



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 49 OF 2013

BETWEEN

SILAS MALIOLO ZAKAYO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kakamega (Chitembwe & Thurairia Jaden, JJ) dated 8th November 2012)

in

H. C. Cr. A. No.1 of 2011)

JUDGMENT OF THE COURT

Silas Maliolo Zakayo, (the appellant) was charged with one count of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code***.

Particulars of the offence were that on 24th October 2009 at Savane Village, Savane sub-location, while armed with a dangerous weapon, namely; a panga, robbed Festus Makachi Musonye of ½ kilogram of sugar, tea leaves, soap and cash Kshs. 200/- all valued at Kshs. 295/- and that immediately before or immediately after such robbery used actual violence on the said Festus ***Makachi Musonye PW 1 (Festus)***.

The brief facts of the case are that on 24th October, 2009, at 6.00 pm Festus was walking home from his casual jobs and had bought ½ kilogram of sugar, soap for Kshs. 20/-, and 25 grams tea leaves. He saw the appellant emerge from a thicket armed with a panga. The appellant attacked him with the panga and cut his head. Festus screamed alerting neighbours who came to the scene. The appellant ran off after snatching his shopping.

John Muhatia, PW 2, heard Festus screaming, and rushed to the scene where he saw the appellant wielding a panga which he had used to cut Festus. As he approached, the appellant ran off. ***Josephat Isutsa, PW 4***, also saw the appellant coming from the direction of the screams dressed in a red coat and holding a panga, and was last seen disappearing through a fence.

Soon thereafter, Joseph Muhatia assisted Festus to Savane Health Centre where he was treated for a deep cut to the head. On 30th October 2009, **Kennedy Mbomji (PW 3)**, the clinical officer at Kakamega Hospital completed the P3 form which he produced in court.

In his defence, the appellant denied committing the offence. He claimed that the sub chief had demanded Kshs. 50,000 from him, failing which he would face the charges of robbery. He also claimed to have a land dispute with Festus.

Upon consideration of the entire evidence, the learned trial magistrate having found the charge against the appellant was proved to the required standard, convicted and sentenced him to death as by law prescribed.

The appellant was aggrieved and appealed to the High Court against both the conviction and sentence. The High Court was satisfied with the decision of the trial court and dismissed the appeal and upheld the conviction and sentence.

The appellant was further aggrieved by the High Court's decision and lodged this appeal setting out eight grounds of appeal which were that the courts below failed to appreciate that there were discrepancies in the evidence; the charge sheet was defective; the prosecution had failed to call essential witnesses; this was a case of identification and not recognition; the medical evidence was insufficient to uphold a conviction; a grudge existed between the appellant and the complainant over land; the prosecution did not prove its case as it was not demonstrated that the appellant was in the company of one or more assailants; and the appellant's alibi defence was not taken into account.

When the appeal came up for hearing, the appellant's learned counsel, **Mr. Omondi**, informed us that he would submit on the grounds that there were discrepancies in the evidence which the courts below failed to take into account; that the lower courts did not consider that a grudge existed between the appellant and the complainant over land; and that the prosecution did not prove the offence of robbery with violence, and would abandon the other grounds.

On the issue that there were discrepancies in the evidence, counsel submitted that the record showed that Festus reported the incident six days after the robbery on 30th October 2009, while the incident had taken place on 24th October 2009. Counsel cited **Terekali & another vs Republic [1952] EA 259** for the proposition that a first report by the complainant is a good test by which the truth and accuracy of a subsequent statement can be gauged. Furthermore, that the P3 form showed that the attack was reported 4 hours after the incident, but the P3 form was completed 13 days from the date of the alleged assault. As a consequence, the injuries could not have been inflicted on the 24th October 2009.

Another discrepancy in the evidence was that Festus had testified that the appellant had cut him with a panga, and when he screamed the appellant had ran away before people came. That according to John Muhatia, he saw the appellant cutting Festus with a panga. In counsel's view, if the appellant had ran away, it was not possible for John Muhatia to have seen the appellant cutting Festus.

Counsel's next complaint was that the lower courts did not consider the appellant's defence which showed that, there was a land dispute between Festus and the appellant, and that the appellant had been framed to deprive him of his land.

Another complaint was that the prosecution had not proved its case, as it was not shown that the appellant was in the company of one or more persons when the offence was alleged to have been committed, that the panga was not produced in court, and that the appellant was not found in possession of the stolen items.

Mr. Ketoo, learned prosecutions counsel for the State, opposed the appeal and submitted that the ingredients for the offence of robbery with violence had been proved. The appellant was armed with an offensive weapon, namely, a panga. Festus stated that the appellant had attacked him, and John Muhatia

saw the appellant attack Festus with a panga whereupon he had sustained head injuries. The incident was reported 4 hours after the attack, and Festus was treated on the same day. The P3 form had been completed by the clinical officer 6 days later owing to the seriousness of the injuries.

