



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL 104 OF 2013

TIMOTHY WAWERU MUTUOTA..... APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(From original conviction and sentence in criminal case Number 287 of 2013 in the Principal Magistrate's court at Githunguri – W.NGUMI (AG.SRM) on 7/6/2013)

JUDGMENT

The appellant, Timothy Waweru Mutuota and Simon Mburu Kuria were jointly charged with the offence of Robbery with Violence contrary to section 296 (2) of the Penal Code.

After a full trial the appellant was convicted of the said offence and sentenced to death. His co-accused was acquitted at the close of the prosecution case as the court did not find any evidence linking him to the offence.

Aggrieved by the said conviction and sentence, the appellant lodged this appeal and advanced 8 grounds of appeal which we have summed to three. Four of them primarily dwelt on the issue of Identification while the other two dealt with material inconsistencies in the prosecution evidence and rejection of the appellant's defense by the trial magistrate respectively.

As the first appellate court, it is our duty to look at the evidence afresh, re-evaluate the same and come to independent conclusions.

The complainant PW1 was preparing dough for "mandazi" on 7th March 2013 at around 3 a.m. He had just sent his wife to the kitchen to pick some papers and as she was shutting the door on her way back, a group of three men armed with a knife and a "rungu" (club) suddenly entered the house. They then ordered PW1 to his bedroom and demanded his motorcycle key which they were given. They also demanded and were given money amounting to Kshs.1, 400/=. His wife tried to alert the neighbours but by the time they responded the robbers had escaped. The ordeal lasted about 15 minutes. The complainant was robbed of his motor cycle make Boxer 150CC registration number KMCU 866T which was red in color, mobile phone make Tecno and cash Kshs. 1400/= all valued at Kshs. 97,000/=. Together with his brother they reported the incident.

The same day PW1 received information that someone was looking for him and when he met him, one Mr. Kimemia, he informed him that he had heard about his (PW1's) stolen motorcycle. He reported to him a suspect encounter he had had the previous evening with people who had gone to his place to

borrow a torch they purportedly intended to use that night. The first accused had asked Mr. Kimemia to assist him look for market for the motorcycle and as he was in the process of doing so the accused was arrested.

Later on, they met someone who divulged to them information about these three people's identities namely Waweru, Joram and Njogu. The gist of this appeal in our view revolves around the core issue of Identification evidence by PW1.

The trial magistrate was satisfied that the appellant was positively identified at the time of the offence. He concurred that his name was given at the time the first report was made and further that the circumstantial evidence surrounding the offence placed him in the organization of the offence. He saw no need for an identification parade to be conducted. In convicting the appellant the learned trial magistrate had the following to say,

“In respect of the second accused, I notice that he was positively identified at the time of the offence. His name was given at the time the first report was made and further, the circumstantial evidence surrounding the offence places him in the organization of the offence. All the evidence points to his guilt. I am well satisfied with the identification made and find that there was no need for an identification parade to be conducted”

The appellant on his part argued that the court did not demonstrate caution when analyzing the quality of identification evidence in his case. It failed to interrogate the lamp light that aided identification, the circumstances of identification and the character of light.

PW1 testified that he identified the assailants who stormed the kitchen as the light of the lamp was on and it was bright enough. They were not hooded. They also had a torch whose lights were not as bright as it seemed to be low on battery. The appellant had a “rungu” (club) and is the one who ordered him to enter the bedroom where he threatened to kill him. During cross examination by the appellant, he testified having seen the appellant's face and having known him for a period of one year. He also described seeing him at his place of residence, and also at (PW1's) place during the time of robbery. He demanded PW1's phone and motorcycle during the robbery ordeal.

Later on in the record, PW1 was recalled and this time testified of there being electricity lighting when he identified the appellant. This was apparently coming from a charging lamp. He identified him at the time by the name Weche which was his alias name.

PW2 was approached by one Mburu, who led him to three other men who he identified by their names Waweru, Njogu, Mburu and one other. They asked him to assist them in finding a buyer for a motorcycle they were selling. While in court, he was able to identify the appellant and his co-accused at the dock as those that had approached him and further testified that he had known them for a long time. However, from the cross examination of PW2 by both accused persons, it is apparent that he identified the 1st accused in a more elaborate detail than he did the appellant herein. He had previously lived with the 1st accused at his place for over a month, and had occasionally asked PW2 to assist him look for market for a motorcycle. This was not dislodged and no attempt was even made to do so by the first accused. We are surprised that the first accused was acquitted in the face of such strong identification evidence.

PW3 testified that the appellant and his co-accused were among a group of four men who had approached him on 6th March 2013 at around 7 pm at his place of work, looking for a torch. The men intimated that they would pass by later at 1 am which came to pass. Together with his colleagues they kept vigil and at 3.00 am they heard a scream nearby in their vicinity and suspected the same men were the ones committing a crime.

He later learnt that a motorcycle had been stolen and instinctively suspected the four men could have been involved. It was his testimony that the appellant was arrested the following day and further that he had been identified by the complainant PW1, who told him he knew the appellant. In his cross examination by the 1st accused he urged that he identified the appellant herein from his walking style. In

cross examination by the appellant, he reiterated that he had prior knowledge of him.

PW4 was at the patrol base on 8th march 2013 when the appellant was brought in by members of the public and the complainant. It was his evidence that PW1 identified the appellant as being among the people who had robbed him that day.

PW5 was the investigating officer. He testified that PW1 told him that he could identify the assailants by their appearance and also by their names. However, not much was given in this regard. The appellant was brought in by members of the public and PW1 when he was arrested. He noted that PW1 reported that the appellant was indeed armed with a knife and torch and was the one demanding the ignition keys during the ordeal which he took and handed over to his accomplice who was not arrested.

In his defence the appellant denied the offence. He denied knowledge of any of the assailants. He urged that his name was not disclosed in the 1st report according to the investigation diary. According to P.W. 5 the investigating officer, the complainant said in the first report he had identified the appellant and another.

The appellant was not a total stranger to P.W. 1 the complainant who used to see him at Ngenia area. On the night of the robbery, the lights in the complainant's house were on as he was kneading some dough for baking. The appellant held a club and is the one who forced P.W. 1 into his bedroom.

There was communication between the assailants and P.W. 1. They demanded the motor cycle ignition key and asked first for a phone which was surrendered by his wife. In the bedroom the appellant commanded P.W. 1 to enter the bed and threatened to stab him with a knife. He asked for money and took Kshs. 1,400/= from his trouser. The assailants took about 15 minutes in the house. All this while they were not hooded. We are persuaded that there was sufficient time for P.W. 1 to make a positive identification of the appellant free from error.

The appellant was also one of those people who passed by the place of work of P.W 3 to borrow a torch because theirs had low batteries. They did not disclose why they needed a brighter torch. On the same night P.W. 1 was robbed. This evidence considered alongside that of the complainant provides strong circumstantial evidence to link the appellant to the crime.

It is not always the case that stolen property is recovered. The fact that nothing was recovered in the instant case does not absolve the appellant of the crime. The evidence in totality confirms the appellant was involved in committing the offence. The assailants were more than one and the appellant was one of them. They were armed with offensive weapons and in fact the appellant threatened to stab the complainant in his bedroom. The ingredients of robbery with violence under Section 296 (2) of the Penal Code were satisfied.

We see no merit in this appeal which is hereby dismissed.

SIGNED DATED and DELIVERED in court this **1st Day** of July **2014**.

A.MBOGHOLI MSAGHA

L.A. ACHODE

JUDGE

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