REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 397 OF 2010

(as consolidated with Criminal Appeal No. 398 of 2010.)

REPUBLIC…..……...…….RESPONDENT

Versus

ANTHONY NG'ANG'A WANJIKU....……....1ST APPELLANT

BENSON MUNGAI NJENGA……..…..….2ND APPELLANT

[Being an appeal from the original conviction and sentence by Hon. M.A. Murage S.P.M. dated 14th July, 2010 at Limuru CMCCR Case No. 409 of 2009.]

JUDGEMENT

The appellants herein, **Anthony Ng'ang'a Wanjiku** and **Benson Mungai Njenga,** being 1st and 2nd accused respectively, were arraigned before Senior Magistrate's Court at Limuru on a charge of robbery with violence contrary to S. 296(2) of the Penal Code, Chapter 63, Laws of Kenya. The particulars of the charge are that on the 28th day of March, 2009 at Gatimu Village, Ngecha Location in Kiambu West District within Central Province jointly with others not before court while armed with offensive weapons namely pieces of timber and pangas robbed Antony Ngige Mbiyu of cash Ksh.5,500/= and Nokia 5000 all valued at Kshs.15,500/= and at or immediately after the time of such robbery used actual violence on the said Antony Ngige Mbiu.

The prosecution called five witnesses while the appellants opted for unsworn statements and also called DW2, **Jane Wangui Mungai** in defence. The prosecution case was that the appellants accosted PW1, Antony Ngige Mbiyu on 28th March, 2009 at 2100 hours as he walked home. He was attacked by two people who claimed to be police officers. They held him and he fell whereupon others joined them. He heard the voice of one of the assailants and recognized it as that of Anthony Ng'ang'a Wanjiku, the 1st appellant. The complainant was hit on the head and a motor vehicle came along forcing the assailants to run away after they took away his Nokia cellphone and Kshs.5,500/= cash. The complainant was taken to hospital with injuries on his left side and left eye. He was taken to Tigoni, Kijabe and Kikuyu hospitals. He thereupon reported the matter to the police and later lost one eye. He now dons an artificial eye. The witness testified that he recognized the 1st appellant during the robbery as he is a neighbor from his place. He also knew and recognized his voice. He was also known to the 2nd appellant who is also his neighbour. PW1 stated that he had no grudge against the appellants.

PW2, Peter Mbiyu Kamau of Gatimu Village testified that on 28th of March, 2009, he and his son were walking home when they met seven people armed with crude weapons. The complainant walked two

meters ahead of him. He recognized the two accused at the scene. He heard them talk and enquired as to who they had attacked. He asked them why they were attacking them. The 1st appellant attacked him whereas Mungai, 2nd appellant and his group attacked the complainant. They were near home and he saw them as the night was clear. They demanded money, frisked them and the 1st appellant slapped him. He had only Ksh.23.00. The 2nd appellant removed his documents and identity card. He screamed and people went and he reported that the 1st appellant had assaulted him. They took the complainant to hospital and told people who had come that the appellants had attacked him. He stated that the appellants were known criminals and are his neighbours, but they however, had a good relationship.

At the close of the prosecution case, the appellants were put on their defence. The 1st appellant gave an unsworn statement and did not call any witnesses while the 2nd appellant gave a sworn statement and one witness in defence.

In his defence, the 1st appellant, **Anthony Nganga Wanjiku** testified that he used to sell firewood. On 28th March, 2009 he went to work in Ndenderu till 4.00 p.m. and went home. He later went for Nappier Grass. That evening he rested and at around 7.00 p.m. he was in the house, his wife cooked and he slept. The following day he went to church. On 1st April, 2009 at 12 midnight he was called and told to open which he obliged. He further testified that the police searched his house for 25 minutes and left at 1.00 p.m. without informing him as to why he was arrested. He was later charged and denied the offence.

The 2nd appellant testified that he is a casual worker. He testified that on 28th March, 2009 he went to work at Loreto and went home in the evening. His wife was pregnant and he helped her cook. After supper they slept and the following day he slept as well. It was on a Sunday. The following day at 1.00 a.m. his brother called him and told him to open. He was arrested by 7 policemen. They searched two houses and after 5 minutes handcuffed him. They went to five other homes and other suspects were arrested. He was in custody for 7 days. He was informed of the charge.

Jane Wangui Mungai testified that she stayed in Gatimu and she was a casual labourer. On 28th March, 2009 she was home with the 2nd appellant. At midnight of 31st March, 2009 police went and searched the home. They did not find a thing but the 2nd appellant was later charged.

At the conclusion of the trial, the court convicted the appellants and sentenced them to death as provided for by the law. They now appeal against the conviction and sentence. The appellants respectively frame their grounds of appeal as;

1. *THAT, the learned trial magistrate erred in law and facts when she convicted me in this case while relying on recognition without her considering that the circumstances prevailing to recognition were not favourable and even the first report was not done by my names.*

2. *THAT, the learned trial magistrate breaches the Natural rules of justice when she convicted me with contradiction evidence between pw 1 ad 2.*

3. *THAT, the learned trial magistrate erred in law and facts when she convicted me in this case without her considering that there was no exhibit of this case that was recovered on my possession.*

4. *THAT, the learned pundit magistrate erred in law and facts when she convicted me while rejecting my defence without explaining the proper reasons for rejecting thus violating the law provision under section 169 (1) of c.p.c.*

5. *THAT, my lordship I cannot recall the whole evidence that was adduced during the trial I now beg leave to this honourable court of justice to furnish me with trial proceedings in order to assist me to add more grounds during the hearing of this appeal and same I pray to be present during the hearing date.*

The grounds for Anthony Ng'ang'a Wanjiku are as follows;

1. *THAT, the learned trial magistrate erred in law and facts when she convicted me in this case while relying on Identification by recognition without her considering that it was by after though since the first report was not made with my Names.*

2. *THAT, the learned trial magistrate breaches the Natural rules of justice when she convicted me with no exhibit that can link me with the scene of crime.*

3. *THAT, the learned trial magistrate erred in law and facts when she convicted me with contradicted evidence between pw 1 ad 2.*

4. *THAT, the pundit magistrate erred in law and facts when she convicted me while rejecting my defence without explaining the proper reasons for rejecting thus violating the law provision under section 169 (1) of c.p.c.*

5. *THAT, my lordship I cannot recall the whole evidence that was adduced during the trial I now beg leave to this honourable court of justice to furnish me with trial proceedings so that they may assist me to add more grounds during the hearing of this appeal and same I pray to be present during the hearing date.*

When the matter came for hearing on the following day, Ms Kang'ethe, learned counsel for the appellants submitted in favour of the appeal. She sought to rely on the authority of **Mwangi Sungu Vs R, Cr. App. No. 363 of 2003** that set out the principles of voice recognition. She submitted that the presiding court did not consider these principles in arriving at a conviction in the circumstances. PW2 testified that the night was clear while PW1 testified that it was a dark night. The incident occurred within a span of five minutes. This was a short time and therefore a conviction on grounds of recognition is not safe and length of time makes it unsafe as a basis for conviction. She relied on the authority of **Kabue Vs. Republic** to support her submission that recognition within a short span is unsafe for a conviction.

The appellant also cited inconsistency in evidence as a ground for appeal. She submitted that PW1 states that the attackers were 2 in number. At page 5, states that they were 5 whereas he also states that they were many. PW2 states that these were 7. PW1 states that the attacker was armed whereas PW2 says that the people were armed. There is no description of the arms. In the authority of **George Okello VS Republic [1998]**, **Criminal Appeal No. 428 of 1998** relied on by counsel for the respondent, inconsistency of evidence, like he submitted was in this case found to be fatal. The appellant therefore urged the court to quash the conviction and uphold the appeal.

