



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 638 & 639 OF 2010

JAMES MATHENGE KAMAU.....1ST APPELLANT

SIMON MWANGI MUGO2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 2057 of 2009 in the Chief Magistrate's Court at Kiambu – C. Oluoch (SRM) on 11/11/2010)

JUDGMENT

1. **James Mathenge Kamau** and **Simon Mwangi Mugo** the appellants herein were tried and convicted for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** by the learned Senior Resident Magistrate at Kiambu law courts. They were sentenced to suffer death as by law prescribed.
2. The chief facts were that on the 23rd November 2009 at around 8.30 p.m. at Kahawa Wendani Estate in Nairobi while armed with a dangerous weapon namely a club they robbed Erick Musila Nzau of Kshs.6,200 and at or immediately before or immediately after the time of such robbery used personal violence against the said Erick Musila Nzau.
3. Being aggrieved by the conviction and sentence the appellants filed appeals number 638 and 639 of 2010, respectively. On 18th February, 2014 the appeals were consolidated and proceeded as appeal No. 638 of 2010.
4. In the first appellant's grounds of appeal he complained that he was not supplied with the first report as requested; identification was not beyond reasonable doubt; the evidence was contradictory, uncorroborated and unreliable; **Sections 214, 208(3) and 302** of the **Criminal Procedure Code** were overlooked; the mode of arrest was riddled with doubts and the conviction was against the weight of evidence. The second appellant's grounds of appeal were that he was not positively identified and no identification parade was conducted; Provisions of **Section 200(3) and 151** of the **Criminal Procedure Code** were violated; no exhibits were recovered in his possession and that he was convicted on non-existent evidence of **PW2** and **PW3**.
5. Miss Ndombi learned counsel for the respondent, opposed the appeals. On identification she recapped the testimony of **PW2** that he was in the company of **PW3** and that he was hit from

- behind as they were walking. That he turned and saw two people one of whom slapped him and his spectacles fell from his face. That the two men assaulted and drugged him to a nearby butchery and took a screw driver and Kshs.6.200 from his pocket.
6. Miss Ndombi submitted that the complainant was able to identify the two appellants by the street lights. She urged that there was no need for an identification parade because **PW2** took the police to the butchery where the assault occurred and both appellants were found and arrested. The first appellant was the owner of the butchery while the second appellant was his employee.
 7. Miss Ndombi contended that the subject matter being money it was easy to dispose of it since the appellants were arrested a day later hence the lack of recoveries made. That the club which was used to assault **PW2** was recovered and produced in evidence. Miss Ndombi disputed that there were defects in the charge sheet, as complained by the appellants and submitted that the charge sheet was proper. She also maintained that both Sections **200(3)** and **214** of the **Criminal Procedure Code** were complied with since the appellants were informed of their rights in both instances.
 8. We have anxiously re-evaluated the evidence on record bearing in mind our duty as the first appellate court is to re-evaluate the evidence afresh and make our own findings and draw our own conclusions, being cognisant of the fact that we did not have the advantage of observing first hand, as the witnesses testified.
 9. The prosecution case rests on the evidence of identification since the assailants were not arrested at the scene and there were no recoveries made from them. Of the four witnesses who testified for the prosecution, **PW1** a doctor and **PW4** the arresting officer were not at the scene of the robbery. The evidence of **PW3** who was at the scene with **PW2** did not lend much support to the prosecution case. Although he mentioned in passing that he identified the appellants because there were security lights it was not evident at what point he was able to do so.
 10. In the recollection of **PW3**, **PW2** was struck from behind as they were walking along together, causing his spectacles to fall off his face **PW3** followed the direction the spectacles had taken as the intruders grabbed **PW2** and dragged him back towards where they were coming from to stop outside a butchery. **PW3** did not shout for help nor go to his companion's aid but busied himself at the scene looking for **PW2**'s spectacles that had dropped to the ground.
 11. According to **PW3**, he later met **PW2** who was limping and who told him that he had been beaten by the two men. At that point **PW2** told him he had money on him but **PW3** was not clear in his evidence whether the two men robbed **PW2** of the money or it was still with him. In cross examination he was categorical that he did not see **PW2** being beaten or robbed.
 12. The above analysing leaves us with only the evidence of **PW2**, the complainant himself in our analysis we are alive to the fact that evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. – See **KARANJA & ANOR V. REPUBLIC [2004] 2KLR pg 10.**
 13. We analysed the evidence to assess the circumstances under which **PW2** purported to have identified his assailants and found that they were difficult and did not provide for safe identification. The time of the offence was 8.30 p.m. and the blow that commenced the attack on **PW1** was delivered from behind. The blow caused his spectacles to fly off his face and immediately he turned to see who had struck him a slap was delivered to his face.
 14. From that moment he was dragged backwards according to **PW3**. He ended up outside a butchery where blows were rained upon him using what he said was a club. One of the two assailants dipped his hand in **PW2**'s pocket and took his cash Kshs.6,200/= and a screw driver therefrom. The screams of **PW2** did not avail him much in terms of intervention from anyone.

15.It is instructive to note that according to **PW2** his assailants were strangers to him and that he did not record in his statement to the police, that he had been assaulted and money taken from him in the incident. We also note that the appellants were not arrested in the act nor was there any exhibit recovered from any of them to connect them to the offence. Furthermore there is no evidence to indicate the length of time the robbery took to enable us conclude that it was sufficient for **PW2** to have identified his assailants. The attack appears to have been concluded within a few minutes.

16.In sum, applying our minds to the evidence before us, we came to the conclusion that in view of the circumstances obtaining at the time of robbery, a reasonable doubt exists as to the correctness of the identification of the appellants.

In the result, we quash the conviction and set aside the sentence imposed upon the appellants. We order that each appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and **DELIVERED** in open court this **8th** day of **April 2014**.

A.MBOGHOLI MSAGHA

L. A. ACHODE

JUDGE

JUDGE