



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, (PCA), SICHALE & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 452 OF 2010

BETWEEN

JOSEPH MUTAVI MULAVU..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Machakos, (Lenaola & Ochieng, JJ) dated 15th December, 2009

in

HC. CRA. NO. 54 OF 2002)

JUDGMENT OF THE COURT

The appellant **JOSEPH MUTAVI MULAVU** together with **SIMON KYALO KIILU, JOSEPHAT KISILU MULINGE** and **JOHN MUSYOKI MUOKI** were charged with the offence of robbery contrary to section 296 (2) of the Penal Code. The particulars were that on the night of 29th January, 2001 at Miwani Estate, Mumbuni Location in Machakos District within Eastern Province, jointly with others not before the court while armed with offensive weapons namely, pangas, rungs, hammers and iron bars robbed the deceased **RUTH NDUKU NDUNDA** of one sewing machine, two bed sheets, one mosquito net, one stove, one blanket, a pair of rubber shoes, five *sufurias*, assorted household utensils, plates, spoons, cups and assorted clothes all valued at Kshs. 20,000/= and at or immediately before or immediately after the time of such robbery offered (*sic*) personal violence to the deceased **RUTH NDUKU NDUNDA**.

The trial proceeded before **J. R. NYAGA** the then Senior Principal Magistrate at Machakos. The prosecution called a total of 12 witnesses. In a ruling delivered on 22nd November, 2001 the trial court found that the 3rd and 4th accused had no case to answer and acquitted the two under Section 210 of the Criminal Procedure Code. The first accused (the appellant herein) and the second accused were found to have a case to answer. In their defences, each elected to make sworn statements of defence. In a judgment delivered on 8th March, 2002, the trial court found the second accused not guilty and acquitted him under Section 215 of the Criminal Procedure Code. The Learned Senior Principal Magistrate however returned a verdict of guilty against the appellant and sentenced him to death as by law prescribed. The appellant

was dissatisfied with the conviction and sentence and filed an appeal in the High Court. On 15th December, 2009, Lenaola and Ochieng, JJ dismissed the appellant's appeal, thus precipitating the appeal before us.

In his grounds of appeal filed on 2nd February, 2010, the appellant raised six grounds of appeal which can be summarized as follows; that the first appellate court failed to re-analyze and re-evaluate the evidence tendered in the trial court; that he was not accorded a fair trial; that the prosecution did not prove the charge against him beyond any reasonable doubt; that the trial court failed to consider his evidence and finally that Section 211 of the Criminal Procedure Code was not complied with.

During the plenary hearing before us on 2nd July, 2015, Mr. Nyawade learned counsel for the appellant abandoned the ground that Section 211 of the Criminal Procedure Code was not complied with. In his submissions before us, counsel faulted the conviction and sentence and condensed the appellant's grounds of appeal into two that is failure to re-analyze and re-evaluate the evidence and failure to prove the charge against the appellant beyond any reasonable doubt. He relied on the following authorities:-

1. **Patrick & Anor v Republic [2005] 2 KLR 162**
2. **Ouma Obenjo & Anor v Republic [2010] eKLR**
3. **Oluoch v Republic [1985] KLR 549**
4. **Ganzi & 2 Ors v Republic [2005] KLR 52**
5. **Gichangi & 3 Ors v Republic [2007] 2 KLR 177**
6. **Woolmington v DPP (1935) AC 462**

Mr. Orinda the learned Assistant Director of Public Prosecutions opposed the appeal on the basis that this being a second appeal, (it is) only matters of law that should be considered. Contrary to the assertion by the appellant, Mr. Orinda was of the view that the evidence against the appellant was overwhelming.

This is a second appeal before us. As pointed out by Mr. Orinda the position in law as regards a second appeal is that this Court is restricted to consider matters of law only. As this Court had stated many times it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the finding.

In **DAVID NJOROGE MACHARIA V R [2011]e KLR** this court said:

“Only matters of law fell for consideration and this court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence or the courts below are shown demonstrably to have acted on wrong principles in their findings.”

