



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 223 OF 2011

(An Appeal Arising Out Of The Conviction And Sentence Of Hon. P.M. Ndwiga, Sr. M. Delivered On 2nd September 2011 In Nairobi Cm. Cr. Case No.1699 Of 2009)

JOHN THUO NGUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, John Thuo Ngugi was charged with another, with two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the night of 29th and 30th August 2009 at Hall 13 Hostel, University of Nairobi, the Appellant, jointly with another, while armed with dangerous weapons, namely a toy pistol and a pen-knife robbed Jerioth Mumbi Gitang'a and Everline Cheplangat Bor of their mobile phones, a flash disk and cash of Kshs.2,600 and Kshs.300 respectively and at or immediately before or immediately after the time of such robbery used actual violence to the said Jerioth Mumbi Gitang'a and Everline Cheplangat Bor. The Appellant was further charged with **assault causing actual bodily harm** contrary to **Section 251** of the **Penal Code**. The particulars of the offence were that in the same night and in the same place, the Appellant unlawfully assaulted Jerioth Mumbi Gitang'a causing her actual bodily harm. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty. After full trial, he was convicted as charged on the two counts of robbery with violence. He was sentenced to death. The Appellant was aggrieved by his conviction and sentence. He has 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 he had been convicted on the basis of the evidence of identification that was doubtful. He took issue with the fact that the trial court had relied on the evidence of the circumstance of his arrest to convict him. The Appellant was aggrieved that he had been convicted on the basis of a defective charge sheet and contradictory evidence. The Appellant faulted the trial magistrate for failing to take into consideration the entirety of the evidence which did not establish to the required standard of proof that he had participated in the said robberies. The Appellant was aggrieved that the trial magistrate 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 the appeal, quash his 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 orally added in court that there was contradiction in the evidence that was adduced by the

prosecution witnesses that did not support the finding made by the court that he was guilty as charged. The Appellant urged the court to re-evaluate the evidence and reach its determination allowing the appeal. Mr. Kabaka for the State opposed the appeal. He submitted that the prosecution witnesses had adduced evidence which placed the Appellant at the scene of crime. The Appellant was properly identified by the victims of the robbery. The evidence adduced in court clearly connected the Appellant to the crimes. He urged the court to disallow the appeal and confirm the conviction and sentence of the trial court. This court shall revert to some of the arguments made in this appeal after briefly setting out the facts of the case.

PW1 Jerioth Mumbi Gitang'a and PW2 Everline Cheplangat Bor were at the material time students at the University of Nairobi. They were residents at Hall 13 Hostel. PW1 occupied Room No.209 while PW2 occupied Room No.208. PW2 testified that on 29th August 2009 at about 2.00 a.m., she woke up to discover that there was a man in her room. The man pointed a pistol at her. She ordered her not to scream or else he would kill her. He then demanded that PW2 gives him her mobile phone. PW2 surrendered her mobile phone to the man. She was ordered to surrender the money that was in her possession. She gave the man Kshs.300/-. He demanded to be given more money. She told him that she did not have any. She requested the man to leave her the SIM card. The man acceded to her request. During the entire period, the electric lights had been switched on. PW2 testified that she interacted with the man and his accomplice for about thirty minutes. In the statement that she later recorded to the police, PW2 described the man as being short and in his early 20s. She was later to identify the man in an identification parade conducted by the police as the Appellant in this case. After she was robbed, she was ordered to go back to sleep. PW2 later heard screams emanating from PW1's room. PW1's room was next door to the one of PW2. The stolen mobile phone was not recovered.

