



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 228 OF 2012

DUNCAN GITHUI WANJAUAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 5167 of 2011 in the Chief Magistrate's Court at Makadara – T. Okelo (SPM) on 14/08/2012)

JUDGEMENT

1. The appellant filed an appeal following his conviction by Mr. T. Okelo, Senior Principal Magistrate, for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in **Makadara CM Cr. Case no. 5167 of 2011**. He had been sentenced to death in accordance with the law.
2. The particulars of the offence were that on the 30th day of September 2011 at Kariobangi North in Nairobi, jointly with others not before the court while armed with a dangerous weapon namely knives, they robbed John Irungu Kanyoku of motorcycle Registration No. KMCQ 243 H valued at Kshs.65, 000/= and at, immediately before or immediately after the time of such robbery they threatened to stab the said John Irungu Kanyoku.
3. He filed a petition of appeal in which he relied on 8 grounds as follows:
 - a. **The points of determination and the decision made were contrary to section 169 of the Criminal Procedure Code;**
 - b. **Identification, and recognition by PW1 was not free from possibility of errors or mistake;**
 - c. **The evidence of the complainant was incredible**
 - d. **Crucial witnesses were not summoned to testify;**
 - e. **Prosecution evidence was riddled with inconsistencies, discrepancies and contradictions;**
 - f. **The prosecution case was not proved beyond reasonable doubt;**
 - g. **His defence was not considered.**
 - h. **He was framed.**

2. The State opposed the appeal through learned counsel Mr. Kabaka, who submitted that the ingredients of the offence of robbery with violence were established through the prosecution witnesses. That it was demonstrated that the appellant together with two other people confronted the complainant, **PW1** while armed with a knife and robbed him of motor cycle Reg. No. KMCQ 243H. On identification Mr. Kabaka urged that the appellant was well known to **PW1** because they worked together as touts and that the appellant called him by name during the robbery, and **PW1** informed **PW2** that the appellant had robbed him of the motorcycle.
3. The prosecution case is that **PW1** was at his place of work at Kariobangi, when the appellant came and asked him to take him to Pangani on his motorcycle at a cost of Kshs.200/=. On the way to Pangani the appellant put a knife on his neck and ordered **PW1** to stop the motorcycle abruptly. Two other people appeared and threatened to stab **PW1** with a knife. He did not know them, but the appellant was still seated behind him holding the knife. The three men relieved **PW1** of the motorcycle and rode off.
4. **PW1** reported the incident to his mother the owner of the motorcycle. The appellant was later found and arrested at Kariobangi round-about, by **PW1** who was accompanied by some boda boda operators and the police.
5. The appellant gave sworn testimony in which he denied the offence. He told the court that he was arrested at Kariobangi round-about, taken to the police station, and told to produce the motorcycle. That the police asked him to take them to where he worked. He took them to Kayole where they arrested the second accused for no reason, but he was later released by the court.
6. The evidence before us boils down to the word of the complainant against that of the appellant. It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring positive identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest yet be mistaken. See - the decision of Hon. Judges of Appeal Omolo, Githinji and Onyango Otieno, JJA in **Ogeto v Republic [2004] 2KLR**.
7. The undisputed facts of the case are that the complainant and the appellant were well known to each other. Both told the court that they had worked together in the matatu industry. The appellant stated that he was a driver while **PW1** was the tout. **PW1** clarified that they had known each other for 1½ years. It is also not in dispute that **PW1** participated in the arrest of the appellant and that it was he and his fellow motorcycle riders who arrested him.
8. Evidence of the ownership of the motorcycle was produced by **PW2** the mother of **PW1**, who was the owner of the said motorcycle. She produced the log book to the motorcycle in evidence and told the court that indeed she owned the motorcycle but had given it to **PW1** to do business with. That he called her on 30th September 2011 to tell her that one Duncan, the appellant herein, had taken it from him. The motorcycle was never recovered.
9. **PW3** who was the Investigation Officer in the case confirmed that **PW1** made a reported at the police station stating that he had been robbed of his mother's motorcycle by a person who had posed as a customer. That **PW1** returned some time later to report that the suspect had been arrested. That suspect was the appellant herein. It was the evidence of **PW3** that while in custody the appellant offered to lead the police to the person to whom he sold the motorcycle. He led them to Kayole, where they arrested the man who was later charged with him. The motorcycle was not however recovered.
10. We have analysed the evidence on record afresh as is our mandate as the first appellate court, to draw our own inferences. The learned trial magistrate observed that identification in this case was by recognition, that the complainant and the appellant were well known to each other and that the offence occurred in broad daylight. We also note that the appellant was in company with two others when they attacked **PW1** and robbed him of the motorcycle and were armed with knives. The ingredients of **Section 296(2)** of the **Penal Code** have therefore been proved. The conclusion

which does commend itself to us is that it is the prosecution witnesses who were telling the truth and not the appellant.

11. We note that the learned trial magistrate did not warn himself of the dangers of convicting the appellant on the evidence of a single identifying witness, but find that such failure is not fatal since the appellant was convicted on sound evidence. – See **Anthony Kangethe Mwangi v Republic Cr. App. 81 of 2008**.

12. Having given careful consideration to all the circumstances of this case, we are satisfied that the learned trial Magistrate properly convicted the appellant based on sound evidence. We therefore confirm the conviction and sentence and dismiss the appeal.

SIGNED DATED and DELIVERED in open court this **17th** day of **June 2014**.

A. MBOGHOLI MSAGHA

L. A. ACHODE

JUDGE

JUDGE