



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.75 OF 2015

(An Appeal arising out of the conviction and sentence of Hon. E.K. NYUTU – PM delivered on 16th April 2015 in Makadara CM. CR. Case No.1316 of 2014)

DENNIS WANJOHI KAGIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Dennis Wanjohi Kagiri was charged with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the night of 24th and 25th February 2014 at Ruai Township within Nairobi County, the Appellant, jointly with others not before court robbed Hellen Wangari Thumbi of Kshs.5,000/-, a mobile phone, 2 T-shirts and a bag and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Hellen Wangari Thumbi (hereinafter referred to as the complainant). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial he was convicted as charged. 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 insufficient evidence which did not establish his guilt to the required standard of proof beyond any reasonable doubt. He took issue with the manner in which the trial court relied on the evidence of identification to convict him when, in his view, the said evidence was not free from the possibility of error and mistake. He faulted the trial magistrate for failing to consider all the circumstances of the case which in his opinion would have exonerated him from the crime. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

Prior to the hearing of the appeal, the Appellant filed written submission in support of his appeal. He also made oral submission in court. The Appellant submitted that the evidence adduced by the complainant was contradictory and did not irresistibly point to him as a person who robbed the complainant. He submitted that there was contradiction as to the time the robbery took place and the time the complainant made the report to the police. He urged the court to take into consideration the fact that although the complainant told the police she knew the person who had robbed her, she did not give the names of the person who robbed her in the first report that was made to the police. The complainant did not give the description of her assailants. The Appellant explained that he was arrested fourteen (14) days after the

robbery incident. He attributed his arrest to a disagreement that he had with the complainant. He explained that the complainant was his girlfriend and prior to the complaint being lodged with the police, they had had a disagreement. It is this disagreement that escalated into the trumped up charge being brought against him. He urged the court to take into consideration the fact that prior to the commencement of the trial, the complainant had indicated to the court that she wished to withdraw the case after she had discussed the issue with village elders. This request to withdraw the charge was denied by the trial court.

On the substance of the charge, the Appellant submitted that none of the items that were allegedly robbed from the complainant were recovered in his possession. The evidence that was adduced by the complainant was insufficient to link him to the offence. The ingredients to establish the charge of robbery with violence were not established. The complainant claimed that she was strangled before being robbed. There was no medical evidence to support her claim that she had indeed been strangled. The Appellant urged the court to take into consideration that the evidence adduced by the complainant was not corroborated. He was of the view that the circumstances of the case clearly pointed to the fact that he had been framed with the charge. He urged the court to allow the appeal.

Ms. Sigei for the Appellant opposed the appeal. She submitted that the prosecution established its case to the required standard of proof. The complainant testified that she was accosted at night by two men as she was heading to the bus stage to board a motor-cycle to take her home. She was able to recognize the Appellant as he was a customer in her bar. In her testimony, she referred to the Appellant by his name – Dennis. The complainant knew the Appellant before the robbery incident. The Appellant wore no disguises. In the report that the complainant made to the police, she identified the Appellant as the person who had robbed her. She reiterated that the complainant was so sure that it was the Appellant who had robbed her that she led the police to his arrest at his residence. She urged the court to dismiss the appeal as all the ingredients to support the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** had been established.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court 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, Ruwalla v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to support the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** that was brought against the Appellant.

This court has carefully re-evaluated the evidence adduced before the trial magistrate’s court. It has also considered the submission made before this court by the parties to this appeal. From the facts of this case, it was clear that the prosecution relied on the evidence of a single identifying witness to secure the conviction of the Appellant. According to the complainant, she was robbed by two men as she was walking to the bus stage to get transport to take her home. The incident took place at about midnight. The complainant testified that she was able to identify the Appellant as he was a frequent customer at her bar. She even referred to the Appellant by the name Dennis when she testified in court. She told the court that she was able to identify the Appellant as there was sufficient light from the security lights at the place that she was robbed. Nothing that was robbed from the complainant was recovered.

This court doubted the veracity of the complainant’s testimony on several grounds: firstly, if the

complainant knew the Appellant as she claimed in her evidence, *why didn't she give his name in the first report that she made to the police?* In the first report that she made to the police, the complainant told the police that she knew the person who had robbed her. She did not give the name of her assailant. Neither did she give his description. Secondly, *how come the complainant knew the residence of the Appellant?* The complainant did not tell the trial court under what circumstances she came to know the residence of the Appellant. If she knew the residence of the Appellant, *why did it take fourteen (14) days before the Appellant was arrested by the police? What is the reason for this delay?* In his defence, the Appellant testified that the complainant was his former girlfriend. They had disagreed after his parents had warned him not to continue with the relationship. *Could this be the reason why the complainant knew the residence of the Appellant?* In this court's considered view, reasonable doubt has been raised by the facts of this case. This court is not convinced that the events as narrated by the complainant actually occurred.

Another factor that influenced this court in doubting the complainant's story is the fact that whereas the complainant alleged that she was strangled before she was robbed, no medical evidence was produced in court to support this claim. If indeed the complainant was strangled as she claims, then it was imperative that she secures medical evidence to support her claim. Further, prior to the commencement of the trial, the complainant indicated to the trial court that she wished to withdraw the complaint. The trial court denied the complainant's application to withdraw the charge. The complainant told the court that she wished to withdraw the charge because village elders had successfully promoted reconciliation between herself and the Appellant. The trial court did not inquire as to the nature of reconciliation that was discussed between the complainant and the Appellant. It may well be that the complainant and the Appellant were being reconciled on account of their broken relationship. People who do not know each other cannot be reconciled. The claim by the Appellant to the effect that the charge may have been motivated by a relationship gone sour may not be beyond the realm of possibility.

The upshot of the above reasons is that the circumstance of this case raises reasonable doubt that the Appellant robbed the complainant. The Appellant's appeal therefore has merit. It is hereby allowed. His conviction is quashed. He is set at liberty forthwith and ordered released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF JULY 2016

L. KIMARU

JUDGE