



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: BOSIRE, WAKI & KARANJA, JJ.A.)

CRIMINAL APPEAL NO. 155 OF 2009

BETWEEN

BENARD MUTUA MATHEKAAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from the judgment of the High Court of Kenya at Malindi (Njagi & Omondi JJ.) dated 22nd July 2009

in

H.C.CR.A. NO. 120 OF 2007

JUDGMENT OF THE COURT

This is the second and probably the last appeal by **Benard Mutua Matheka**, the appellant, against his conviction for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. The main issue in the appeal before us is identification. There are three other grounds which his counsel, Mr. Nyabena, argued before us, notably:

- (1) The prosecution failed to call essential witnesses.
- (2) The appellant was not given any opportunity to offer statements in mitigation of sentence.
- (3) The sentence meted out to the appellant was excessive in the circumstances.

Under **section 361 (1)** of the Criminal Procedure Code, only issues of law fall for consideration, this being a second appeal from a subordinate court. In considering such an appeal the guiding principle is that this Court will normally not interfere with the decision of the first appellate court unless it is apparent that on the evidence presented and accepted by the trial court, no reasonable tribunal could have reached that conclusion. Additionally, the court has loyalty to accept the findings of fact of the two courts below, provided they are based on acceptable and clear evidence which was adduced at the trial. (See **M'Riungu v. Republic** [1983] KLR 455).

In the appeal before us the identification of the appellant was by a single witness in broad daylight. The robbery complained of occurred as **Daniel Kaingu Joseph** (PW1), a pastor with Agape Fellowship Centre, Malindi, was pushing his bicycle along a path from Casuarina to Kisumu Ndogo. He was confronted by two people who ordered him to “*Toa Pesa*” (produce money). When he responded that he did not have any money, one of them, whom he identified at the trial as the appellant, grabbed his bicycle and tried to take it away from him. There was a tussle over it as the complainant did not want to let go. At that point a third person emerged from a nearby thicket armed with a knife, which he placed against the complainant’s stomach with a threat that if he did not produce some money he would stab him with it. The complainant pleaded with him that he was a pastor and did not have any money. One of the robbers held him by the neck, and fearing for his life, he released the bicycle. At that point he heard one of the robbers saying “*Mutua chukua baisikeli*” a statement which the complainant said was repeated about four times. The bicycle was taken away and has not to date been recovered.

The robbers, according to the complainant also took his mobile phone, make **Sendos 300**, worth about Kshs.5000 and Kshs.5000 in cash. They then escaped. The matter was later reported to the police. The complainant told the police that he would be able to identify his attackers if he saw them, and for that reason the police told him to be on the look out in case he was able to see any of them.

Indeed on the 4th day after the robbery, the complainant saw two people, both of who he recognized as having been among his attackers at the time he was robbed of his bicycle. He was then in the company of friends. With their assistance he tried to have the two arrested. They succeeded in arresting one but the other escaped. The one who was arrested was the appellant in this appeal. When the appellant saw the complainant, he is alleged to have remarked “*oh it is you Mzee, come and pick your items.*” A mob built up and wanted to stone the appellant but he pleaded “*Pastor save me from the people. They want to kill me.*” The appellant was taken to the Malindi Police Station where he was later charged as herein stated.

The appellant’s trial dragged on for a considerable length of time due to several adjournments for various reasons, including non-availability of witnesses. An issue has been raised in the appeal before us that notwithstanding the various adjournments to enable the prosecution to get its witnesses, some essential witnesses were not called and the failure to call them was prejudicial. We will revert to this issue later on in this judgment.

In his defence the appellant gave sworn evidence and stated that the complainant and himself had a business transaction, in which he sold curios to a European who was introduced to him by the complainant, at a price of Kshs.9,000/= and 800 Euros. The complainant demanded commission which the appellant declined to give. A dispute arose and almost degenerated into a fight. The appellant relented and gave the complainant Kshs.3000/=. They parted company in the belief that the matter was settled. However on 11th May 2006, about five days after the business transaction, the complainant met him at a kiosk and with the help of his friends who were drunk caught hold of him and demanded more money. A quarrel ensued in the course of which there was a scuffle. He was arrested and taken to Malindi Police Station where the complainant had already made a report about a theft from him. He denied the offence. He stated that he knew the complainant to be a watchman. It is however noteworthy that in his evidence the complainant stated that he was a pastor and also worked as a clerk with Flamingo Villa Hotel.

