



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.127 OF 2014

(An Appeal arising out of the conviction and sentence of Hon. D. K. Mochache - PM delivered on 5th September 2014 in Kiambu CM CR. Case No.1679 of 2013)

SIMON NJOROGE KANYINGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Simon Njoroge Kanyingi was charged with one count of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on 1st July 2013 at Banana Shopping Centre, Karuri within Kiambu County, the Appellant, jointly with others not before court, while armed with crude weapons namely iron bars, robbed Peter Kimani Kabaru of his mobile phone Nokia C1 valued at Kshs.5,000 and immediately before the time of such robbery used actual violence on the said Peter Kimani Kabaru. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charge. After full trial, he was convicted as charged of the offence of **robbery with violence** and sentenced to death. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that his identification at the identification parade was not reliable as the identification parade was not properly conducted. He complained that there was no evidence that the prosecution witnesses gave a description of their assailants to the police prior to the identification parade. He was further aggrieved that he had been convicted on the basis of visual identification yet the circumstances favouring positive identification were absent. He faulted the trial court for placing reliance on the evidence regarding the circumstances of his arrest to find him guilty of the charge. He was also aggrieved that he had been convicted on the basis of inconsistent and contradictory evidence. Finally, the Appellant was aggrieved that the trial court did not take into consideration his defence before arriving at the decision to convict him. In the premises therefore, the Appellant urged the court to allow his appeal, quash the conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He further made oral submission urging the court to allow his appeal. In his submission during the hearing of the appeal, the Appellant contended that PW2 could not have properly identified him since the scene was bushy and was not well lit. The Appellant further argued that the prosecution had failed to adduce evidence to show that PW2 had in his initial report to the police, reported that she had identified

him at the scene. For the above reasons, the Appellant urged the court to allow his appeal. Ms. Nyauncho for the State opposed the appeal. She submitted that the prosecution had adduced evidence which connected the Appellant to the robbery with violence. She submitted that the Appellant, in the company of other men, while armed, with crude weapons accosted the complainant before robbing him of his mobile phone. In the process, the complainant was injured. She submitted that the medical evidence presented in court during trial established that the complainant had indeed been injured. The Learned State Counsel further submitted that PW2 recognized the Appellant as one of the assailants since there was sufficient light at the scene. She submitted that the Appellant was well known to PW2. She further submitted that PW2 was able to identify the Appellant in an identification parade. It is on the basis of the above facts that the State urged the court to find the appeal without merit and dismiss it.

The facts of the case as presented by the prosecution are as follows: On 1st July 2013 at about 10.30 p.m, Peter Kimani Kaburu was with his wife PW2 Mercy Nduta at their business premises in Karuri. They operated a bar known as Big Five. On the material day and time, the couple was with a customer, PW3 Stephen Ng'ang'a, who was having a drink at the bar. PW3 testified that at about 10.30 p.m, he was ready to depart. He therefore asked PW2 to see him off since the area was known to be insecure. PW2 testified that she escorted PW3 outside and stood at the bar's veranda to watch out for the Appellant as he walked towards the main road. She testified that she could see him as he headed towards the main road since there were security lights. PW2 testified that after about ten (10) minutes, she saw four (4) boys emerge from a bush. They accosted PW3. She began to scream. The evidence of PW3 was that he was confronted by about five (5) people. He testified that he surrendered and told them to pick everything from his pockets. He pleaded with them not to harm him. PW3 testified that he heard PW2 screaming and he also began to scream for help. He testified that In the course of the fray, he was robbed of a tape measure, a screw driver, a Nokia phone and a sum of Kshs.1,700 in cash.

The evidence of the complainant was that he heard PW3 screaming and he dashed outside to check on him. He testified that he saw about five (5) young men outside his bar. He testified that the men fled when they saw him. He saw that PW3's left pocket was torn. The complainant testified that the young men thereafter returned to where PW2 had been standing. PW2 testified that she recognized the Appellant amongst the said men who came up to her. She testified that the Appellant hit her on her mouth with a stone. She testified that she recognized the Appellant as she had known him for about a year. They lived within the same neighbourhood and she referred to him as 'Njoro'.

