



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 10 OF 2013

APPEAL FROM THE ORIGINAL CONVICTION AND SENTENCE OF THE ACTING SENIOR

**PRINCIPAL MAGISTRATE AT MWINGI (MR.H. M. NYABERI) IN CRIMINAL CASE
NO 547 OF 2010**

MADARAKA KASYUKO MWENDWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Madaraka Kasyuko Mwendwa, whom we will call the appellant in this judgement, was charged in the Principal Magistrate's Court at Mwingi jointly with two others with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. It was alleged that on 31st May 2010 at Mwingi Township in Mwingi District within Eastern Province jointly while armed with crude weapon namely a hammer robbed Catherine Mutethya Wambua of Kshs 10,000, mobile phone Nokia 2630, one handbag, Equity ATM card and Sony Flash Disk all valued at Kshs 18,200 the property of Catherine Mutethya Wambua and at the time of such robbery used personal violence on the said Catherine Mutethya Wambua.

The facts of this case are that on 31st May 2010 Catherine Mutethya Wambua (PW1) was walking towards her parent's home situated near Kasina Primary School in Mwingi Town when she was attacked by two men. The time was about 6.30pm and she spotted the two men emerge in front of her about 100 metres to the gate of her parent's home. One of them was holding a claw hammer. As she was bypassing them the man holding the hammer hit her at the back of her head. She fell down unconscious. She regained consciousness at Mwingi District Hospital where she had been taken by members of public who included Veronica Kanini Ngui (PW2). She realized that she had lost the items listed in the charge during the time of the attack. She was treated and referred to Kenyatta National Hospital for further treatment. She reported the matter to the police and investigations commenced.

Acting on a tip-off Police Constable John Njuguna (PW6) of CID Office Mwingi in company of other police officers arrested the appellant. From his house was recovered several items including Exhibit 6, a claw hammer. The mobile phone, Exhibit 1, was recovered from Rachael Mwendu Muthui (PW5) who said she had been given the same by her aunt. The phone was traced to one Mwanzia Maithya who was charged jointly with the appellant and another person. He named the appellant as the person who had given him the phone as a pledge after Mwanzia had loaned the appellant Ksh 300.

The trial magistrate found the charges proved and convicted and sentenced the appellant to death. The appellant is aggrieved by the judgement and has filed this appeal. He has prepared five grounds of appeal

which we have summarized as follows:

- i. The trial magistrate overlooked that the evidence surrounding the recovered hammer is contradictory and inconsistent.
- ii. The blood samples were illegally obtained.
- iii. The evidence was not sufficient to base a conviction on.
- iv. The trial magistrate failed to consider the appellant's defence

In support of the grounds of appeal, the appellant has submitted the alleged claw hammer used to hit the complainant was not the same one presented to the government analyst and that the evidence surrounding the hammer is contradictory and inconsistent; that the blood samples were obtained illegally because it was not obtained by chief inspector of police; that it is not clear when the blood samples from the appellant and the complainant were obtained, whether 4th June 2010 or 7th June 2010; that there was no sufficient evidence to connect the appellant with the offence and that the trial court dismissed the defence of the appellant without considering the same. The appellant asked the court to reconsider the evidence, re-evaluate the same and set him free.

Learned State Counsel Mr. Allen Mulama opposed the appeal. He submitted that the complainant was robbed at 6.00pm and was able to identify her attackers; that she found her phone, one of the stolen items being used by PW5; the phone was traced to accused three in the lower court; that the appellant was identified in an identification parade and the hammer used in the attack was recovered from his home; that DNA samples taken from the hammer matched those of the complainant; that the trial magistrate cautioned himself on relying on this evidence and that PW4 corroborated the evidence on injuries.

Counsel further submitted that the death sentence is legal as it is founded on law in Article 26 of the Constitution and section 296 (2) of the Penal Code. Counsel quoted **Charo Ngumbao v. Republic [2011] eKLR** on the issue of sentence.

We have considered all the evidence. That PW1 was attacked and injured is not in issue. Her injuries have been confirmed by Anthony Kilonzo, PW4, who completed the P3 form (Ex. 1). It is also a fact that she did not know the two men who attacked her. We however note that she was attacked at 6.30pm and the men approached her from the front. She saw them and noted one was carrying a claw hammer. Following a tip off PW6 in company of other police officers arrested the appellant. A search in his house yielded several items including the claw hammer. PW6 stated in evidence: **“After 20 minutes Corporal Mulai and his team came with the suspect Maradaka Kasyuko. We entered into the house and started conducting a search. We found a claw hammer.”** The record of the lower court shows on page 39 that **“Hammer without claws marked MFI-6.”** PW1 testified that she saw the claw hammer at the police station. I have noted that Henry Kiptoo Sang, PW8, testified that he received a hammer in a khaki envelope. The description of the hammer is not given. We have noted the differences between the court record, the exhibits sent to the government analyst and the evidence by PW6 in respect of the hammer. We find that with these differences, we are not certain whether the evidence refers to the same hammer that was used to hit PW1. There are doubts in our minds about this hammer.

We have considered the issue surrounding the blood samples. We find that there is no clear evidence as to how the samples were obtained. The evidence shows that blood samples from PW1 and the appellant were taken by a doctor. We however did not come across evidence of such a doctor on the matter. We do not know how the samples were taken and preserved. This again casts some doubts on the prosecution evidence.

We however take into account the evidence of the identification parade. PW1 testified to having seen the two men who had attacked her. The conditions for positive identification were good. It was not dark and the attackers came from the front. They were not known to her. To clear any doubts on this issue, the identification parade was conducted. The appellant was satisfied in the manner in which the parade was conducted and he did not raise any issues. PW1 was able to pick him from the parade.

We have considered his defence. He raised an alibi that he spent the whole day at Ukasi market selling

miraa and went home in the evening arriving in Mwingi at 9.00pm. He called Ibrahim Salim, PW5, a police officer attached to Ukasi Police Station at the time acting OCS. This witness did not support the appellant's case. He denied having been with the appellant on 31st May 2010 and stated that although he knew the appellant as a person operating a miraa selling business at Ukasi market he had never bought him tea and he did not remember seeing him at Ukasi on 31st May 2010.

We are alive to the legal principle that an accused person does not assume the burden of proving the defence of alibi. The burden of proving the case remains with the prosecution (see **Sekitoleko v Uganda [1967] E.A 531** and **R. v. Johnson [1963] 3 All E.R 969**).

The appellant claims that the trial court did not consider his evidence. We have noted that the trial court did consider the appellant's defence. We have also considered the same and compared it with the prosecution evidence. We have no doubt that the appellant was properly identified by PW1 as one of the attackers. Though this is evidence of a single witness, we have cautioned ourselves on the dangers of relying on such evidence. We, too, reject the defence by the appellant and find that we are satisfied that he was clearly seen by PW1 that she was able to positively identify him at the identification parade.

We have examined the evidence relevant to the appellant's case and we have come to a conclusion that the appeal has no merit. We find that the evidence was sufficient to base a conviction on. We subsequently dismiss the appeal and uphold the conviction. On the issue of the sentence being unconstitutional, we wish to state that this is not true. The Constitution in Article 26 (3) allows deprivation of life as authorized by law. Section 296 (2) provides death penalty for robbery with violence. See also **Criminal Appeal No 5 of 2008 Joseph Njuguna Mwaura & 2 Others v Republic**. This is a judgement of a bench of five Court of Appeal Judges delivered on 18th October 2013. It affirms the death sentence and stated that it will remain in our statute books until Parliament amends the law. We need not say more on this issue. We make orders accordingly.

Signed and dated this 22nd November 2013

S.N MUTUKU

W. KORIR

JUDGE

JUDGE

Dated and delivered this 29th November 2013

S. N. MUTUKU

JUDGE