



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK JJ.A.)

CRIMINAL APPEAL NO. 227 OF 2012

BETWEEN

GERALD MUCHIRI MATHENGE 1ST APPELLANT

JOSEPH KANJA MWANIKI 2ND APPELLANT

SAMUEL MUGEREKI MATHENGE..... 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nyeri

(Sergon & Wakiaga, JJ.) dated 30th May 2012

in

H. C. Cr. Appeal No.362 of 2007)

JUDGMENT OF THE COURT

1. The appellants Gerald Muchiri Mathenge, Joseph Kanja Mwaniki and Samuel Mugereki Mathenge were jointly charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars were that on 3rd December, 2006, at Kariguini village in Nyeri District within Central Province jointly with others not before court, while armed with dangerous weapons namely sharpened crow rod robbed William Kingori Wachira cash Ksh. 9,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said William Kingori Wachira.
2. The prosecution case was based on the testimony of the complainant PW1 William Kingori Wachira and PW2 Joseph Wambugu Mugereki.
3. PW1 William Kingori Wachira testified as follows:

“I am a businessman. I operate a bar known as Umoja bar at Kariguini. I stay at Kariguini. I am 24 years old. I do recall on 3rd December 2006 at 11.30 pm I was from work heading to my house when I met Samuel Mugereki and Gerald Muchiri with

Kanja. The three accused persons are in the dock. I know all the three accused persons; they are my neighbours. I know the 1st accused as we attended the same school although he was ahead of me in class. He is Kanja. I also know Samuel, he is my neighbor. We were raised together. The 3rd accused Gerald Muchiri hails from the same village and we were in the same school but he was ahead of me in class. On 3rd December 2006 I met the three accused persons and there was a fourth person who I did not recognize or identify. When I met the four, the 1st accused got hold of me on my neck with lockers arm locking me with his elbow. The 2nd and 3rd accused hit me using fists while the 1st accused was still holding me “ngeta” (hold the neck by the arm). They told me you son of the teacher today we will kill you. They continued to assault me. At first they assaulted me using their fists then I held the 2nd accused to prevent him from assaulting me and I held him so hard. The 3rd accused had a container pricked then squeezed its contents into my hand; ...he poured the contents into my left hand. I got paralyzed. I fell down they robbed me after which they ran away. When the three accused were running away I called out their names but they escaped. I screamed and Joseph Wambugu was the last customer I had sold to him a cigarette before locking the bar came. Before he reached his home he heard screams and he came back and found me on the ground and he called my parents. I was taken to Nyeri Police Station and referred to Nyeri Provincial General Hospital. I was admitted for four months. While undergoing treatment my hand was amputated.I was robbed Ksh. 9,500/=. The 3rd accused injected me with an acid on my hand; he also injected the acid into my buttocks. I have healed on my buttocks.... It was at night but I recognized all the accused well, there was full moonlight and it was quite bright. I saw the syringe with the injecting needle which I was pricked on the left hand and I let the 2nd accused go and when I kept holding the 2nd accused, the 3rd accused injected the acid into my buttocks...”.

4. PW2 Joseph Wambugu Mugereki testified as follows:

“I am a driver. I do recall on 3rd December 2006 at about 11.30 pm when I heard screams. I ran to the direction of the screams and I met Kingori (PW1). I asked him why he was screaming. He told me he was burning but I could not see any fire; he kept on screaming saying he was burning. He had burns on the left hand, chest and buttocks. He was lying down. As he held his hand, the flesh was peeling out. PW1 was in extreme pain, he did not say who burnt him with chemical. He later named the attackers but not immediately. I later visited him in hospital and he told me that he was attacked by Kanja, 1st accused; Mugereki 2nd accused and Gerald 3rd accused. I know all the three accused persons very well; they are my neighbours. The 2nd and 3rd accused are my cousins, they are brothers. I do not have a grudge with any of the three accused persons.... I did not find anything at the scene. PW1 was hurting in pain and his flesh was melting off. When PW1 was screaming many people came and flashed a torch at him but he only screamed that he was burning. We could recognize him by his voice and the darkness was very slight as there was moonlight”.

