



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO 39 OF 2019

AMOS KIPSOI KINYAGAH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Criminal Case No 1660 of 2017 – Njeri Thuku, PM)

J U D G M E N T

1. The Appellant in this appeal, **AMOS KIPSOI KINYAGAH**, was convicted in *Count II* of **robbery with violence** contrary to **section 296(2)** of the **Penal Code**. It was alleged that on 06/10/2017 at about 10:30 pm at Jikaze Trading Centre in Laikipia East Sub-County within Laikipia County, jointly with others not before the court, he robbed one **DAVID NDERITU NGUNYI** of cash KShs 950/00 and one mobile phone make *X-Tigi*, both valued at Kshs 2,000/00, and that immediately before the time of the robbery he threatened to harm him.
2. The Appellant was acquitted in *Count I* of the similar offence of robbery with violence where it was alleged that on the same date, time and place, also with others not before court, he robbed one **JOSEPH NDUMIA WAHOME** of KShs 13,600, one mobile phone make *Tecno*, and three crates of wines and spirits, all valued at KShs 37,000/00.
3. On 02/09/2019 the Appellant was sentenced to seven (7) years imprisonment. He has appealed against both conviction and sentence. The conviction is challenged upon the main ground that the Appellant was not positively identified as being among the persons who had robbed the complainants.
4. Learned prosecution counsel for the Respondent did not support the conviction.
5. I have read through the record of the trial court in order to evaluate the evidence placed before that court and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have born in mind however, that I neither saw nor heard the witnesses testify, and I have given due allowance for that fact.
6. The evidence laid before the trial court disclosed that in the night of the robbery the complainants (PW1 and PW2) and other people had been accosted by a group of five men who were armed with at least two firearms who robbed PW1 and PW2 of the items listed in the two offences in the charge sheet. The robbers had posed as police officers.
7. Of the several victims of the harassment by the robbers, only PW1 and PW2 testified. They reported the robberies the same night to police officers (including PW3) at **Wiyumiririe Administration Police Camp**.
8. The following day at about 11 am PW1 and PW2 went back to the police camp and reported that they had seen a suspect of the robbery at the trading centre. PW3 and other police officers accompanied PW1 and PW2 back to the trading centre and arrested the Appellant at the garage of PW2 where he had taken his motor cycle for repairs.
9. The Appellant was then taken to **Wiyumiririe Police Station** in PW1's motor vehicle. In the vehicle was also PW2 and the police officers. An identification parade was then conducted by PW4 at which PW1 and PW2 purported to identify the Appellant.
10. In their testimonies in court PW1 and PW2 stated that they had known the Appellant well before the incident. He was in fact PW2's customer at the latter's motor garage where he normally took his motorcycle for repairs.
11. The problem with this purported recognition of the Appellant is that when PW1 and PW2 initially reported the robberies to PW3 and other police officers, they did not at all state that one of the robbers was a person that they knew. In their subsequent written statements given to the police they also did not state that they knew one of the robbers. One would expect that if a victim of a robbery has recognized the person that has just robbed them, they would tell the police so in their first report! Why did PW1 and PW2 NOT tell PW3 and other

police officers that among the five robbers was one person whom they knew well?

12. The answer may lie in the fact that the prevailing circumstances at the time of the robbery were not conducive to a good and positive identification. It was at night and dark and without any artificial light. PW1 and PW2 stated that they saw and recognized the Appellant by their mobile phone light which they said were in use. The situation must also have been stressful with at least two of the robbers armed with firearms, and the victims being made to lie down flat on the ground.

13. In my own assessment, the evidence placed before the trial court did not at all disclose a good source of artificial light and opportunity for PW1 and PW2 to positively identify any of the five robbers. They could not have been sure of any identification or recognition, and that must be the reason why they did not initially tell the police that they had recognized anyone amongst the robbers.

14. The identification parade conducted by PW4 was simply cynical and useless; it did not help at all. To start with, it was arranged by the investigating officer. Secondly, it was PW1 and PW2 who led the police to the Appellant and his arrest, and then transported him to the police station in PW1's motor vehicle. So, what was meant to be achieved by the identification parade?

15. Apart from the purported recognition by PW1 and PW2, there was absolutely no other evidence connecting the Appellant to the robberies. And why would he, only a few hours after the robberies, take his motor cycle to PW2 for repair if he had robbed him?

16. PW1 and PW2 were clearly mistaken in their purported recognition of the Appellant. Even the trial court rejected his purported recognition by PW1; it is not immediately clear why that court accepted the purported recognition by PW2 given all the circumstances of the case.

17. The Appellant put forth the defence of alibi. Contrary to what the trial court held, that defence was raised in cross-examination of the prosecution witnesses, not at the defence stage. The Appellant testified to that defence under oath and called two witnesses. The alibi was entirely plausible and may well have been true.

18. Having evaluated the evidence placed before the trial court, I am not satisfied that the charge in *Count II* was proved against the Appellant beyond reasonable doubt. The conviction is simply not safe and cannot be allowed to stand. Learned prosecution counsel properly conceded the appeal.

19. In the result the conviction entered against the Appellant is hereby quashed and the sentence set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 28TH DAY OF APRIL 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 29TH DAY OF APRIL 2021