As stated earlier in this judgment the main issue is identification. The robbery allegedly took place at about 2.15 p.m. It was broad daylight. The complainant testified he had the opportunity of observing his attackers. He had a tussle with them and therefore was quite close to them. The complainant gave a detailed account as to what happened during the robbery. A name was mentioned. Coincidentally the appellant is known by that name. At the time of arrest the appellant is said to have referred to the complainant as “*pastor*” implying familiarity. The complainant in his evidence denied he knew the appellant before. One would have believed that the appellant might have known the complainant in the course of his pastoral work. However, the appellant is alleged to have said much more. He invited the complainant to go and pick his items. That removed the notion that the appellant might have known the complainant in the course of his pastoral work or otherwise than in the course of the robbery complained of.

The appellant did not challenge the complainant on the utterances allegedly made by him, the appellant. Those were incriminating remarks which when taken with other evidence show that the complainant's identification of the appellant was correct.

There are however certain aspects of this appeal which need careful consideration. We earlier stated that certain essential witnesses were not called to testify. As a general rule the prosecution is supposed to call all witnesses whose evidence is material for the just determination of a case, whether or not it is favourable to their case. They are not obliged to call more witnesses than are necessary for the just determination of the case. (See **Bukenya & Others vs. Uganda** [1972] EA . The court may however draw an adverse inference that an essential witness who is not called to testify would have testified adversely against the prosecution case, unless of course reasonable cause is shown for not calling that witness. There is however an additional qualification. An adverse inference may only be drawn where the evidence in support of the prosecution case is barely sufficient to prove its case. Differently put, where the prosecution case cannot be said to have been proved beyond any reasonable doubt.

Mr. Nyabena for the appellant in his submissions before us introduced another angle to the case. He cited the Bible – the Book of **Deutonomy 17:6**; which as material, states that:

“On the evidence of two witnesses or of three witnesses the one who is to die shall be put to death, a person shall not be put to death on the evidence of one witness.”

The Bible quotes from Mosaic Law. When this was pointed out to Mr. Nyabena, his response was that our law has its origin from the English law, and the English law had also originated from Mosaic Law. That in our view, may well be so. That, however, is not part of the law of Kenya presently. What we have is a coded law and the law of evidence (section 143 of the Evidence Act) which provides that the testimony of one witness, if believable, is sufficient to sustain a conviction even in a case in which a conviction attracts the death penalty, as in the case before us.

Who are the witnesses who did not testify and whose evidence according to Mr. Nyabena was crucial before a conviction.

The police officer who arrested the appellant did not testify. But how important was his evidence ? According to the evidence on record the appellant was arrested by the complainant himself who was accompanied by friends. Would his testimony have added anything to the prosecution case? We do not think so. All he did was to re-arrest the appellant.

Mr. Nyabena also submitted that at least one of the complainant's friends with whom he arrested the appellant should have been called by the prosecution as a witness. We think that it would have been desirable. However, is the absence of that evidence *per se*, a sufficient reason to draw an adverse inference against the prosecution case ? That would be so if the trial and first appellate courts did not believe the complainant. Otherwise calling the friend or friends as witnesses would only have meant calling a superfluity of witnesses. Unless where the law expressly says so there is no specific number of witnesses necessary to prove a fact. (**Abdulla Bin Wendo & Another vs. R.** [1953] 20 EACA 166 and **Charles Maitanyi. V. R. [1986]** 1 KLR at P.198). A fact may be proved by the testimony of one witness provided where the issue of identification of a suspect is concerned the court is obligated to exercise caution before convicting on such testimony.

The trial Magistrate in his judgment rendered himself thus on the credibility of the complainant:

“I find the complainant truthful, and his version of the events to be factual account and that by accused to be untruthful.”

The High Court, on first appeal stated about the trial magistrate's judgment thus:

“We decline to make an adverse finding against the prosecution. The learned trial magistrate judgment was well reasoned out, he considered both evidence by prosecution as well as appellant's

defence, and gave reasons as to why he believed complainant and why he rejected the defence evidence the ingredients of robbery with violence contrary to section 296 (2) were established – one need not suffer injury for it to qualify as violence.”

Those are concurrent findings of fact and as stated earlier this Court has loyalty to accept those findings in absence of a proper basis for rejecting them. They are based on evidence which was properly received. That being our view of the matter, there is no proper basis for making an adverse finding against the prosecution for their failure to call as witnesses, the complaint’s friends or at least one of them.

Then there is a witness whose name was given as **Karisa**. Mr. Nyabena took us through the record of instances when the prosecution sought an adjournment to call certain witnesses. On 13th March 2007, the prosecutor told the court that only one witness was remaining and gave his name as **Jackson Karisa**. It was said then that the witness did not attend court because he lost a relative and he had travelled to his rural home for burial. The court granted the prosecutor’s request for adjournment.