5. PW3 Benjamin Wachira Wambugu testified that while they were on their way taking the complainant PW1 to Nyeri Police Station, PW1 told them that he had been attacked by Samuel Mugereki, Gerald Mwaniki and Kenja Muchiri.
6. In his defence, the 1st appellant testified that he knew the complainant and stated he was framed up and charged with the offence. The 2nd appellant testified that the complainant’s parents could have instructed PW1 to fix him though he had no grudge with the complainant. The 3rd appellant in his defence testified that his father and the father to the complainant had a grudge and he was framed over a land dispute that exists between the fathers.
7. Upon considering the prosecution evidence and the defence testimony, the trial magistrate convicted the appellants on the charge of robbery with violence and sentenced them to death. The High Court upheld the conviction and sentence. Aggrieved by the decision, the appellants have

- lodged this second appeal and are represented by learned counsel Mr. J. N. Nderi while the State is represented by the Senior Prosecution Counsel Mr. J. Isaboke.
8. Counsel for the appellant relied on a supplementary memorandum of appeal raising the following grounds:
- i. ***That the learned trial court and the first appellate court erred in law in failing to find that the evidence adduced on identification of the appellants based on recognition did not meet the threshold required as to be free from error to warrant conviction of the appellants;***
 - ii. ***That the learned Judges failed in their duty to subject the evidence adduced to a fresh and exhaustive analysis and scrutiny as is expected of the first appellate court thereby failing to appreciate there was no evidence to find and sustain a charge of robbery with violence as the requisite ingredients to prove such a charge were absent.***
9. Counsel for the appellant elaborated on the grounds of appeal and emphasized that the key issue relates to identification of the appellants. It was submitted that the alleged offence was committed at 11.30 pm during darkness and the conditions were not favourable for an identification that was free from error; that the learned Judges in their re-evaluation of the evidence came to a wrong conclusion; that the intensity of the moon light was not interrogated; that the trial magistrate and the learned Judges erred in shifting the burden of proof and requiring the appellants to explain and prove their defence; that the evidence of PW2 shows that the moonlight was not bright when he testified that torches had to be used to illuminate the scene of crime. That PW1 did not give the names of his attackers in the first instance when PW2 came to his aid; that the trial court did not warn itself on the dangers of relying on the testimony of a single identifying witness; that the trial magistrate erred in law in arriving at the conclusion that the defence testimony was evasive and he shifted the burden on the appellants to prove their defence. Counsel further submitted that the ingredients for the offence of robbery with violence was not proved since no evidence was led to prove the theft of anything; that PW1 merely indicated that he lost Ksh. 9,500/= but he did not say how he lost it. It was submitted that had the learned Judges properly re-evaluated the evidence afresh, they ought to have come to the conclusion that the charge disclosed was one of assault and not robbery with violence.
10. The State in opposing the appeal submitted that the prosecution case was proved to the required standard; that the issue in this appeal is one of recognition and not identification under unfavourable conditions. That PW1 clearly testified that he recognized the appellants as his attackers; that PW1 was in severe pain, thus he could not immediately speak and give the names of his attackers; that after medical attention in hospital, PW1 gave the names of the appellants as his attackers.; that PW3 testified the complainant gave the names of the appellants as the attackers. On the conditions favourable for positive identification, Mr. Isaboke submitted that PW1 testified there was moonlight and PW2 also stated that the darkness was slight. The State submitted that the learned Judges properly re-evaluated the evidence on record and were satisfied that all ingredients of the offence were proved; that the complainant was attacked with more than one person, violence was used on the complainant and a weapon in the form of a crow bar was used for “ngeta”, a chemical was poured on the complainant and the sum of Ksh. 9,500/= was stolen. It was submitted that both the trial court and the learned Judges did not err in considering and evaluating the defence testimony. That the appellants in their defence never said anything about the events and occurrences of 3rd December, 2006, and the prosecution case was never shaken.
11. We have considered the rival submissions by counsel. We have examined the record of appeal and the judgment of the High Court. This is a second appeal which must be confined to points of law. As was stated in ***Kavingo – v – R, (1982) KLR 214***, a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. This was further emphasized in ***Chemagong vs. Republic, (1984) KLR 213*** at page 219 where this Court held:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on

which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)”.