On the existence of a grudge, counsel submitted that the trial court considered it to be far-fetched and an afterthought.

This is a second appeal and by dint of **section 361 (1)(a)** of the **Criminal Procedure Code**, this Court can only determine matters of law unless the decision based on the available facts or the courts below have overtly acted on no evidence or on wrong principles in arriving at such decision. See **David Njoroge Macharia vs Republic [2011] eKLR**.

We have carefully considered the evidence and the submissions of counsel and find that the following issues fall for our determination.

- i. *Whether there were discrepancies in the evidence that the courts below failed to take into account;*
- ii. *Whether a grudge existed between the appellant and the complainant over land; and*
- iii. *Whether the prosecution proved the offence of robbery with violence.*

On the complaint that there were discrepancies in the evidence, it was counsel's case that the complainant's case should be treated with circumspection as the incident was alleged to have taken place on 24th October 2009, and was reported 6 days later.

According to Festus, he was attacked and treated for the injuries sustained on 24th October 2009. The treatment notes of Savane Health Centre show that Festus was treated on the same day of the attack. On 30th October 2009, he reported the attack to Police. In his evidence, he stated that he had reported the incident the next day, yet the report was made to the police six days later. No explanation was proffered for the delay in reporting.

John Muhatia testified that he saw the appellant cutting Festus with a panga on 24th October 2009, while Josephat Isutsa saw the appellant who was wearing a red coat leaving the scene holding a panga.

P C Kipkorir Bii, PW 6, testified that on 30th October 2009 following a report he received from Festus at Kakamega Police Station that he had been attacked and injured with a panga by the appellant, he issued him with a P3 form and charged the appellant.

There is no doubt that the attack was reported some six days later. Yet having said that, when the evidence is considered in its totality, there is also no doubt that the appellant attacked and cut Festus on his head on the 24th October 2009. We are satisfied that though there was a delay in making the report, this did not create any doubt that it was the appellant who attacked Festus.

On the contradictions between the evidence of Festus and John Muhatia, Festus testified that when he was attacked he screamed, and the appellant ran away. John Muhatia stated that when he heard screams he ran to the scene where he saw the appellant cutting Festus, and it was when he approached him that the appellant ran off.

On analysis of the evidence, it remains uncontroverted that when John Muhatia ran to the scene he found the appellant having cut Festus who was bleeding from a deep cut to the head, and holding a panga. The only conclusion that could be arrived at is, that the appellant attacked and injured Festus.

As such, we find that the contradictions were immaterial and did not in any way dislodge or displace the evidence, and for these reasons this ground fails.

We turn to the issue that the courts below failed to take into account that a land dispute existed between

the complainant and Festus.

When the trial court considered the appellant's defence it was found to be farfetched and an after thought as no relationship could be established between the demand by the assistant chief for an amount of Kshs. 50,000/- the land dispute, and the charges for the alleged assault on Festus. No particulars of the land in question, or reasons for the alleged dispute were provided.

We agree with the trial court that the defence advanced, was illogical and did not in any way attest to the existence of a grudge between the complainant and the appellant or for that matter with any of the prosecution witnesses. As a consequence this ground fails.

The final issue was that the prosecution had not proved its case, in particular that it was not proved that the appellant was in the company of more than one assailant, and that he was not found in possession of the weapon used to assault Festus, or the stolen items.

In addressing this issue, we will begin by setting out what constitutes the charge of robbery with violence under **section 296 (2)** of the **Penal Code**. The case of ***Johana Ndungu v. Republic Criminal Appeal No. 116 of 1995 (unreported)*** sets out the requirements in these words:-

“(i) Therefore, the existence of the afore described ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section.

(1)If the offender is armed with any dangerous or offensive weapon or instrument, or

(2)If he is in company with one or more other person or persons, or

(3)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.”

The Court is not required to look for the presence of all three ingredients, as proof of one of the ingredients would suffice to secure a conviction. Where the court reaches a conclusion that immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person, the offence under **subsection (2)** is proved. Both the trial court and High Court, found that grievous harm was inflicted on Festus following the vicious attack by the appellant with a panga, where he sustained a deep cut to the head, and the subsequent robbery of the ½ kilogram sugar, tea leaves, soap and cash Kshs. 200/- all valued at Kshs. 295/-.

The evidence showed that the appellant attacked and cut Festus on the head with a panga. The treatment notes, the P3 form and the evidence of Kennedy Mbuji confirm that he sustained injuries presumably from a sharp object. The evidence points to the appellant as having attacked and seriously injured Festus while armed with a dangerous weapon, in the form of a panga.

As such, we are satisfied that the ingredients for robbery with violence were established, and that the prosecution proved its case to the required standard.

For the reasons aforestated, the appeal has no merit, and is dismissed.

It is so ordered.

Dated and delivered at Kisumu this 12th day of February, 2016.

D. K. MUSINGA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

**I certify that this is a
true copy of the original
DEPUTY REGISTRAR**