REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 146 OF 2010

AS CONSOLIDATED WITH CRIMINAL APPEAL NO. 149 OF 2010.

LESIIT, J.

FRANCIS KANYURU MWENDA.....1ST APPELLANT

ISAIAH MUTHAMIA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant FRANCIS KANYURU MWENDA, hereinafter the 1st Appellant and ISAHIAH MUTHAMIA, the 2nd Appellant were jointly charged with one count of Robbery with Violence contrary to section 296(2) of the Penal Code. After the trial, both Appellants were convicted of the offence of Robbery contrary to section 296(1) of the Penal Code and each was sentenced to 10 years imprisonment.
2. Being aggrieved by the conviction and sentence both Appellants filed their appeals, which I have consolidated having arisen from the same trial in the lower court.
3. In the 1st Appellant's ground of appeal he challenges the conviction entered against him on the grounds the learned trial magistrate failed to observe there was a grudge between the 1st Appellants and PW2, and that the evidence adduced by the prosecution was full of contradictions, that vital witnesses were not called and that his defence was not considered.
4. The 2nd Appellant's in his grounds of appeal challenged the conviction entered against him on the grounds the evidence tendered by the prosecution was contradictory, that the learned trial magistrate failed to observe that the evidence against the 2nd Appellant was by a single witness and that the conviction was against the weight of evidence.
5. Both Appellants gave written submissions. The mains issues raised are those of identification where the Appellants claimed that the complainant did not specify the light he used to identify the attackers. The second issue is that of an alleged existing grudge between the 1st Appellant and the complainant which the learned trial magistrate is accused of having ignored.
6. Mr. Mulochi, Prosecution Counsel represented the state in this appeal. He opposed the appeal and urged that it should be dismissed. Counsel urged that the incident was at 6.30 pm and so identification was possible, that 1st Appellant had a peculiar feature on his nose making it easier to recognise and further that he was arrested as he tried to sell a C-line which had been stolen from the complainant during the incident.
7. On the sentence Mr. Mulochi urged that the Appellants were convicted of robbery contrary to

section 29(1) of the Penal Code where the maximum sentence provided was 14 years. Counsel urged that 10 years imprisonment was lenient.

8. I am a first appellate court. I have carefully considered this appeal and have subjected the entire evidence adduced before the lower court to a fresh analysis and evaluation, and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses, and I have given due consideration.
9. I am guided by the court of appeal case of **OKENO VS REPUBLIC 1972 EA 32** where the duties of a first appellate count are set down as follows:

> "**An Appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"

10. The facts of the prosecution case are that on 28th October, 2006 the complainant arrived at his shop cum home, after going to replenish stock. As he opened his shop one man emerged holding a panga above his head. Just then another armed with a gun emerged who ordered the complainant to lie down. The thugs broke into his house cum shop, stole cash and other properties. The properties included a C-line which is a long sharp implement used like a machete. The 1st Appellant was arrested on 5th November, 2006, by PW3 as the appellate tried to sell the C-line to him. The complainant identified it by an X-mark on its handle as his. The C-line was P. exh. 1. The 2nd Appellant was arrested afterwards almost 3 months after the incident.
11. The 1st Appellant denied the offence. He stated that on the day of his arrested he had gone to pick his ailing mother in order to take her to hospital. After taking her to hospital, he decided to check out a report he heard that a man had been trampled down by elephants. That is when he was arrested by Police Officers and a Sub Chief.
12. The 2nd Appellant stated that the complainant was his cousin. He said that on 27th December, 2006 the complainant, who is his cousin met cum plucking miraa on their farm. The 2nd Appellant stated that the complainant cut him on the head with a panga. He was taken to hospital by complainant's sister. Later he was arrested for this offence.
13. The evidence against the 1st Appellant was twofold. The first being that of identification. The complainant said he was able to identify the 1st Appellant as the one who emerged holding a panga before his five accomplices joined him. The complainant said that it was an incident that took place at 6.30 pm and that it was not dark. The complainant said that he could recognise the 1st Appellant whom he had known by nine years and who had a peculiar feature on his nose. The other evidence against the 1st Appellant was fact he sold a C-line with the mark of an X which the complainant identified as his. He sold it to PW3, a community policing officer, on 5th November, 2006, eight days after the attack.
14. The learned trial magistrate considered the evidence against the two Appellants and found that the complainant knew them very well prior to the incident the 1st Appellant being his cousin and the 2nd Appellant his village mate respectively. The 1st Appellant was not the complainant's cousin and no one made such a claim. The 2nd Appellant was the cousin and in his defence he admitted it. The second observation the trial magistrate made was that the 1st Appellant was found in possessing of a C-line, P. exh. 1, which the complainant positively identified as his implement stolen during the incident in question.

