



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CRIMINAL APPEAL CASE NO. 109 OF 2015

WAMBUA MUSYOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal vide Kitui Chief Magistrate's Court Criminal Case No. 857 of 2011)

J U D G E M E N T

1. The appellant herein, **Wambua Musyoka** was charged with the offence of robbery with violence Contrary to **Section 296 (2) of the Penal Code vide Kitui Chief Magistrate's Court Criminal Case No. 857 of 2011**. The particulars as per the charge sheet presented in that court are than on 17th December 2011 at about 1 am at Nguuni Village, Mbusyani Location within Kitui County jointly with others not before court while armed with dangerous weapons namely rungas, axes and pliers robbed Carol Musili of her DVD Player make Sony, Mobile phone Nokia 1110 and Kshs. 2000 cash all valued at Kshs. 12,000 and at or immediately before or after the time of such robbery wounded the said Carol Musili.

2. The appellant denied committing the offence and the prosecution called six witnesses to back up their case and at the conclusion of trial, the trial court found the appellant guilty as charged and convicted him.

3. In reaching its verdict, the trial court found that the appellant had been positively identified and connected with the offence. The following is the evidence tendered during the trial.

4. **Carol Musili (PW1)**, the complainant testified that she was asleep at her home on 17.12.2011 (the material date) alone as the husband had gone out for an overnight religious crusade leaving her and their 3 children. She added that at around 1 am she heard dogs barking and someone opening the gate. She woke up and while at the house corridor she heard windows being broken and someone calling Musili, her husband. The witness testified that she went back to the bedroom where the thugs found her and started harassing her asking her where her husband was. She testified that she saw them clearly as they had not concealed their faces and did recognize the appellant whom she knew by alias name "**Ndungu**". She told the court that the thugs started beating her asking for money as the appellant squeezed her fingers using the pair of pliers he had. She stated that the other thugs were armed with clubs and an axe. She recalled the thugs took her Nokia mobile phone, a DVD player, Kshs. 2,000 from her handbag all valued at Kshs. 12,000 and that incident they took about 1 hour before they left. She then using another phone and called her husband and alerted him about the robbery.

5. The witness further testified that her husband came with one Pastor Kombo and other neighbours and tracked the attackers who had left on foot and since it had rained they were able to trace and arrest the appellant whom they found sleeping in his house. She testified that the appellant was taken to District Officer Office at Kisasi where she was called and was able to recognize the

appellant as she knew him well She was also able to recognize the Safari boot worn by the appellant and which the trackers had used to track him from the crime scene to his house. The witness stated that she then went for treatment at Kisasi and identified a P3 form which was later tendered by Dr. Patrick Mutuku (PW5) as Ex 1.

6. **Elijah Musili Musyimi (PW2)**; testified that he received a call from his wife (PW1) stating that she had been attacked by robbers in their home. He was away at the time for a night vigil at their church. He returned to his home and his wife told him of what had transpired and she informed him that she had recognized one of the robbers. He testified he went out in search of the robbers in the company of his neighbours and proceeded to the Appellants home where they found him. He added that they recovered some safari boots which they suspected the Appellant was wearing during the robbery. He testified that they took the Appellant to the D. Os' office where PW1 identified him. The witness produced a receipt of the stolen DVD (MFI-1) and the pair of safari boots recovered from the Appellant's home (MFI-2)

7. **Maluki Mumo, (PW3)** the area chief stated that he was called by PW2 with information that his home had been robbed. He stated that he alerted the police and together they went to the scene. That while there, he noticed PW1's injured arm, he stated that the Appellant was arrested by rescuers and he was later taken into custody.

8. **Nzuki Mbuli (PW4)** on his part told the trial court that he was informed about the robbery by a person he identified as Nzuki Musyimbi. He testified that he proceeded to the scene and together with other rescuers proceeded to the Appellant's home where they found him and his wife. He said that they recovered some safari boots from the Appellant's house before arresting him and taking him and taking him to the police station.

9. **Dr. Patrick Mutuku (PW5)**, the Medical Officer called to testify that PW1 was examined and treated at Kisasi Health Centre for injuries sustained on her left hand wrist joint. The witness produced a P3 form authored by his colleague Titus Kirimi who was the one who examined PW1.

10. **P.C Juma Angwenyi (PW6)** the investigating officer stated that the Appellant was arrested and brought into Mbitini Police Station on 17th December 2011. He stated that PW1 reported the robbery incident and indicated that she was able to recognize one of the robbers, the Appellant herein during the incident. The officer further recorded an inventory of the stolen items and preferred charges against the Appellant. He also stated that none of the items were recovered. He stated that he relied on PW1's statement on recognition of the Appellant and no further investigations were done.

