



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJA.)

CRIMINAL APPEAL NO. 338 OF 2011

BETWEEN

LIVINGSTONE MUSAMBI OKUMU APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kitale (Ibrahim, Karanja, JJ.) dated 21st October, 2011

in

H. C. CRA. NO. 79 OF 2005)

JUDGMENT OF THE COURT

1. The appellant faced a charge of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. It was alleged that on 8th April, 2004 at Mitune Estate in Trans Nzoia District, the appellant together with others not before court, robbed **Godfrey Juma, PW 1**, of K.Shs.2,000/= and at or immediately before or immediately after the time of such robbery he wounded his victim with a knife.
2. After a full trial where the prosecution called five witnesses, the appellant was convicted for attempted robbery with violence contrary to section **297 (2)** of the **Penal Code** and sentenced to death.
3. The appellant was dissatisfied with that conviction and sentence and preferred an appeal to the High Court which was unsuccessful. Undeterred, the appellant moved to this Court on a second appeal.
4. The brief facts of the prosecution case were that on the material day at about 3.00 a.m., PW 1 arrived at his home on a motor bike. Shortly thereafter three people showed up and requested him for assistance to take a sick person to a hospital. PW 1 declined to offer them any assistance and as he was knocking on the bedroom window to wake up his wife, PW 1 was attacked by the three people.
5. One of the assailants held PW 1 by the neck as the other two searched his pockets. PW 1 screamed and neighbours came to his aid. The two assailants who were ransacking his pockets ran away but PW 1 held

tightly on to the one who was holding his neck. The robber stabbed PW 1 with a knife and occasioned him some injuries.

7. The complainant's neighbours who responded to his distress call apprehended the robber, the appellant herein, and took him to Kitale Police Station.

8. **Celestine Were, PW 2, and Paschal Mwolo Wanyama, PW 3**, who were neighbours of PW 1, and who were among those who went to his rescue, corroborated the evidence of PW 1 as to how the appellant was arrested.

9. In his brief defence, the appellant stated that on the material day he woke up at 5.00 a.m. to go to his place of work. Along the way he met a group of people who were running. He was accosted by the people who claimed that he was a thief.

10. **Mr. Mbeja**, learned counsel for the appellant, argued the five grounds of appeal that are contained in the appellant's self-drawn memorandum of appeal that:

(i). The learned judges of the High Court erred in law by relying on the evidence of PW 1 to confirm the appellant's conviction when PW 1's wife had not been called to corroborate his evidence.

(ii). The complainant did not testify that he was robbed of KShs.2,000/=.

(iii). PC Valwa who took the appellant to Kitale Police Station was not called as a prosecution witness.

(iv). The owner of the motor vehicle that carried the appellant was not called as a prosecution witness.

(v). The investigating officer was not called as a prosecution witness.

11. In his brief submissions, Mr. Mbeja contended that there was no proof that anything was stolen from PW 1, and therefore no robbery was established. He further lamented that failure to call several potential prosecution witnesses as highlighted in the memorandum of appeal weakened the prosecution case considerably, and the trial court ought to have found that the case had not been proved beyond reasonable doubt.

12. **Miss Oduor**, Senior Prosecution Counsel, opposed the appeal. She submitted that it was not necessary to call the wife of PW 1 as a prosecution witness because her evidence was not material. Similarly, the evidence of P. C. Valwa would not have been of any evidential value as he never went to the scene of crime.

13. As regards failure to call the investigating officer, Miss Oduor submitted that such omission cannot automatically lead to acquittal of an accused person if there is sufficient evidence to prove the charge. She cited this Court's decision in **HARWARD SHIKANGA & ANOTHER V REPUBLIC, [2008] eKLR** in support of that submission.

14. Counsel supported the trial court's finding that the appellant was guilty of attempted robbery, appreciating the fact that there was no proof of theft of anything.

15. We have considered the record of appeal, the grounds of appeal and the submissions by counsel. Regarding the prosecution's failure to call several potential witnesses, **section 143** of the **Evidence Act** states as follows:

“143.No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of a fact.”

16. It is therefore upto the prosecution to determine who to call in support of its case. See **CLIFF BIKERI MOKUA & ANOTHER V REPUBLIC [2014] eKLR**.

17. We cannot find fault with the prosecution for failing to call the wife of PW 1 as the record does not show that she played any significant role or witnessed anything. Likewise, P. C. Valwa merely took the appellant to Kitale Police Station after re-arresting him, following his apprehension by PW 1's neighbours; who also handed over to him the knife that the appellant had stabbed PW 1 with.

18. As regards failure to call the investigating officer, we agree with Miss Oduor that given the circumstances of this case, such failure did not occasion the appellant any injustice. In **HARWARD SHIKANGA & ANOTHER V REPUBLIC (supra)**, this Court held that failure to call an investigating officer cannot automatically result in an acquittal. Each case has to be considered on its own circumstances.

19. The appellant herein was caught in the very act of attempting to rob PW 1, who was much stronger than his assailant and managed to hold on to him firmly while screaming for help until his neighbours went to his rescue. There was therefore no possibility of any mistake in identification of the appellant.

20. The learned trial magistrate was perfectly right in convicting the appellant for attempted robbery as he had assaulted PW 1 with intent to steal, and was in the company of two other persons.

21. We find no merit in this appeal and we hereby accordingly dismiss it in its entirety.

DATED & Delivered at Eldoret this 29th day of October, 2015

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR