



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL CASE NO. 17 OF 2013

(Appeal from the judgment of R. ODENYO Principal Magistrate, Mandera)

ABDI ABUBAKAR IBRAHIM.....1ST APPELLANT

ALI MUSTAFA.....2ND APPELLANT

-VERSUS -

REPUBLIC.....RESPONDENT

JUDGEMENT

In this appeal, the appellants were aggrieved by the judgment of Mandera Principal Magistrate where they were jointly convicted of the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and sentenced to death in the manner prescribed by the law. It was alleged in the charge that on the 28th June 2011 at Township location of Mandera District, they jointly robbed Jelle Maalim of cash KShs.7500/= using violence to which charge they pleaded not guilty.

The brief facts of the case are that PW1 the complainant was at the miraa market collecting money from his customers for produce he had delivered the previous day. As he waited for one customer to organize the funds to pay him, the 1st appellant snatched KShs.7,500/= from PW1's pocket and ran away. PW1 pursued him and before he could catch up with him, the 1st appellant threw the money to the 2nd appellant. The attempts of PW1 to get hold of the second appellant was not successful resulting in the two appellants escaping from the scene. PW1 reported the matter at Mandera Police station. The two appellants were arrested at separate times and charged with the offence.

The first appellant was represented by Mr. C. P. Onono who filed the petition of appeal on 10th of July 2014 substituting the earlier grounds filed by the appellant in person. The second appellant appeared in person and filed amended grounds on 20th September 2013 which are not at variance with those of the first appellant.

The grounds of appeal for the two appellants may be summarized as follows:

1. That there was no evidence to support the conviction;
2. That the evidence was contradictory;
3. That the conviction was against the weight of the evidence;
4. That the first appellant had difficulties in understanding the language used by the court and could

not properly represent himself;

5. That the 2nd appellant's constitutional rights were violated for he was not granted bail and that the charge was not read to him contrary to the provisions of **Section 207** of the **Criminal Procedure Code**.

6. That the death penalty imposed on the 2nd appellant was unconstitutional.

In his submissions, Mr. Onono raised one major issue which was derived from the grounds of appeal for the 1st appellant. He told the court that during the robbery there was no violence used on the complainant and as such, the offence of robbery with violence was not established. It is the case of the first appellant that the trial court ought to have convicted of the offence of stealing from the person contrary to **Section 279(a) Penal Code** as opposed to an offence of robbery with violence contrary to **Section 296(a)** of the same **Code**.

This appeal was vehemently opposed by the State. The State counsel Mr. Orwa submitted that the ingredients of the offence of robbery with violence under **Section 296(2)** were proved and after all even one ingredient constitutes an offence. He submitted that the record is clear that the charge was read to the accused persons and that any defect is curable under **Section 382 Criminal Procedure Code**. As for the 2nd appellant, the State argues that there was no violation of constitutional rights in any way.

It is the duty of this court of appeal to evaluate the evidence of the trial court and reach its own conclusion. It was held in **Okeno vs. Republic Criminal Appeal no.75 of 1971**:

It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its conclusions. Only then can it decide whether the magistrate's findings should be supported.

The appellants argued that their constitutional rights were violated in the following instances:

- a. That the 2nd appellant was not granted bail as required by the Constitution;**
- b. The charge was not read to the 2nd appellant in accordance with the law;**
- c. That the first appellant had a problem with the language used in the trial and was not able to follow the proceedings.**

On the issue of language the law requires that the charge be read and explained in the language that the accused understands. The same case applies to the rest of the trial that an accused person who does not understand the language of the court or any other language used by a witness shall be accorded an interpreter. This is a Constitutional right which the court must zealously guard.

On perusal of the court record and in particular the proceedings of 1st July 2011, we observe that the plea was taken in presence of a court clerk namely Mohamed. It is clearly indicated that the language used was Kiswahili. The two appellants pleaded not guilty which plea the court accordingly entered. The appellants were therefore accorded an interpreter and understood the charge as read and explained in Kiswahili language. Each of them replied; **"It is not true"**, meaning that they both understood the charge. PW1 and PW3 testified in Kiswahili language and PW2 in Kisomali. PW4 was stepped down as soon as he introduced himself while PW5 was the clinical officer who produced the P3 Form and testified in English. There was an interpreter in court during the hearings. The accused cross-examined each of the three witnesses PW1, PW2 and PW3 adequately. PW5 was also cross-examined as to the cause of the injury as shown by the record by the 2nd accused. The appellants gave sworn statements in their defences and used Kiswahili language. There is nothing in the court record to show that any of the appellants complained of any language problem. The proceedings demonstrate that the two appellants understood

Kiswahili language well which was used by most of the witnesses in their testimonies and in answer to questions in cross-examination. There was an interpreter throughout the proceedings as required by the law. We believe that the interpreter translated the evidence of PW5 to the appellants.

We have explained how the charge was read and explained to the appellants in Kiswahili language and that they pleaded to it as required by the law. It is, therefore, not correct to say that it was not read to the 2nd appellant. There is no way he should have proceeded with the full trial without pleading to the charge and understanding the offence facing him.

The 2nd appellant says he applied for bail but was not granted the orders by the court. The proceedings of 1st August 2011 show that the accused persons applied to be released on bond orally in court.