11. When placed on his defence, the appellant denied committing the offence. He testified that on the material date he slept at home and the following day he saw people going to his home while armed. He further stated that the people asked where his uncle was before they arrested him accusing him for stealing. He stated that the crowd wanted to lynch him because he looked like the thieves. He denied owning the Safari boots adding and that nothing else was recovered from his house.

12. The trial court upon evaluation of the evidence tendered found that the prosecution's case against the appellant had been proved because the appellant was positively identified by the Complainant who had known him for a long time prior to the incident. The trial court also found that the appellant was found with safari boots which had assisted the neighbours to track the thugs following their footprints including the safari boots prints. The appellant was convicted and sentenced to serve death penalty.

13. He felt aggrieved and filed this appeal raising the following grounds namely: -

i. That the trial magistrate erred in both law and facts by dismissing the Appellant's defence even after informing the court where he was during the material day and what he was doing.

ii. That the public prosecutor never proved his case beyond reasonable doubt since he only relied on the evidence adduced by PW1 in the entire prosecution case.

iii. That the investigating officer never executed his mandate to the required standard since he never derived any reliable information from PW1 as who attacked her by their names, physical appearance and so on.

iv. That the prosecution evidence is based on single evidence because PW1 never reaffirmed to her husband the exact perpetrators though she claimed to know them by names.

v. That the trial magistrate erred in law and fact by failing to consider the first report given by PW1 in her judgment where PW1 never mentioned her attackers even after claiming to know them.

14. In his written submissions, the appellant faults the trial court for failing to inform him of his right to legal representation and has relied on the case of *Felix Mwova Vaasya versus Republic [2016] eKLR*. This additional ground of appeal however has been raised by the appellant without leave pursuant to *Section 350 (b) (iv) of the Criminal Procedure Code*. The appellant in his petition of appeal did not allude to the fact that he suffered a mistrial because of lack of legal representation as held in *David Njoroge versus Republic [2011] eKLR* where the court held that a retrial can only be ordered if substantial injustice was suffered due to lack of legal representation.

In this matter the appellant has not contended unfair trial due to lack of legal representation or that he sought for legal representation at the trial and was denied.

15. The Appellant has also challenged his identification as the perpetrator. He has relied on the case of *Francis Kariuki Njiru & 7 others versus Republic [2001] eKLR* where the court restated the circumstances for a positive identification of a suspect.

16. The Appellant also submits that the trial court failed to consider his defence by dismissing it as a mere denial. He further submits that the prosecution's case was not proven beyond reasonable doubt. He has relied on the case of *Republic versus Mwangi s/o Manaa 1963 EACA 29* where the court laid out the procedure of carrying out a proper identification parade. The Appellant therefore takes issue with prosecution's case stating that the prosecution failed to conduct an identification parade.

17. The State/Respondent has opposed this appeal vide its written submissions dated 14th October 2021.

18. The prosecution opposes the appeal and urge the court to dismiss the same. They submit that the prosecution proved its case beyond reasonable doubt and proved the elements of robbery with violence. They submit that the appellant while being in the company of a group of people broke in PW1's house and stole some items from her house and also attacked her in the process with a pair of pliers.

19. On identification of the appellant, the prosecution submits that PW1 was able to positively recognize the appellant having known him for a long time.

20. This court has considered this appeal and the response made. They are 3 issues emerging from this appeal which can be framed as follows: -

a) Whether the identification of the appellant was positive.

b) Whether the prosecution's case was proved to the required standard.

c) Whether the sentence was harsh.

21. (a) **Whether the identification was positive.**

The appellant contends that the prosecution's case on the question of identification was based on the evidence of the complainant (PW1). It is true that where identification is solely based on the evidence of a single witness, a trial court should be cautious in evaluation of evidence to ensure that the identification whether by visual recognition or identification is free from error to avoid a situation of a mistaken identity.

22. This court has re-evaluated the evidence tendered by the prosecution at the lower court. The evidence of PW1 shows that she

was alone in the house with kids and that the robbers struck at 1am and managed to gain access to the house by breaking the window. The complainant indicated that she had not concealed their faces and that they spent more than one hour in her house. She however did not indicate the number of the attackers. How many were they" She only mention that the appellatant was armed with a pair of pliers while the rest had clubs (rungus) and an axe.

23. The crucial omission by the prosecution was the source of light that made it possible for the complainant to see the faces of the robbers. The evidence presented does not provide clarity on how PW1 was able to see and identify the appellatant given that it was at 1:00 am in the dead of the night. There was no mention of the lighting condition in her house. Was there electricity connected to the house" did she light a lamp, a torch or what made it possible for a positive recognition" This crucial evidence is missing given that is not possible to visually identify someone in pitch darkness. It is of course possible to recognize one by voice especially where the person is familiar but the complainant did not allude to that fact.

