told him that he had fought with someone the night before. At his house the complainant was able to identify the appellant.

12. PW 4 Mr. Ndirangu a clinical officer testified on the injuries sustained by the complainant and produced P3 form in support thereof while PW 4 Sgt. Stephen Taara and PW 5 PC Jaakin Miriti confirmed the arrest of the appellant and the recovery of stolen items from the same.

13. When put on his defence the appellant gave sworn evidence in which he states that on 15/5/2011 he got up and went to church. On the way he met a couple one who introduced herself as the head woman and a police officer. He was arrested and taken to Karatina police station. When he was shown the exhibits in this case and that he did not know the complainant before.

14. From the evidence tendered before the trial court as analyzed herein the proceedings and submission we have identified only two issues for determination;-

a) Whether the prosecution's case was proved beyond reasonable doubt.

b) Whether the appellant's defence was properly considered.

15. It is clear from the evidence tendered that the appellant was arrested from the scene of the attack and all items stolen from the complainant were recovered from him some hours after the attack. It was further the evidence of the complainant that at the home of the attack the appellant was together with another person and that the complainant was informed in the process as confirmed by the evidence of PW 4. We are therefore of the considered view that all the ingredients of the charge of robbery with violence were proved by the prosecution witnesses.

16. It is also clear from the appellant's defence that he did not say anything on the night of 14th May 2011 and only testified as regards his arrest on 15/5/2011 we therefore agree with the trial court's finding that the defence was not plausible and did not displace the prosecution's case. We also agree with the finding that the appellant was positively identified by the complainant and PW 3.

17. We are therefore of the considered view that the conviction of the appellant was very safe and find no merit on the appeal herein which we hereby dismiss.

Dated and delivered at Nyeri this 4th day of July 2014.

J. WAKIAGA

J. NGAAH

JUDGE

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