The thrust of the appellant's appeal was that the High Court failed to re-evaluate and re-analyze the evidence tendered in the lower court. This is the same as saying that the charge against the appellant was not proved beyond any reasonable doubt as the appellant's argument as we understand it is that if the two courts had properly re-analyzed and re-evaluated the evidence it should have found that the evidence was insufficient and hence the charge against the appellant was not proved beyond any reasonable doubt. Having restated our mandate in a second appeal, we shall proceed to determine if the appellant's complaint has any basis. The evidence adduced in the trial court was that **PW 1 NICHOLAS MUTISO MUTINDA** lived in an adjoining room to the deceased's room. They were both tenants of Mwangangi (PW10). On the night of 28th and 29th at about 3 a.m. PW1 heard the deceased's door being broken. He attempted to get out only to find his door locked from outside. He got out of his house through a window

to call PW10. On coming back to the deceased's room, they found her dead in a pool of blood. **PW2 NICODEMUS KYALO NDUNDA** was a son of the deceased. He got to know of the tragic death of his mother on 30th January 2014. On 4th February 2001 at Machakos police station he identified a blanket and two *sufurias* belonging to his mother. He had bought the blanket in December 1999 and he wrote on it "for Mum" as he wanted to distinguish it from the one he was using with his wife. He appended his signature on the writing. He also witnessed his mother sew that part of the blanket with red stripes using white thread. As for the *sufurias*, he identified them as belonging to his mother as the two had cut marks for purposes of identification as the *sufurias* used to be washed in a common area used by other persons as well. He knew of the marks as when his mother was ailing, he often cooked for her. The blanket and the two *sufurias* were recovered from **PW5 DAMARIS KOSE MUTEVU** and **PW6 KOSE MUTEVU** who were wife and husband respectively.

According to PW6, the appellant had borrowed Kshs.200 from him on 29th January 2001 and left behind the items as security. PW6 knew the appellant as the appellant used to patronize his hotel. These items which were then in a paper bag were handed to PW5 who had found her husband (PW6) with the appellant. On 3rd February 2001 when police came calling, she handed over the blanket and the two *sufurias*. After his arrest, the appellant led PW7 **Pc MICHAEL KIONGOSI** and **Pc JOSEPH KIPTOO** to where he had left the blanket and the two *sufurias*. When they got there the appellant asked the then 2nd accused to go to PW6 for purposes of retrieving the blanket and *sufurias*. The appellant remained in the land rover as he was having leg injuries which he sustained whilst scaling a wall in a bid to thwart his arrest. It was not the 2nd accused who knew where the exhibits were but he was acting under the directions of the appellant. The appellant was arrested by **PW3 TIMOTHY MBITHI MAINGI** who was in company of **BONIFACE KIMATHI (PW4)** and others as they were patrolling the area. The date of arrest was 2nd February 2001. It was the evidence of PW3 that the appellant on seeing them fled away, attempted to scale a wall and injured himself. The appellant was subsequently re-arrested by **PW1 Pc MICHAEL KILONGOSI**. In his unsworn statement the appellant denied committing the offence. He told the court that he was arrested by a group of persons who were armed with bows, arrows and stones. He knew nothing of the charge against him.

The first appellate court found, and rightly so in our view, that:

"PW2 identified one blanket and two sufurias. He had marked the blanket with the words 'for mum', and he also signed the label. It is those two markings that enabled him to positively identify the blanket. As for the sufurias, there were very many at the police station. But PW2 identified the two sufurias from cuts which he and his mother had made on the edges, using an axe. He explained that it was their regular habit to mark all items, as his mother lived in a plot where many other people were also resident. In the circumstances, unless sufurias were marked, it was difficult to identify them, especially considering that the washing of items on the plot was done at a common place."

In our view we could not agree more with the summation of the 1st appellate court that PW2 positively identified his deceased mother's blanket and the two *sufurias*.

Having positively identified the blanket and the two *sufurias*, we are satisfied that these items belonged to the deceased. The same items were taken to PW5 by the appellant who obtained Kshs.200 from PW5. When the appellant was arrested he led the police to PW5's place where the items were recovered. In view of the above evidence, we are satisfied that the first appellate court properly re-evaluated and re-analyzed the evidence. We too find that the conviction of the appellant was safe.

Accordingly, we find no merit in this appeal. It is dismissed.

Dated and delivered at Nairobi this 16th day of October, 2015.

P. KIHARA KARIUKI, (PCA)

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR