



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO. 342, 343 & 338 OF 2009

FRANCIS KINYUA WANGARI 1ST APPELLANT
PETER MBURU SIMON2ND APPELLANT
SAMUEL NDUNGU WAIRIMU3RD APPELLANT

VERSUS

REPUBLIC APPELLANT

(From original conviction and sentencing in Criminal Case No1458 of 2008 at the Chief Magistrate's Court in Thika by C.W. Meoli, Chief Magistrate)

JUDGMENT

These appeals are consolidated. The appellants were jointly charged with the two counts of Robbery with Violence contrary to Section 296 (2) of the Penal Code. The particulars of count I stated that on 19th April, 2008 at Muchatha Trading Centre, Thika District while armed with offensive weapons namely knives, they jointly robbed Richard Muthomi Karani of his mobile phone make Panasonic A102 and cash Kshs. 800/= all valued at Ksh. 5,800/= and immediately before the time of such robbery wounded the said Richard Muthomi Karani.

In the 2nd count it was alleged that on the same day and place while armed with offensive weapons namely knives, they jointly robbed Simon Ndirangu Kamau of cash Kshs. 600/= one long trouser, one shirt, one vest and a pair of leather shoes all valued at Kshs. 3700/= and immediately before the time of such robbery wounded the said Simon Ndirangu Kamau. They denied the offences but after a full trial they were convicted and each sentenced to death. These appeals arise from the said convictions.

On the night of the alleged offences at about 10.00 p.m. P.W. 1 and P.W. 2 who were university students at Jomo Kenyatta University of Agriculture were returning to the university after an outing. As they approached the university they were accosted by three people who attacked and separated them before relieving them of the properties set out in the charge sheet. P.W. 1 told the court that he was cut with a knife on his left hand by the 1st appellant herein. He was then robbed of his phone and cash.

P.W. 2 on the other hand was stripped of his clothes and shoes and left in his underwear only. He sustained bruises on his face, knees and feet. P.W 3 is a taxi operator who happened to be near the scene and met P.W. 1. In his quest to rescue him he was confronted by the 1st and 3rd appellants. The 3rd appellant was wielding a knife. When he asked the 1st and 3rd appellants why they had attacked P.W. 1 they said that P.W. 1 had stolen a phone from them. The evidence on record is that the scene of this confrontation was near a petrol station and Senate Hotel.

There were electric lights coming from the station and the hotel. P.W. 1, P.W. 2 and P.W. 3 testified that they were able to identify the assailants with the aid of the said light. A few days after the attack the three appellants were arrested. In their defenses the three appellants denied the offences in the process alleging that they were arrested and charged with the offence of possession of changaa. The learned trial magistrate believed the evidence of the prosecution witnesses, disbelieved the defences of the appellants and proceeded to convict them.

As the first appellate court, we have reviewed and assessed all the evidence adduced before the trial court with a view to arriving at independent conclusions. P.W. 2 was a student at the university since the year 2002. He was familiar with the 2nd and 3rd appellants. He was able to recognize them on the night of the attack aided by the light from the petrol station and hotel. He remained firm under cross examination.

P.W. 3 on the other hand, had been operating a taxi at Juja for four years. He knew the 1st and 3rd appellants. He spoke with both of them on the night of the attack and therefore they were not strangers to him. When the report of the attack was made at the police station, there is evidence from P.W. 7 the investigating officer, that the appellants' names were given to the police in the first report.

According to this witness there were security lights between Senate Hotel and Barclays Bank. He also confirmed that the three appellants were arrested for possession of Chang'aa and later charged with these offences. The learned trial magistrate in assessing the evidence adduced used the following words, "**Lucid, strong, cogent and believable**". These are observations made by the presiding magistrate after observing and hearing the witnesses, a benefit we do not have. Although P.W. 1 talked of an identification parade there is no evidence that this was conducted. This however does not diminish the evidence adduced by the prosecution.

Our assessment of the evidence is that the prosecution presented sufficient evidence to warrant the conviction. There is no way P.W. 2 and P.W. 3 who knew the appellants could have mistaken them for any other persons, because of the nature of lighting at the scene and the communication that took place. It is not true therefore that the appellants were not at the scene as alleged in their defences. The learned trial magistrate correctly observed that their denial is totally displaced by the evidence of P.W. 2 and P.W. 3 in particular.

The three appellants were armed with a knife. They assaulted the complainants leading to the injuries sustained. There was a common intention. The case against them was proved beyond any reasonable doubt. The conviction was well founded. The sentence is mandatory and we have no reason to interfere with it. These appeals are therefore dismissed.

SIGNED, DATED and DELIVERED in open Court this 14th Day of April, 2014

MBOGHOLI MSAGHA

L.A. ACHODE

JUDGE

JUDGE

