



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 39 OF 2010

KENNEDY KAMAU WANGUI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence from Karatina S.R.M.C.R.C. No. 524 of 2008 delivered on 09/2/2010 by Hon. L.Mbugua Ag. Principal Magistrate.)

JUDGMENT

KENNEDY KAMAU WANGUI, the appellant herein, was tried and convicted for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were stated to be that on 15th July 2008, at Wariruta Shopping Centre in Nyeri North District within Central Province, the accused while armed with a sharp object robbed one **DAVID MWANIKI GITHONGORI** of a motor cycle no. KBC 673B red in colour and at or immediately before or immediately after the time of such robbery wounded the said David Mwaniki Githongori. Upon conviction, the appellant was sentenced to suffer death. Being dissatisfied, the appellant preferred this appeal.

The following grounds of appeal were put forward for consideration by this court:

1. **The learned trial Magistrate erred in law and in fact in not finding prosecution did not abide by the requirement c/s 72/3 of C.P.C to find that the delay was to enable the prosecution to manufacture incriminating evidence against the accused.**
2. **The learned trial Magistrate erred in law and in fact with regard to standard of proof where identity or recognition of the accused is in issue and is claimed to be mistakenly.**
3. **The learned trial Magistrate erred in law and in fact with regard to mode of arrest that was after the thirty seven (37) days from the time of crime.**
4. **The learned trial Magistrate erred in law and in fact in convicting the appellant without finding the defence tendered perusable and give point to determination.**

When the appeal came up for hearing, the appellant argued it in person while Mr. Kaigai, learned Principal State counsel strenuously opposed the appeal on behalf of the Director of Public Prosecutions.

At this juncture, we wish to first state in brief the case that was before the trial court. Four (4) witnesses were summoned to testify in support of the prosecution's case. It is the prosecution's case that in the night of 15/07/2008 at around 8.00pm, David Mwaniki Githogori (P.W.1) was at their motor cycle parking yard when he was called by the accused (appellant) with a request to pick him up at Kagochi stage. P.W.1

operated boda boda transport business using motor cycle registration no. KBC 673B jointly with **Stephen Wanjohi Wangu** (P.W.3). The appellant was someone well known to P.W.1. P.W.1 obliged and picked the appellant who then requested P.W.1 to take him to Wariruta. Before riding to Kagochi stage, P.W.1 had agreed to meet with his partner (P.W.3) at Celebration Place. P.W.1 passed by celebration place to meet P.W.3 who informed him that he wanted to use the motor cycle to transport another customer somewhere. P.W.1 managed to convince P.W.3 to allow him to first transport the appellant to Wariruta. It is the evidence of P.W.1 that when he reached Wariruta, the appellant obtained a panga and cut him severally all over his body, then threw him into a trench before taking off with the motor cycle. P.W.1 was left for dead until next morning when he was picked up by police and taken to hospital for treatment. Meanwhile, P.W.3 waited in vain for the return of P.W.1. P.W.3 later learnt that his colleague (P.W.1) had been attacked and injured. He later went to see P.W.1 in hospital. **PC Richard Lokale** (P.W.4) said he got information from his colleague in the morning of 16/07/2008 that there was a body lying at Wariruta. They rushed to the scene and found P.W.1 lying unconscious while critically injured. P.W.4 together with his colleagues took P.W.1 to hospital for treatment. When P.W.1 got stabilized P.W.4 said he told him he knew his assailant. On 7/9/2008 P.W.1 and P.W.3 managed to arrest the appellant and was later re-arrested by the police.

When placed on his defence, the appellant denied the offence and stated that on the material day i.e on 15/07/2008 he spent the whole day doing his masonry and went home where he spent the night without venturing out. He said in the evening of 7th September, 2008 he was arrested by four people while he was on his way to do fishing. The appellant stated that those people who arrested him demanded from him to show where he had kept the motor cycle he stole. He was taken to the police when he denied the offence where he was kept in custody until 22nd July, 2008 when he was taken to court. He denied knowing P.W.1. He also denied having been transported by P.W.1 on the fateful day. The trial learned Principal Magistrate considered the evidence and concluded that the evidence of P.W.1 was credible to sustain a conviction.

On appeal, the appellant urged this court to allow the appeal and make an order for retrial. He argued that there was need for an identification parade in the circumstances of this case. The appellant stated that if the complainant knew him he could have been arrested almost immediately. He also stated that P.W.4 did not mention his names. Mr. Kaigai opposed the appeal arguing that the complainant knew the appellant very well, hence there was no need for an identification parade. Although the appellant's grounds of appeal are not very concise we think he is basically arguing that he was not properly identified and that he was convicted on weak evidence. We have on our part, re-evaluated the evidence. The evidence which appear to link the appellant with the offence is that of P.W.1. It is the evidence of P.W.1 that on 15/7/2008, he was called by a customer to pick him at Kagochi stage. He obliged and upon reaching Kagochi stage the customer is said to have instructed P.W.1 to take him to Wariruta. P.W.1 passed by celebration place to first meet his colleague P.W.3. The complainant stated that the customer declined to pay him when he demanded to be paid upon reaching Wariruta. P.W.1 said he took the customer further down from Wariruta and that is when the customer is said to have removed a panga and viciously cut him and left him for dead. P.W.1 stated that he had known the appellant for about a year. P.W.1 further stated that he reported the incident to the police when he was discharged. He claimed he told the police who his assailant was and that he specifically mentioned the appellant. P.W.3 who was P.W.1's colleague said he visited the complainant in hospital and that is when he told him that the customer he had taken to Wariruta the previous night had attacked him. **PC Richard Lokale Utang** (P.W.4) stated that P.W.1 was unconscious when he was found lying near Wariruta. PW4 said he visited P.W.1 in hospital after two days and this time round he was able to talk. P.W.4 said that P.W.1 was able to give the physical description of his assailant. P.W.4 said P.W.1 claimed he personally knew his attacker to be of medium height, built and had rastas. We have carefully considered the evidence of P.W.1, P.W.3 and P.W.4. We doubt whether the complainant knew the appellant. If indeed, the complainant knew the appellant by name then why didn't he mention his name to his colleague P.W.3 and the administration police officer (P.W.4). P.W.3 purported to claim to know the physical appearance of the appellant. We are unable to accept P.W.3 evidence because the encounter he had if any with P.W.1's customer was so short and in any case it was at night. We think the evidence of identification is not satisfactory. The complainant failed to state how well he knew the appellant. Was he a village mate or was he a regular customer or was he an acquaintance? We give the appellant the benefit of doubt.

Consequently, the appeal is allowed. The conviction is quashed and the sentence set aside. The appellant is hereby set free forthwith unless lawfully held.

Dated, signed and delivered this 20th day of February, 2014.

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J.K.SERGON

JUDGE

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J. WAKIAGA

JUDGE