On the resumed hearing of the case on 5th June 2007, he did not attend forcing the prosecutor to apply for adjournment and a witness summons. The witness did not attend again on 21st June 2007 and this time the court prosecutor was constrained to apply for a warrant of arrest which the court duly ordered to be issued. The witness was neither arrested nor did he appear in court voluntarily to testify. The investigating officer too failed to attend court on 24th July 2007, when he was expected to. The court prosecutor successfully applied for adjournment. He also requested for witness summons but there is no note that the request was acceded to. On 13th August 2007, and one other date preceding it none of the two witnesses appeared, and there is a remark by the court prosecutor that they could not be traced. He was forced to close the prosecution case.

There is one curious statement attributed to the appellant concerning Karisa, which we noted. On the day the prosecutor applied for a warrant of arrest against Karisa, the appellant remarked thus soon after the court prosecutor told the court that the witness had not come:

“Accused – the prosecutor is new – The witness wont come.”

Thereafter the court prosecutor applied for a warrant of arrest. The remarks attributed to the appellant were suggestive of the fact that there was some interference with prosecution witnesses. Perhaps the trial magistrate should have made an inquiry as to the basis of those remarks in view of the several previous adjournments of the case to obviate the accused possibly benefitting from his own criminal act. The magistrate having not done so, we have made reference to that incident merely for purposes of completeness of the history of this case.

We have considered the failure to call Karisa and the investigating officer, and say this. We do not know what Karisa was going to testify about as no details are given. As for the investigating officer his evidence would have been mainly confined to how he went about collecting evidence. He would have perhaps testified on what Karisa would have testified about. His evidence would have been desirable but we cannot go as far as stating that it was essential.

It would have made the prosecution case flow better but its absence does not leave a gap which would create a doubt on the guilt of the appellant.

Before we leave this aspect of the case, we would like to point out that the High Court on first appeal dealt at some length with the issue of failure to call certain witnesses, and came to the conclusion that the failure to call the witnesses was not a deliberate act; frantic steps were taken by the prosecution to secure their attendance, in vain and the timing of the hearing was before the Witness Protection Act had been enacted. It was the Court’s view that absence of such a law may have contributed to the failure of some of the witnesses to attend court. In the end the court concluded that there was no proper basis for making an adverse finding against the prosecution case. With due respect to the High Court Judges, while we agree with them that the failure to call those witnesses may not have been deliberate, we do not agree with them

that it was as a result of fear that they did not attend. There is no evidence to that effect, except the remark the appellant made in court, which on the basis of the material before court may not explain fully the failure of the witnesses to attend court.

For the reasons we have endeavoured to give, we find no basis for making a finding adverse to the prosecution case based merely on the failure to call certain witnesses. Having gone through the material before us we are satisfied that it was not deliberate and in any case their evidence, as stated earlier would not have made the prosecution case any better.

Two issues remain for consideration, firstly, the alleged failure to give the appellant an opportunity to offer mitigation before sentence and the question of severity of sentence. These two issues are intertwined and may be handled together. Judgment was read on 30th August 2007. Thereafter the proceedings, as shown in the record of appeal went on as follows:

“Prosecutor – no records. Be treated as first offender.

Accused in mitigation – I am sorry I did that.

Court – there is only one sentence for this offence under the law, death.

Accused sentenced to suffer death by law prescribed. Right of appeal 14 days.”

From the foregoing record it is clear the appellant was given an opportunity to offer mitigation, and actually did so although he did not say much. In our view, all a court is obliged to do is to give an accused an opportunity to offer mitigation. The court has no obligation to urge the accused to say more. Its obligation ends with explaining the right to offer mitigation, which we are satisfied was done here.

However, as regards sentence **section 361 (1) CPC** which we cited earlier precludes this Court from handling issues on severity of sentence in second appeals. But Mr. Nyabena’s submission was based on a recent decision of this Court in the case of **Godfrey Ngotho Mutiso v. Republic Criminal Appeal No. 17 of 2008**. Mr. Nyabena submitted that the trial court should not have proceeded as though death was the only sentence available in the event of a conviction for an offence under **section 296)(2)** of the Penal Code. Mr. Nyabena did not appreciate any difference between a sentence of death for murder and one under **section 296 (2)** above. **Godfrey Ngotho Mutiso v. Republic** was a case of murder. The court did not outlaw the sentence of death, but dealt with the mandatory aspect of the sentence. Whether or not the reasoning in that case covers cases under **section 296(2)** of the Penal Code is an issue which, we think, has to await for a more appropriate case as a decision one way or the other will require all interested parties to be heard.

The appellant’s appeal lacks any merit. Accordingly it is dismissed. It is so ordered.

Dated and delivered at Mombasa this 15th day of March, 2012.

S. E. O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR