REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 68 & 69 OF 2015

JOHN IRERI NJIRU.....2ND APPELLANT

AND

PAUL MUREITHI MAREGU.....1ST APPELLANT

VERSUS

REPUBLIC…… ……..……..RESPONDENT

(Being an appeal from the original conviction and sentence in 455/14 at Embu Chief Magistrate's Court by Hon A.G. Munene - SRM on 18th August, 2015)

JUDGEMENT

1. In these two consolidated appeals the appellants appealed against their conviction and sentence of 6 years imprisonment in respect of a charge of robbery contrary to section 296 (1) of the Penal Code (Cap 63) Laws of Kenya, which were imposed upon them by the court of the Senior Resident Magistrate at Embu on 18th August, 2015

2. The state thorough Ms Mbae supported both the conviction and sentence recorded against each of the two appellants.

3. The evidence upon which the appellants were convicted consisted of the eye witness evidence of both Peter Mugendi Njiru (PW 1) and that of Nancy Wangari (PW 2). According to the evidence of these two witnesses, they were able to recognize the appellants as the persons who attacked and robbed the complainant of his cash money in the sum of Kshs 5500/-. They were able to recognize the two appellants because they had known them before the date of the robbery. They were further enabled by electricity light which was on during the material night at the scene of the robbery.

4. Both appellants gave sworn testimony. John Ireri the 1st appellant testified that he was not at the scene of the robbery on the material day. He testified that he was sick in his house. He further testified that he was arrested the following day from his house and was taken to Itabua Police Station and charged with this offence. Under cross-examination, he admitted knowing the complainant (PW 1). He also admitted that he never had any grudge with the complainant. He went further to state that he grows and sells miraa (khat). He called Janet Mbere (DW 1) who supported his defence of alibi. DW 1 testified that John Ireri is a son to his sister. She further testified that she herself resides at Githegi while John Ireri resides at Giekaru village.

5. Paul Mureithi Maregu, the 2nd appellant also gave sworn testimony in his defence. He testified that he

grows and sells miraa. His further evidence was that the complainant (PW 1) told the court lies. According to him, there was no electricity at the scene of the crime. He further testified that the complainant had a grudge against him arising out of the miraa business. He concluded his evidence that he was arrested on 25th March 2015 from his house by the police and was taken to Itabua police station where he was charged with this offence. He did not call any witness in support of his case. While under cross-examination, he admitted that he knew the complainant as a businessman dealing in miraa. He also admitted that the complainant had a grudge with him arising out of a farm which he had leased in which the complainant had an interest.

6. Both appellants filed their petitions of appeal in this court. They both raised common grounds of appeal which are identical. For this reason, I will consider the petition of appeal of John Ireri Njiru who is the appellant in criminal appeal No. 68 of 2015. In ground 1 of his appeal, the appellant has stated the unchallengeable fact that he did not plead guilty. In ground 2, the appellant has faulted the trial court for relying on the identification evidence of the complainant (PW 1) and Nancy Wangari (PW 2) who were a brother and a sister to convict him. I find from the evidence of PW 1 and 2 that they knew the appellants before this robbery. I find that there was plenty of electricity at the scene of crime which enabled them to positively recognize the two appellants. In the circumstances, I find that the identification of the two appellants was free from mistake or error. The fact that the two witnesses were related does not affect the credibility of their testimony which I find was rightly believed by the trial court. I find no merit in this ground of appeal and is hereby dismissed.

7. In ground 3, the appellants have faulted the trial court for failing to consider and find that there existed a grudge between the complainant (PW 1) to frame the case against them. In this regard, I find that when the complainant testified, the issue of the existence of a grudge was not put to him. I find that this is an afterthought and for this reason I further find that the appellants were not framed up. I further find that the appellants gave sworn testimony and after assessing their credibility the trial court rightly disbelieved them. For this reason, I find no merit in this ground of appeal which is hereby dismissed.

8. In ground 4, the appellants faulted the trial magistrate that their identification was not positive in view of the fact that there was a distance between the source of the light and where PW 1 was at the material time. They have further complained that there was no independent witness who came to testify. Additionally, they have also complained that the sub-area (village elder) to whom the report was given was not called to testify. I have already found that the two appellants were positively identified. I have found from their evidence that they were credible witnesses. I further find that the sub-area should have been called as a witness because he is the one who received the initial report of the complainant. However, the failure to do so did not occasion the failure of justice in terms of section 382 of the Criminal Procedure Code (Cap 75) Laws of Kenya. If is for these reasons that I find no merits in this ground of appeal.

9. In ground 5, the appellants have faulted the trial court for failing to consider and find that there was no weapon or exhibit recovered from them. In this regard, I find that the appellants attacked the complainant and robbed him of the sum of Kshs 5500/-. The evidence clearly indicates that there was no weapon used during the attack. There is further evidence that the two appellants were arrested after some days following the commission of the offence of robbery. In the circumstances, it was not possible to recover the money stolen so that it could be produced as an exhibit. In the circumstances, I find no merit in this ground and I hereby dismiss it.

10. In ground 6, the appellants have faulted the trial court in failing to consider that the investigation was one sided because they allege that it was only the statement of the complainant which was recorded. I find that this assertion is of a general character. It does not specifically say which aspect of the case that the police failed to investigate as required by the law. In the circumstances, I find no merit in this ground of appeal and I hereby dismiss it.

11. In ground 7, the appellants have faulted the trial court for rejecting their defence evidence without good reasons which is in violation of section 169 (1) of the Criminal Procedure Code (Cap 75) Laws of Kenya. I find from the evidence that the trial court properly directed itself that the main issue was one of

identification at night. After doing so, that court found that the two appellants were positively identified as the persons who robbed the complainant. That court went further and found that their sworn testimony was incredible. In these set of circumstances, I find that the trial court gave reasons for rejecting the defence evidence of the appellants in terms of section 169 (1) of the Criminal Procedure Code.

12. This is a first appeal. As a first appeal court, I am required according to ***Peters V. Sunday Post Limited (1958) EA 424*** to reassess the evidence and come to my own independent conclusions. I have done so and I find that the two appellants were convicted on sound evidence.

13. As regards the appeal against their sentence, the trial court found that they were first offenders. It further found that the offence was prevalent in that locality. It then proceeded to sentence them to 6 years imprisonment. I find that the maximum sentence provided for under section 296 (1) is 14 years imprisonment. In the circumstances, I hereby find that the sentence of 6 years imprisonment was merited.

14. The upshot of the foregoing is that the two appeals are hereby dismissed in their entirety.

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

In the presence of both appellants and Ms Mbae for the respondent.

Court clerk Njue

J.M. BWONWONGA

JUDGE

29.11.16