The prosecution did not respond to the application and the record does not show whether the court invited them to reply to the oral application. The ruling was fixed for 16th August 2011 and was later deferred to 18th August 2011. Throughout the rest of the proceedings, the issue of bail did not arise and there was no ruling delivered by the court. The appellants did not remind the court of the matter at any one time. It appears that the matter may have escaped the court's attention for there was no formal application heard which would have made the registry forward the file to the magistrate to prepare the ruling. In our considered opinion, the appellants had a duty to remind the court that there was an issue that was still pending for determination. It is our view that there is no indication of any deliberate move on the part of the court to ignore or refuse to deal with the issue of bail. The judgment of the court was delivered only two months after the appellants applied for bond which demonstrates fast-tracking and expeditious disposal of the case. The omission of the court to revisit the issue of bond does not in our view constitute violation of the appellant's constitutional right. The appellants should have been vigilant in following up the matter of their bail application.

On careful consideration of violation of constitutional rights in regard to the bail application, language and pleading to the charge, we find no merit in any of the grounds. We find that there was no violation of any constitutional right in regard to any of the appellants.

It was alleged that there were contradictions in the evidence of PW1 and PW2. PW1 explained how he was robbed and how he struggled to get back his money. PW2 came to the rescue of PW1 and told the court of how he raised alarm and how the second appellant scratched his face trying to resist arrest and possible recovery of the cash. The testimony of PW1 refers to his experience with his attackers before PW2 came to his rescue. PW2 testified on what happened between him and the 2nd appellant after PW1 exited the scene. We find no contradiction or variance in the evidence of the two witnesses.

In regard to the evidence of the witnesses and the offence that was proved, we wish to examine the evidence of the witnesses especially the complainant. PW1 testified that he was in the miraa market in Shafey Shafey location in Mandera on the material day and time. He was waiting for a lady customer to organize payment of money for some products he had delivered to her the previous day. The first appellant came and removed cash KShs. 7,500/= tied with a rubber band. PW1 turned to see who it was and the first appellant immediately threw the money to the 2nd appellant. PW1 pursued the 2nd appellant and as PW1 was about to get hold of him, the 1st appellant struck him with a stick on the head. PW1 raised alarm but efforts to arrest the two men by other traders in the market was not successful. The first appellant was spotted later in the day and arrested at Darusalam area of Mandera town. The second appellant was to be arrested at a later date.

The first appellant snatched the money from PW1's pocket but PW1 did not see him until he turned to the direction where the first appellant was. When PW1 saw the first appellant for the first time, the appellant had already taken the money. It was no longer in the hands of the complainant. When PW1 pursued the 2nd appellant, he was hit on the head with a stick by the first appellant. PW2 said that the 2nd appellant picked a stone as he fled the scene and as PW2 pursued him. When PW2 continued running after the 2nd appellant, he attacked him by scratching his face using his finger nails.

The offence of robbery with violence contrary to **Section 296(2) Penal Code** entails the use of violence at, or immediately before or after the robbery. In the present case, the first appellant had already snatched the money from PW1's pocket before PW1 turned back to see who it was that had taken his cash. There was no violence used immediately before the robbery. After the first appellant noticed that PW1 had seen him, he passed on the cash to the 2nd appellant who ran away with it. There is no doubt that by the time PW1 was hit with a stick by the 1st appellant, the money was already gone. The issue whether the appellants should have been convicted of stealing from the person contrary to **Section 279(a) Penal Code** will depend on the rest of the evidence in this case. The episode of snatching the money cannot be treated in isolation unless there is no other evidence. The ingredients of the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** were set out in the case of **Ganzi & 2 Others vs. Republic (2005) 1KLR 52** as:

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

In the case of **Ajode vs. Republic (2004) 2 KLR 81**, it was held that injury of the victim itself is not the only ingredient of the offence under **Section 296 (2)** of the **Penal Code**.

In the case before us, there is sufficient evidence that at the time of the incident, the first appellant was accompanied by the 2nd appellant. This element of being accompanied alone coupled with the taking of the complainant's property makes the offence of robbery with violence complete. Even assuming that violence was not used at, or immediately before or after the robbery, the mere fact of being accompanied at the time of robbing by one or more persons is sufficient to constitute an offence of robbery with violence under **Section 296(2) Penal Code**. The argument of the first appellant that he was wrongly convicted of the offence of robbery is not supported by the evidence on record.

We come to the conclusion that the prosecution proved the offence of robbery with violence as charged and that the trial court's finding was correct as it was supported with cogent evidence.

The 2nd appellant advanced the ground that the death sentence imposed on him was unconstitutional. He relied on the case of **Godfrey Ngotho Mutiso vs. Republic Criminal Appeal no.17 of 2008** where it was held that imposition of the mandatory death sentence was arbitrary and unconstitutional.

In determining the issue raised in this ground of appeal, we wish to rely on the recent **Court of Appeal case no.5 of 2008 of Joseph Njuguna Mwaura & 2 Others vs. Republic** where a five-judge bench held that courts have no jurisdiction to exercise discretion in death sentence and that the only lawful sentence for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** is death. The court also included in this category of offences carrying a mandatory death sentence, the offence of treason contrary to **Section 40** of the **Penal Code**, that of administering oaths to commit a capital offence contrary to **Section 60** of the **Penal Code**, robbery with violence contrary to **Section 296(2)** of the **Penal Code** and attempted robbery with violence contrary to **Section 297(2)** of the **Penal Code**. The decision of **Godfrey Mutiso** is therefore no longer applicable in the issue of the constitutionality and legality of the death sentence. The sentence imposed by the trial magistrate was therefore lawful and is supported by **Article 26** of the **Constitution**.

It is our finding that this appeal has no merit and is hereby dismissed. We uphold the conviction and sentence imposed in this case.

Dated and signed this 11th day of September, 2014.

F. N. MUCHEMI
JUDGE

S. N. MUTUKU
JUDGE

Judgment delivered this 18th day of September 2014 by Justice S.N. Mutuku.