When the complainant saw PW2 being attacked, he threatened the said boys not to enter the bar and they walked away slowly. The complainant testified that he then chased them and managed to get hold of one of them. He testified that the boy began to scream for help and the rest of the boys came back to rescue him. They wrestled the complainant on the ground while hitting him with iron bars on his legs. The complainant testified they escaped after he let go of the boy. He testified that he sustained injuries on his leg. He also lost his Nokia C1 phone during the attack. The complainant produced a copy of a receipt for the purchase of his lost mobile phone as **Prosecution's Exhibit No. 1**.

The incident was reported at Karuri Police Station by the complainant and PW2. They both testified that they reported that they had identified the Appellant amongst their assailants. The Police advised the complainant to seek medical attention at Karuri Health Centre. At the hospital, the complainant was seen by PW6, Richard Munene, a clinical officer on 3rd July 2013. On examination, PW6 observed that the complainant had a tender swelling on the left eye, neck, orbital region, upper limbs and on the right middle finger. PW6 formed the opinion that the injury was caused by a blunt object. He assessed the complainant's injuries as harm. PW6 filled a P3 form in respect of the complainant which was produced into evidence as **Prosecution's Exhibit No. 2**.

PW5 Ag. IP Peter Kiilu was assigned to investigate the case. He confirmed that PW2 reported that she identified the Appellant as one of their assailants. He testified PW2 reported that she was able see the Appellant during the incident as there was sufficient lighting at the scene from the security lights. He testified that PW2 was able to identify the complainant in an identification parade conducted by PW4 Robert Ojwang on 4th August 2013. A copy of the Identification Parade Report was produced into evidence as **Prosecution's Exhibit No.3**. After concluding his investigations, PW5 reached the

determination that a case had been established for the Appellant to be charged with the present offence. When the Appellant was put on his defence, he denied committing the offence.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the conviction of the Appellant as was held by the Court of Appeal in Njoroge – vs- Republic [1987] KLR 19 at P. 22:

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v. R [1957] e.a 336, Ruwala v. R [1957] E.A 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the Appellant on the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the facts of this case. It has also considered submission made by both the Appellant and the Learned State Counsel in support of their respective opposing positions. This court has also considered the grounds of appeal put forward by the Appellant. The Appellant was convicted essentially on the evidence of identification. From the evidence adduced during trial, this court has no doubt that the Appellant was properly identified by PW2. PW2 knew the Appellant before the robbery incident. She referred to him as **“Njoro”**. The evidence was that of recognition. She recognized the Appellant as they lived together in the same neighbourhood. The Court of Appeal in Anjononi –Vs- Republic [1980] KLR 54 at P. 60 held thus:

“Being night time the conditions for identification of robbers in this case was not favourable. This was however a case of recognition not identification of assailants; recognition of an assailant is more satisfactory, more reassuring and more reliable than identification of a stranger because he depends upon personal knowledge of the assailant in some form or other.”

PW2 was not identifying a stranger but a person who was well known to her. Identification by recognition is more reassuring than the identification of a stranger who the victim met for the first time. This court discerned no reason why the said identifying witnesses could give false testimony against the Appellant. The identifying witnesses was consistent in insisting that it was the Appellant who had committed the robbery. This was evidence for the time the first report was made to the police to the time the said witnesses testified in court. There is no doubt in the mind of this court that the Appellant was properly identified.

In the premises therefore, this court finds that the prosecution proved its case against the Appellant on the case of **Robbery with Violence** contrary to **Section 296 (2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt. The prosecution established that indeed the complainant was robbed of his Nokia C1 phone and he sustained injuries from the attack. The injuries were assessed as harm. This court finds no merit in the Appellant’s appeal and it is hereby dismissed. The conviction and the sentence of the trial magistrate’s court is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF MAY 2016

L. KIMARU

JUDGE