PW1 testified that on the night of 29th August 2009 at about 2.40 a.m., she woke up to find someone touching her head. She thought it was her friend. The light in the room had been switched on. She saw a man in her room. The man had a pistol. He ordered her to surrender her mobile phone. She directed the man to the window sill where she had kept the phone. The man then ordered her to give him money. She reached for her handbag which was on the floor. She was told not to bother because the man had already taken the money. The sum which was in the bag was Kshs.2,600/-. The man insisted that he be given more money. At that time, another man jumped through the window and entered the room. The two of them started harassing PW1 insisting that she give them more money. PW1 gave description of the two men to the police. He described the person fitting the description of the Appellant as being short with a mark on his face and with thick lips. In the course of the robbery, PW1 was stabbed several times with a knife when the men became frustrated that she was not giving them more money. Part of the frustration was caused by the fact that PW1 was screaming seeking help. No one came to her aid. She was stabbed on both her legs and on her head. After she had kept quiet, she was ordered to enter the bed and cover herself. She was bleeding profusely from the stab wounds. The two men jumped out of the window and ordered her not to take any action until after 30 minutes. PW1 recalled that the entire robbery incident took more than one hour during which time she interacted at close proximity with the robbers.

After the robbers had left, PW1 went to Room No.206 where her friend PW4 Brenda Murungi was sleeping. She woke her up and requested for assistance to get medical attention. PW4 testified that when she saw PW1, she was bleeding from injuries on her head and her legs. She went to her room and noted that the entire floor and the bed sheets were full of blood. She sought the assistance of the security guard who was at the entrance. This security guard, PW5 Mwanzi Maundu working for Riley Security Services, called an ambulance which took PW1 to the University Dispensary before she was taken to MP Shah Hospital where she was admitted. PW1 testified that the injuries that she had sustained on her ear required an operation to repair it. She was admitted for three days at the MP Shah Hospital before she was transferred to the Students' Sick Bay at the University of Nairobi where she stayed for a further four days on treatment. The injuries that she had sustained on her legs required that she be on crutches for three weeks. She was also put on physiotherapy. She was able to regain her walking posture after three weeks. On 6th November 2009, PW1 was examined by Dr. Zephania Kamau at the Police Surgery. He noted that PW1 had a scar on the left ear lobe and interior to the same ear. She had three healed scars on the right buttock. She also had a scar on the right calf leg, on the middle aspect of the interior aspect of the right leg and also on the left calf. He was of the opinion that the injuries were caused by a sharp object. The P3

form was produced into evidence.

PW5 and PW6 Peter Okinyi Nyambega testified that on the night of 5th September 2009 they were on duty guarding the female hostels at the University of Nairobi. PW5 was guarding Hall 13 while PW6 was guarding the Women Hostels. At about 2.15 a.m. the two security guards employed by Riley Security Services saw two men suspiciously moving towards Hall 13. They saw them hide behind the flowers planted along the perimeter fence. PW6 called his supervisor PW9 Oscar Juma Nandasaba and informed him of the event. PW9 was on a patrol vehicle within the University of Nairobi's Halls of residence. He was with two police officers, PW10 Julius Biwott and PW11 PC Joseph Kimani. The security officers went to the flower bed and found the Appellant and his accomplice hiding. The Appellant and his accomplice were arrested and taken to Kileleshwa Police Station. On being searched, the Appellant was found with a toy pistol while his accomplice was found with a red pen-knife. The toy pistol and the pen-knife were produced into evidence by the prosecution.

Upon their arrest, the Appellant and his accomplice were detained at Kileleshwa Police Station. PW14 IP Bethophen Gachago was requested to mount a police identification parade. This request was made on 8th September 2009. In the identification parade held at Kilimani Police Station, PW1 and PW2 identified the Appellant as the shorter member of the gang of two that robbed them of their mobile phones and assaulted PW1. PW1 testified that during the identification parade she was positive that it was the Appellant who had assaulted and robbed her because of the mark that he had on his face and the fact that he had thick lips. PW1 stated as follows:

“I singled one man out and asked the police whether I could speak to him. I said hi to the man in English. I asked him, how are you. He replied and said fine. I identified the short man. I can still identify him. He is the 1st Accused in the dock.”