24. I have gone through the evidence of PW2 who testified that he was away from home when the incident occurred as he was attending some "keshu" or a religious crusade but rushed home when the wife (PW1) alerted him about the robbery. He testified that the wife was able to recognize one of them but she did not mention names and in particular the appellatant. I have keenly looked at the evidence tendered by PW1. She told the trial court on re-examination that, ***"I told my husband I had recognized one person from Kisasi but I did not tell him the name."*** The question posed is why would the complainant fail to mention the name of a person (assailant) whom she knew very well even by his alias name "Ndungu'" In my view, that raises some doubts regarding positive identification. The trial court appears to have fell into error by assuming that there must have been sufficient lighting in the complainant's house to allow her identify the appellatant. It was unsafe to make such assumptions. What was required was hard evidence.

25. Secondly, I have noted from the evidence tendered that there is a mention of safari boots which helped the trackers trail the suspect (appellatant) to his house. That could have provided a good link but there is a missing nexus because PW1 did not state that she saw the appellatant wearing the boots at her house during the robbery incident. Had she done so, then perhaps there could have been some nexus between the safari boots shoes recovered from the appellatant's house with the commission of the offence. The trial court fell into error when it concluded that PW2 & PW4 followed safari boots prints to the house of the appellatant. There is no evidence from PW2 and PW4 that they got crucial lead from PW1 that one of the attackers was wearing safari boots which could then have meant that they were out following some specific foot prints of safari boots and not just any other foot prints. It is true that there was evidence that it had rained at the time but the said missing crucial link cannot be disregarded given the fact that the standard of proof applicable here is high (beyond reasonable doubt).

26. It is possible that visual identification can be mistaken and hence can cause miscarriage of justice and that is why there is need to weigh/evaluate the evidence carefully to avoid such a scenario. In ***Wamunga Versus Republic (1989) eKLR 425***. The court held as follows: -

"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

27. Further to the above position, ***Mativo J. in Donald Atemia Sipendi versus Republic [2019] eKLR*** made the following relevant observations: -

"I am also alive to the fact that it is necessary to test the evidence of a single witness respecting to identification, and take great care and caution to ascertain whether the surrounding circumstances were favourable to facilitate proper identification. These in my view include light, time spent with the assailant, clothes or any item that the witness may positively identify and whether the accused was known to the complainant. Such evidence may be reinforced by sufficient collaboration and where there is no collaboration the court needs to treat it with caution."

28. The evidence presented to the trial court in my considered view fell short in showing that proper conditions at that hour of the night existed for proper identification to take place. In the case of ***Roria versus Republic [1967] EA 58 at page 548, the Court of***

appeal for East Africa stated as follows: -

“A conviction resting entirely on identity invariably causes a degree of uneasiness...That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.”

29. (b) **Whether the prosecution proved their case against the appellant**

The ingredients of robbery with violence are set out in *Section 296 (2) of the Penal Code* as: -

- a) **The offender must be armed with any dangerous or offensive weapon or instrument; or**
- b) **The offender must be in the company of one or more other person or persons or;**
- c) **At or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.**

30. To ascertain that the ingredients necessary for robbery with violence were met, an overview of the pertinent facts will place the issue in question into perspective.

31. PW1 stated that on the night of 17th December 2011 at about 1.00am she was in her house when robbers broke into her house and robbed her of some valuables including a DVD Sony player, mobile phone and cash. She stated that the robbers were armed pliers, rungs and axes and that they beat her and injured her in the process. She was treated for injuries sustained on her left hand wrist joint at Kisasi Health Centre as stated by PW5.

32. It is evident that the prosecution’s case established the necessary ingredients of the offence of robbery with violence. The only issue missing is the identification of the culprit or specifically the positive connection between all the ingredients with the appellant herein. The evidence presented showed that none of the stolen items were recovered in possession of the appellant which could have kicked in the doctrine of recent possession against him. In the end and for the reasons of lack of positive identification my inescapable conclusion is that the prosecution’s case against the appellant could not be sustained.

33. (c) **Whether the sentence was harsh.**

In view of my above findings, I do not find it necessary to go into the issue of sentence because the conviction of the appellant in the first place was sustainable.

In summary this court finds merit in this appeal. The conviction was not safe and is hereby set aside. The sentence meted out is hereby reversed.

The appellant shall be **set free** forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KITUI THIS 26TH DAY OF APRIL, 2022.

HON. JUSTICE R. K. LIMO

JUDGE



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