Ms Spira for the state opposed the appeal. She opposed the contention of inconsistency of evidence and submitted that PW2 recognized the 2nd appellant (2nd accused) as his neighbour and friend at line 6-7 of the proceedings. PW2 at page 7 recognized the2nd appellant/2nd accused when he talked. PW2 addressed the accused by name. The passing of a car by the scene enabled PW1 to see the accused. He properly identified them. They were his neighbours.

Both accused were placed at the scene of crime. A medical report was produced to show evidence of violence. There is therefore no doubt as to the guilt of the accused.

After considering the grounds of appeal in the amended memorandum of appeal and respective submissions of the appellants and the respondent, we consider the critical issues in this appeal to be whether appellants were properly identified; whether there was consistent and sufficient evidence upon which the trial court could safely convict the appellants and whether the trial court shifted the burden of proof onto the appellants thereby misdirecting itself and coming up with the wrong conclusion and finding.

On the issue of identity of the appellants, PW1 and PW2 clearly testified that they were able to identify the appellants by virtue of their prior knowledge of them as their neighbours in the locality. PW1 was also able to identify the 1st appellant through his voice which was well known to him. PW2 testified that this was early evening and visibility was clear so that he was able to identify the appellants and even talk

to them. We are therefore satisfied from the evidence on record that the appellants were clearly recognized by the complainant, PW1 and PW2. This ground of appeal therefore cannot stand.

The issue of inconsistency and insufficiency of evidence for purposes of conviction is also raw in that there is overwhelming evidence by the prosecution witnesses on the sequence of events about the robbery. PW2 testified that a car passed by thereby aiding visibility and that he recognized the 2nd appellant who slapped him. The appellants did not challenge the evidence of prior familiarity or even neighbourliness. This ground of appeal therefore faulters and falls by the wayside.

We agree with the state in this matter. There is no inconsistency in the evidence of PW1 and PW2 even on the identity of the accused person. The complainant, PW1 concretely identified him through his voice. PW1 was able to make visual identification of the appellants. This is buttressed by the evidence of PW2 who was also a victim of the robbery. Both witnesses were able to easily identify the assailants/appellants who were their neighbours within the vicinity of the robbery. The issue of identification therefore fails *in toto*.

The injuries to the complainant were debilitating. He lost one of his eyes even after undergoing long periods of treatment. PW2 also complained of being attacked during the robbery. The ingredients of the offence are therefore proven. The appellants were therefore rightly found guilty of robbery with violence and convicted and sentenced.

On such elaborate testimony by the prosecution witnesses at the trial, the appellants cannot be heard to state that a burden of proof was shifted to them. We find that this was not the case as the prosecution went out of its way to prove the case.

The appellants submit that the trial court disregarded their defence. This is not true. The trial court considered their evidence and found it to be untrue. Their defence was that they were at home that evening. They did not offer any evidence in support of the fact that indeed they were at home and indoors at the time of the robbery.

The appellants did not offer a substantive defence but made mere denials of the charge in their respective statements. DW2 also comes in as a casual witness and does not give any probative evidence in defence. We find her testimony not credible.

We are alive to the fact that an accused person need not offer any defence or at all during trial. He can choose to remain silent through and through. It is the onus and duty of the prosecution to prove its case beyond reasonable doubt. However, in this case, having critically reviewed the evidence before the trial court, we are of the firm view that the prosecution did indeed prove the case.

In the result we find that the prosecutions' cases in the trial court were proved. We dismiss the appeal and uphold both the conviction and sentence.

Delivered, dated and signed the 17th day of June, 2014.

R. LAGAT-KORIR **D.K.NJAGI MARETE**

JUDGE **JUDGE**

In the presence of:

……: Court clerk

……: Appellant

……: For the Appellant

……: For the State/respondent