Both PW1 and PW2 testified that they were able to point out the Appellant in the identification parade because they had, prior to the said identification parade, given the physical description of the Appellant and his accomplice to the police. They further testified that since the robbery took some time, they had time to interact with the Appellant at close proximity, and therefore, they had no doubt that he was the one when they saw him in the identification parade.

PW15 Cpl. Gerald Wasile, a Scenes of Crime Officer, visited the scene of crime on 2nd September 2009. He took photographs at the scene. He produced into evidence thirteen photographs of the scene. The case was investigated by PW16 Cpl. Reuben Onyiego then based at CID Headquarters, Serious Crime Unit. Upon conclusion of his investigations, he formed the opinion that a case had been made for the Appellant and his accomplice to be charged with the offences for which they were convicted. When the Appellants were put to their defence, they opted to keep silent. They did not adduce any evidence in their defence.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced during trial so as to reach 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 questions of 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] EA 336, Ruwala v R [1957] EA 570)”.

The issue for determination by this court is whether the evidence of identification adduced by the prosecution was sufficient to secure the conviction of the Appellant on the charge of **robbery with violence** contrary to **Section 296(2) of the Penal Code** that was brought against him. It was clear from the evidence adduced by the prosecution witnesses that the prosecution relied solely on the evidence of identification to secure the conviction of the Appellant. The Appellant challenged this evidence in this appeal. He was of the view that the evidence of identification was not watertight as to exclude the

possibility of error noting that the robbery incident took place at night.

We have warned ourselves, as is required of us, of the danger of relying on the sole evidence of identification to convict the Appellant. (See **Maitanyi –Vs- Republic [1986] KLR 198 at Page 200**). Having so warned ourselves, we are of the view that the evidence that was adduced by PW1 and PW2 on identification was consistent, cogent and corroborated each other on all material respects. It was clear from their evidence that they interacted at close proximity with the Appellant. PW1 testified that she interacted with the Appellant for close to an hour while PW2 testified that she was in close proximity to the Appellant for about half an hour. During this period, the two witnesses testified that the security lights had been switched on. They had a conversation with the Appellant during this period. They noted his physical appearance. PW1 testified that the Appellant had a mark on his face. He was short and had thick lips. Both PW1 and PW2 gave this description of the Appellant in the report that they made to the police. When they were called upon to identify the Appellant in a police identification parade (which was mounted about nine days after the robbery incident), they were able to point out the Appellant without hesitation. To eliminate any doubt in her mind, PW1 engaged the Appellant in a conversation to confirm if indeed he had the same voice as the one that she had heard during the night of the robbery. She confirmed the Appellant's voice as that of the person who robbed her.

Having carefully re-evaluated the evidence of identification that was adduced by the prosecution witnesses, we have no doubt in our mind that indeed the Appellant was properly identified by the victims of the robbery. The Appellant was arrested at the scene of the robbery about six days after the robbery. It was obvious that the Appellant and his accomplice intended to commit another robbery. He was found with a toy pistol. It was this same toy pistol that the Appellant used to threaten PW1 and PW2 to subdue them. The description that PW1 and PW2 gave of the pistol fitted the toy pistol that was produced in evidence by the prosecution. Taking into consideration the totality of the evidence adduced, this court holds that the prosecution did prove to the required standard of proof beyond any reasonable doubt that the Appellant robbed the complainants, and in the course of the robbery, threatened them using a toy pistol, and in the case of PW1 she was injured when she was stabbed severally with a knife. The ingredients to establish the charge of robbery with violence contrary to **Section 296(2) of the Penal Code** were proved. The Appellant exercised his constitutional right to say nothing when he was put on his defence. That is a right that is constitutionally guaranteed.

The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. The conviction and sentence of the trial court is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF JUNE 2016

L. KIMARU

JUDGE

G.W. NGENYE – MACHARIA

JUDGE