12. The evidence against the appellants is primarily by PW1, PW2 and PW3 as reproduced above. Evidence of visual identification should always be approached with great care and caution (see ***Waithaka Chege – v- R, [1979] KLR 271***). Greater care should be exercised where the conditions for a favourable identification are poor and where identification is by single witnesses (***Gikonyo Karume & Another – v – R, [1900] KLR 23***). Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See ***Abdalla bin Wendo & Another – v- R [195] 20 EACA 166; Wamunga – v- R , [1989] KLR 42; and Maitanyi – v- R, 1986 KLR 198***).
13. In the instant case, the trial magistrate expressed himself as follows on the issue of recognition/identification of the appellants by PW1.

“The evidence of the complainant PW1 is that he recognized his attackers as the 1st, 2nd and 3rd accused persons; he described what each of the three accused persons did during the robbery. On the other hand, the three accused contend that they were framed...From the evidence adduced, it is obvious that the complainant was attacked and injured. There is no dispute that he was robbed. PW2 who was the first to arrive at the scene did not see the attackers...There is no doubt that the circumstances prevailing when the robbery took place were difficult. While I am aware that the case before me is that of recognition, PW 1 told the court that he struggled with his attackers as he resisted the attack. This court has had the benefit to observe the demeanor of all the witnesses and it is satisfied that the 1st, 2nd and 3rd accused were evasive in their defence. The court finds that the three accused were less candid in their defence. On the other hand, the court is satisfied that PW1 was a truthful witness and his evidence cogent. He disclosed to those who visited him in hospital the identity of his attackers...I am convinced by the evidence of PW1 that he positively recognized his attackers, he was candid that he was only able to recognize three of the four attackers; there was a fourth suspect not recognized and or identified. I am well aware of the dangers of relying on the evidence of one witness who recognized the 3 accused persons in circumstances which were difficult and for this reason I proceed to warn myself of the dangers of relying while I am dealing with the evidence of PW1. Having directed myself and warned myself I do safely proceed to rely on the evidence of PW1 which is corroborated by the struggle at the scene. I reject the defenses of all the 3 accused persons. Accused 1, 2 and 3 were positively recognized by PW1 at the time of the robbery”.

14. The learned Judges of the High Court in their re-evaluation of the evidence on recognition/identification of the appellants stated as follows:

“The trial magistrate was very clear in his mind that the case before him was that of recognition and that PW1 told the court that he struggled with his attackers as he resisted the attack and grabbed the 3rd appellant by whom he was incapacitated by the chemical attack (sic)... As regards the strength of the source of the moonlight, we have noted that PW 2 under cross-examination stated “darkness was very slight there was moonlight”. We are therefore unable to interfere with the trial court’s finding based on its observation of the appellants herein”.

15. On our part, we agree with the trial magistrate’s observations as confirmed by the High Court that this was a case for recognition. The evidence linking the appellants to the crime was recognition by the complainant. The credibility of the complainant was not shaken and no grudge was proved to exist between the appellants and any of the prosecution witnesses. At the earliest opportunity when the excruciating pain inflicted upon him had subsided, PW1 gave the names of the appellants as his attackers. There is nothing to suggest that these names were an afterthought. In ***Anjononi & Others vs. Republic, (1976-80) 1 KLR 1566*** at page 1568 this Court held:

“...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other”.

16. We are satisfied that PW1 recognized the appellants. We are further satisfied that all ingredients for the offence of robbery with violence under **Section 296 (2)** of the **Penal Code** were proved. For a charge of robbery with violence to be proved, it is essential that the prosecution must lead evidence that the appellant was accompanied by at least one other person. In the instant case, there was more than one person who attacked the complainant; the attackers were armed, actual violence was used against the complainant and Ksh. 9,500/= was stolen. The record shows that the trial magistrate warned himself on the dangers of relying on a single identifying witness. The defenses raised by the appellants do not affect their guilt and culpability and did not dent the prosecution case. For the foregoing reasons, the totality of our consideration of the grounds of appeal and the issues of law raised is that we find this appeal has no merit and is hereby dismissed.

Dated and delivered at Nyeri this 9th day of July, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR