



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NOS. 26 OF 2015 & 27 OF 2015

ANTHONY KIMATHI WANJOHI.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

AND

ANTHONY MUCHIRI NJAGI.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being appeals from the original conviction and sentence in CR 26 of 2015 at the Chief Magistrate's Court at Embu by A.G. Munene – SRM on 27th March, 2013)

JUDGEMENT

1. The two appeals were consolidated and heard as one appeal. The appellants were convicted of robbery with violence contrary to section 296 (a) of the Penal Code (Cap 63) Laws of Kenya and were sentenced to eight years imprisonment by the court of the Senior Resident Magistrate on 27th March 2013 at Embu. Additionally, the appellant Anthony Muchiri Njagi was sentenced to three years imprisonment in count II in respect of being found in possession of narcotic drugs and psychotropic substances (Control Act) 1994.
2. They have appealed against both conviction and sentence. They have raised common grounds of appeal. In ground 1 Anthony Kimathi Wanjohi has stated that he did not plead guilty. In ground 2 he has stated that the trial court did not consider his defence, which he says was in violation of section 169 (1) of the Criminal Procedure Code. In ground 3 he has stated that he was convicted on evidence which was riddled with contradictions and further the court failed to observe that the witnesses had fabricated the case against him.
3. In ground 4 he has stated that the trial court erred in law and fact by failing to inform him of his right to an advocate which was in violation of Article 50 (2) (g) (h) of the 2010 Constitution of Kenya. In ground 5 he has stated that the trial court erred in law and fact in failing to find that the prosecution had not proved its case beyond reasonable doubt.
4. Anthony Muchiri Njagi has raised grounds of appeal which are similar to those raised by his co-appellant Anthony Kimathi Wanjohi.
5. This is a first appeal. As a first appeal court, I am required according to ***Peters v. Sunday Post Limited (1958) EA*** to reassess the entire evidence produced in trial court. After doing so, I have to make my own findings of fact based on that evidence while at the same time deferring to

- findings of fact based on the credibility of the witnesses. The reason being the trial court was better placed in seeing and hearing the witnesses.
6. There two eye witnesses in respect of count I upon which the appellants were jointly convicted. The evidence of the complainant (PW 1) is that both appellants were persons known to him. According to his evidence, he was drinking a soda at Mugithi Bar in Embu town having earlier on withdrawn a sum of Kshs 10,000/- from Daima Sacco. The two appellants then approached him in that bar and stated that he owed them some money in the sum of Kshs 150/-. **It was Kimathi who stated that the appellant owed them money.** Furthermore, he has stated that he did not owe them any money. As a result, Anthony Muchiri Njagi got hold of his neck and Anthony Kimani Wanjohi then took from the pocket of the complainant Kshs 10,000/-. They overpowered him because they were two. In the course of that robbery, the complainant sustained injuries to his right eye. He made a report to the police (PW 4).
 7. The incident was witnessed by the bar attendant Rose Wandia Murimu (PW 2).
 8. The appellant were arrested by police (PW 3). Upon conducting a search on them, PW 3 recovered 23 rolls of bhang from Anthony Muchiri Njagi which were in a cigarette pack.
 9. When they were placed on their defence, Anthony Kimathi gave sworn evidence. According to him, he was with his co-appellant playing a game of pool. He says the complainant had given them a contract of digging holes in his coffee farm. He also stated that he had failed to pay his co-appellant for the services that had been rendered to him. It is his evidence that the complainant was advised by the bar attendant (PW 2) to frame them up. He was arrested after going to sell milk by the police. Under cross-examination he admitted that the complainant had given them some work to do but he himself refused to do so because the complainant had not paid his co-appellant. He confirmed that the complainant did not owe him any money. He then closed his defence.
 10. Anthony Muchiri Njagi also gave sworn evidence. He says the complainant had given him work to dig holes in his farm of coffee and bananas. After completing doing that work, he did not pay him. Thereafter, he found him drinking alcohol in a club. He then asked him for his money and he did not pay him. Instead he told him to go and undo what he had done. As a result this co-appellant got annoyed, got hold of him and a struggle ensued. The following day, he was arrested by the police and he denied assaulting the complainant and it is at that time that he heard that he was found in possession of bhang (*canabis sativa*).
 11. Under cross-examination, he repeated that he had worked for the complainant but was not paid for his services. According to him, he owed his co-appellant some money and that is why he wanted the complainant to pay him his debt. He would then use that money to pay his co-appellant in respect of a debt owed to him. They went to the club where the complainant was drinking and he refused to pay his debt. It is his evidence that the complainant stays with the bar attendant PW 2. After that he was arrested and charged with these two offences.
 12. I have re-assessed the evidence of the prosecution witnesses and that of the defence. I find that this is a case where the doctrine of common intention applies in terms of section 21 of the Penal Code which was approved in *Solomon Mungai v. R (1965) EA 782* In ground 1, the appellants have stated that the trial court convicted them without considering their defence which is in violation of section 169 (1) of the CPC. I have perused the judgement and I find that their defences were fully considered and properly rejected.
 13. The evidence of the complainant was rightly believed that he had withdrawn a sum of Kshs 10,000/- from Daima Sacco in regard to which he produced a withdrawal slip. The trial court properly directed itself to the defence of both appellants and framed the issue as to whether their defences were credible or not. After doing so, the trial court concluded that their defence were not credible and proceeded to reject it.
 14. I have also come to the same conclusion after considering the evidence in its entirety. In ground 3 the appellants have stated that the prosecution evidence was riddled with contradictions. I have perused that evidence and have come to the conclusion that there are no contradictions in the prosecution case.
 15. I have also considered the contention of the appellants that the case against them was fabricated. In this regard after considering the evidence, I find that the case against both appellants was not fabricated. It was not put to the bar attendant that she was fabricating the case against them. On that account alone, the trial court found that this was an after thought and for that reason their

- evidence was rightly rejected.
16. In ground 4 both appellants have stated that their constitutional right to an advocate at State's expense was violated. According to the Court of Appeal in *Douglas Kinyua Njeru v. R Criminal Appeal No. 28 of 2013 (Court of Appeal at Meru)*, the right to counsel lacks implementing legislation and that is the reason why the trial court was unable to give them counsel at State's expense. Finally in ground 5 the appellants state that the case against them was not proved beyond reasonable doubt.
 17. Upon the assessment of the entire evidence, I have come to the same conclusion like the trial court that the case against the appellants was proved beyond reasonable doubt.
 18. In the circumstances the appeals of both appellants are dismissed in respect of the robbery and possession of bhang.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **29th** day of **FEBRUARY 2016**

In the presence of both Appellants and MS Mbae for the State.

Court clerk Njue.

J.M. BWONWONGA

JUDGE

29.02.16