15. The learned trial magistrate considered that the time of incident being 6.30 pm was not dark and that in the circumstances she was satisfied that there was sufficient lighting to identify the offenders. The learned trial magistrate cautioned herself about the dangers of convicting on the evidence of identification by a single witness and found the evidence was strong enough to sustain a conviction.
16. I find that the learned trial magistrate exercised her mind to the relevant issues and properly applied the law coming to the correct conclusion as far as identification of the Appellants was concerned.
17. I agree with he learned trial magistrate that the complainant knew the Appellants for long before the incident, the 1st Appellant being his village mate and the 2nd Appellant his cousin. In addition the complainant made the report of the incident the very next day and gave the names of the two Appellants and another as his assailants. The first report was confirmed by PW2 the Assistant Chief and PW4 the investigating officer of the case. Both confirmed that in his report the complainant gave the names of the two Appellants as the ones who attacked and robbed him. The first report gives an assurance that the complainant had seen and recognized his assailants at the time of the attack.
18. The 1st Appellant was arrested after selling a C-line P. exh. 1 to PW3. The complainant identified it by a marking he pointed out to the courtit as among his stolen property. The trial count was satisfied that the X-mark on the C-line was sufficient to distinguish the C-line as complainant's property. I see no reason to depart from the trial court's finding of fact regarding the marking on the c-line.
19. The 1st Appellant had a peculiar mark, his nose looks crooked apparently having been injured or cut. The complainant testified that he also recognised the nose of the 1st Appellant's since he knew him with that peculiar nose before the incident. I was able to note the nose during the hearing of this appeal. I agree it is a peculiar mark which is remarkable, invisible and clear and I could clearly see it from where I was seated. I am satisfied that the 1st Appellant was property identified and that there was no possibility or error or mistake.
20. I must mention that from the evidence of the complainant and PW2, the 1st Appellant escaped after his arrest on 5th November, 2006. He was arrested one and a half months later. The escape is not quite clear. However I am satisfied that it does not affect the prosecution case against the 1st Appellant.
21. The 2nd Appellant was complainant's cousin. The complainant gave his name to the Assistant Chief during his first report. Even though the 2nd Appellant alleged a grudge between his family and complainant's family that was clearly not the reason for his arrest. The prosecution clearly demonstrated his role in the robbery. The arrest was not a fabrication of the case against the 2nd Appellant.
22. The Appellants defences were considered and rejected by the trial court. I agree with the court that the Appellants defences could not withstand the strong prosecution case proved against them. The defence did not shake the prosecution's case against them.
23. I wish to comment on one final point. The learned trial magistrate reduced the charge against the Appellants from Robbery with Violence contrary to Section 296(2) of the Penal Code to Robbery contrary to section 296 (1) of the Penal Code. The court invoked S.179 (2) of the Criminal Procedure Code to reduce the charge. The trial court also quoted **OLUOCH VS REPUBLIC CA NO. 66 OF 1984** as justifying the exercise of discretion under S179 (2) as above stated.
24. With due respect to the learned trial magistrate the evidence adduced before the court established that the robbers involved in this case were armed with two guns, pangas and axes. They stole cash and property valued at Kshs. 77,950/-. They also threatened to use violence on the complainant before robbing him of his property. S. 296(2) of the Penal Code stipulates:

> **(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before 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.**

25. The same case the learned trial magistrate cited in the obiter dictum sets out the ingredients of an offence of robbery under S.296(2) of Penal Code. It is stated that robbery with violence is committed where any one of the following ingredients are proved, namely if something was stolen and at the time of robbery:

i. **The offender was armed with a dangerous or offensive weapon; or**
ii. **The offender was in company with one or more persons at the time the offence was committed: or**
iii. **Immediately before or during or immediately after the robbery the offender threatened to use or used actual violence or anyone.**

26. The evidence adduced before the trial court satisfied all three ingredients of the offence under S. 296 (2) of the Penal Code, even though proving only one of them was sufficient. The charge ought not to have reduced to single robbery. Having reduced the charge this court cannot review or reverse the same. The Appellants will benefit from the learned trial magistrate error to reduce the charge.
27. Having considered the appeal I find it has no merit. The conviction was safe. The sentence of ten years was also fair.
28. **Accordingly, I reject both Appellants' appeals, uphold the conviction and confirm the sentence. The Appellants appeal is accordingly dismissed.**

DATED, SIGNED AND DELIVERED AT MERU THIS 17TH DAY OF JULY, 2014.

LESIIT, J,

JUDGE