



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO 447 OF 2013

GERALD NJOROGE MACHARIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence dated 04/04/2013 in Murang'a CM

Criminal Case No 1450 of 2010 – E J N Osoro, Ag SPM)

J U D G M E N T

1. The Appellant herein, **GERALD NJOROGE MACHARIA**, was convicted of **robbery with violence** contrary to **section 296 (2)** of the **Penal Code** and sentenced to death. It was alleged in the charge that on 06/03/2010 at Nyakihai Village in Murang'a North District of the Central Province, jointly with another not before court, and while armed with offensive weapons, namely whips and wood planks, robbed one Hanniel Muturi Maina of cash KShs 2,700/00 and two mobile phones make Nokia 1110 and L G, all valued at KShs 11,300/00, and that immediately before or immediately after the time of the robbery, used actual violence to the said complainant. The Appellant has appealed against both conviction and sentence.

2. I have read through the record of the trial court in order to evaluate the evidence and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

3. The first thing to note is that the complainant (who testified as PW1) was the only eye-witness to the robbery. He said he was robbed at about 7.15 pm or thereabouts. However, the investigating officer, Corporal Zablon Mugunda (PW5) stated that PW1 told him he was robbed at about 10.00 pm, or between 9.30 and 10.00 pm. One thing is clear though: at the time of the robbery it was dark without any natural light.

4. The complainant also testified that he was robbed of KShs 1,900/00 cash and 2 mobile phones. As for cash, PW5 stated that PW1 told him that he was robbed of KShs 2,700/00. This of itself would not be a major issue, but taken together with other discrepancies, it assumes significance.

5. Another discrepancy was that PW1 testified that he was robbed by the Appellant (whom he said he knew) and another person whom he did not know or identify. The Appellant's co-accused (2nd accused) was acquitted because PW1 did not see him during the robbery. PW5 on the other hand stated that PW1 told him that he was robbed by the Appellant and two other men (including the 2nd accused).

6. And then there is the issue of identification. This was a case of identification by recognition. PW1 stated that he had known the Appellant before, and further that earlier in the evening at a hotel in Murang'a Town where he and his cousin (PW2) were having supper, the Appellant had demanded that he (PW1) buy him supper but he had declined, saying that he did not have money to spare. PW1 further testified that when he paid for his supper and got his change, the Appellant took offence as he obviously had enough money for the Appellant's supper. PW1 however responded that he had already budgetted for the change.

7. At the scene of the robbery, PW1 testified, he was suddenly hit on the back with a blunt object. He did not see the person who hit him. PW1 further testified that the Appellant then held him and hit him on his head and he fell into a trench. He then lost his two mobile phones and the money he had in his pocket. He did not see who took the money and the mobile phones.

8. A Nissan matatu then passed by from Murang'a direction and stopped. The assailants fled.

9. The Appellant stated that he -

“Managed to recognise the voice of the 1st accused from his voice, and also the motor cycle we alighted from had its head light on and it reflected on accused I and I identified his voice”.

10. Regarding these prevailing circumstances the trial court said as follows-

“Although the offence took place at night and the circumstances for positive identification were rather difficult, however, the scene was well lit by the motor cycle’s head lights. PW1’s evidence is that he also recognised the 1st accused’s voice....”

11. With tremendous respect, PW1 never stated in his testimony that the scene was well lit by the motor cycle’s head-lights. What he said was that the motor cycle’s headlight was on and that it reflected on the Appellant. In all likelihood this was a fleeting glance during the commotion. Remember, PW1 also stated that he did not see who took his money and phones. Should he not have seen well enough to say it was the Appellant or the other assailant who took them if the scene was well lit?

12. PW1 in fact appeared to emphasize more on his voice recognition of the Appellant. However, he never testified as to what the Appellant may have said during the robbery to enable him (PW1) to recognise the Appellant’s voice.

13. It appeared that his earlier altercation with the Appellant at the hotel led PW1 to believe it must have been the Appellant who attacked and robbed him without actually identifying him at the scene (visually or by voice).

14. My own assessment of the prevailing circumstances is that they were not conducive to a good and positive identification by the complainant of his attacker or attackers. Let us not forget that recognition is a form of identification. It is identification of a person whom the witness says he knew or had seen before. People can still make mistakes of people they know when the conditions are not good enough to afford a clear and adequate view.

15. Having found as a fact that **“the offence took place at night and the circumstances for positive identification were rather difficult...”**, the trial court should have stopped there and given the Appellant the benefit of that doubt.

16. Having given due consideration to the submissions of the learned counsels appearing, and upon my own evaluation of the available evidence, I find that the Appellant’s conviction is not safe. I hereby quash it and set aside the sentence of death imposed. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG’A THIS 29TH DAY OF MARCH 2019

H P G WAWERU

JUDGE