



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**HIGH COURT CRIMINAL APPEAL NO. 109 OF 2016**

**JOHN MBURU WAMBUI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the Judgment delivered on 1<sup>ST</sup> February, 2012 by Hon. B. J. Ndeda (Senior Resident Magistrate) Chief Magistrate's Courts at Thika in Criminal Case No. 2481 of 2010).**

**JUDGMENT**

1. The Appellant, John Mburu Wambui was charged and convicted of the **offence of Robbery with violence contrary to section 296 (2) of the Penal code.**

**The particulars of the offence being that on the 21<sup>st</sup> day of May, 2010 at Murera area in Juja town within Thika district of Central province jointly with others not before court while armed with dangerous weapons namely pangas, robbed Julius Mwangi Mburu of his chloride Oxide battery, a pair of gum boots and sports shoes, a panga and a mattock, mobile phone make C.113 and cash all valued at 10,500/= and immediately before such robbery used actual violence to the said Julius Mwangi Mburu**

2. The case for the prosecution was that on the material day at about 8 p.m. PW1 J M M and his wife and children were at home having dinner while watching the Television when the dogs started barking. The wife went outside to see what was happening. She found six men outside. The men who were armed with crude weapons followed her back into the house and ordered her to put the lights off. The intruders some of whom were masked demanded money while assaulting them. The complainant's two daughters were raped. The thugs then locked the house from outside and left. On checking their house the complainant and his wife found the properties mentioned in the charge sheet missing. They opened the door and raised an alarm.

3. They then heard gunshots and later realized three thugs had been ambushed in the neighbourhood by police officers. It turned out the mattock stolen from their house had been used to break into a neighbour's house. The police officers referred the complainant and his family to hospital where they were treated. The Appellant who was identified as one of the assailants was arrested together with another and arraigned in court.

4. In his defence case, the Appellant gave unsworn evidence. He gave his name as John Mburu Wambui and stated that on 8<sup>th</sup> June, 2010 he was unwell and went to the dispensary for treatment. That two men stopped him, questioned him, called for a police motor vehicle and took him to the police station. He denied having committed any offence.

5. The trial magistrate found the Appellant guilty and convicted him for the offence of robbery with violence and sentenced him to death.

6. The Appellant was aggrieved by both the conviction and sentence and appealed to this court. The grounds of appeal (as per the amended memorandum of appeal) are as follows:

- a. That the evidence of identification was insufficient.
- b. The prosecution evidence was contradictory and inconsistent.
- c. The trial magistrate erred by rejecting the plausible defence case.

7. During the hearing of the appeal, the Appellant relied on his written submissions. The submissions essentially expound on the grounds of appeal.

8. The learned counsel for the state opposed the appeal. He submitted that the prosecution case was proved.

9. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno v Republic (1972) EA 32**.

10. PW1 and his family members who included his wife PW2 J M W, his daughters PW4 & 5 S W M and B W and a visiting relative, PW3 B K gave evidence. The four witnesses gave a similar account of what transpired at the material time. Although the lights had been put off and some of the thugs wore masks, the evidence of PW1 was that while he was giving out the money to one thug who had worn a mask, the money fell down and the said thug flashed a torch and as the said thug bent down to pick the money, the torch light flashed on the Appellant who PW1 recognized as Mburu the Appellant. PW1 gave the name of the Appellant to the police officers the same night.

11. The evidence of PW1 is corroborated by that of his wife, PW2. PW2 gave a similar account of evidence. It was PW2's evidence that she also saw the Appellant as his accomplice flashed the torchlight on him while picking the money that had fallen down. PW2's evidence was that she knew the Appellant.

12. The interaction between PW1, PW2 and their attackers was at close range as there was beating and handing out of money. PW3, the visiting relative who described himself as a Primary School Student also testified that he saw the Appellant through the torch light. It is the evidence of PW3 that he also knew the Appellant who has one bad eye and that he recognized the Appellant who moved close to him.

13. The two girls (PW4 & 5) who were taken to their bedroom and sexually molested were not able to identify the assailants. The trial magistrate did not convict on the offence of rape and indecent act.

14. The evidence of PW1, PW2 and PW3 is that of recognition. As stated in the case of **Anjononi & another v Republic 1980 KLR**:

**“A case of recognition, not identification is more satisfactory, more assuring and more reliable than that of identification of a stranger because it depends on the personal knowledge of the assailant in one form or the other.”**

15. I have considered the defence case. The same is on the fact of arrest. It does not cast any reasonable doubts on the prosecution case.

16. Having evaluated the evidence on record, I am satisfied that the prosecution case against the Appellant was proved beyond any reasonable doubt. I find no merits in the appeal and hereby dismiss the same.

**Dated, signed and delivered at Kiambu this 22<sup>nd</sup> day of June, 2018**

**B. THURANIRA JADEN**

**JUDGE**