



REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 110 of 2011

JOHN MURIITHI NGARI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*From original conviction and sentence in Cr. Case No. 980 OF 2009 at the Principal Magistrate's Court at Siakago by Hon. S.M. MOKUA on 8/11/2010*

**J U D G M E N T**

**JOHN MURIITHI NGARI** was charged with the offence of Robbery with Violence contrary to section 296(2) of the Penal Code.

After hearing the matter fully, the learned trial Magistrate reduced the charge to Robbery contrary to section 296(1) of the Penal Code and convicted him of the same.

The Appellant was aggrieved by the Judgment and has appealed against the conviction and sentence. He has raised the following grounds;

- 1. That the learned trial Magistrate erred in both points of law and facts by convicting the Appellant on untruthful witnesses.***
- 2. That the trial Magistrate erred in law and facts by convicting the Appellant relying on evidence marred with contradictions.***
- 3. That the learned trial Magistrate convicted the Appellant using evidence from PW1 and PW2 which was not corroborated by any other independent witness.***
- 4. That the learned trial Magistrate erred in law and facts by rejecting the Appellant's sworn defence and that of his defence witnesses without sufficient reasons.***
- 5. That the Prosecution's discretion of section 214 of the Criminal Procedure Code was in bad faith.***

When the Appeal came for hearing the Appellant presented written submissions to the Court. He mainly expounded on his grounds. The learned State Counsel opposed the Appeal saying the evidence of recognition was overwhelming. Secondly the sentence of four years was lenient.

This being a first appeal this Court is enjoined to reconsider and reevaluate the evidence adduced and arrive at its own conclusions. I am alive to the fact that I did not see nor hear the witnesses. I rely on

the cases of;

**NGUI -V- REPUBLIC [1984] KLR 729**

**SIMIYU & ANOTHER -V- REPUBLIC [2005]1 KLR 192**

The case presenting itself is that PW1 a tailor at Kiritiri had left Kiritiri on 3/11/2010 at 5.00pm for home. On the way she was joined by PW2 and as they walked together the Appellant whom they knew joined them. He demanded for money from PW1 who gave him her wallet. He was armed with a knife. The wallet had shs.350/=. He then insisted that he wanted to have sex with her. PW1 and PW2 screamed and the Appellant disappeared into the bushes. PW4 received the report from PW1 on 3/11/2009. He was later notified that the suspect had been at Kiritiri. He sent PW3 to effect arrest. The Appellant was shown to PW3 by PW2.

In his defence the Appellant denied the charges and explained how he was arrested by two (2) officers on 16/11/2009. He admits having been at Kiritiri on 3/11/2009 and that PW1 was his former girlfriend who got disappointed when he married somebody else. DW1 in his evidence confirmed having been with the Appellant on 3/11/1009 from 4pm – 7pm harvesting sand at the river. DW2 is the Appellant's wife. He testified how PW1 had come home and told her she would ensure her marriage to the Appellant was broken.

I will deal with all the grounds simultaneously. The learned trial Magistrate correctly reduced the charge of Robbery with Violence to simple robbery contrary to section 296(1) of the Penal Code. This is because there was no violence used on PW1 and the attacker was alone. The issue of the knife and threats is neither here nor there.

The next issue to determine is whether the Appellant is the person who committed the acts complained of. The incident is said to have occurred on 3/11/2009 at 5pm though some witnesses spoke of 3/11/2010. From the evidence of PW1 and PW2 none of them knew the Appellant by name. They said they used to see him at the market/stage at Kiritiri. PW1 made a report to PW4. PW4 who was the investigating officer does not state whether he was given any names or descriptions of the suspect. Two weeks after the incident i.e. on 16/11/2009 PW1 came to PW4 and informed him that the suspect had been seen at Kiritiri market. He had him arrested. He does not explain how but PW3 states that the arrest was done in the presence of PW2. It is nowhere indicated how the Police confirmed that the Appellant was the person PW1 had complained about. PW1 was not present when the arrest was done and she was never called to identify the suspect.

PW1 and PW2 did not give the names or description of the suspect to the police officers. Indeed if they knew the Appellant they ought to have done either of the two above options.

In the case of **SIMUYU & ANOTHER -V- REPUBLIC [2005]1 KLR 192**. The Court of Appeal stressed the need for witnesses or complainants to give the names and/or descriptions of the persons they had identified. The omission to do so shows that the complainants were not sure of the identity of their attackers. I also note that its not PW1 but PW2 who was with the Police when the Appellant was arrested. PW1 ought to have been given an opportunity to identify him in an identification parade if ever she had given any description. All she did amounted to dock identification. In the case of **KIARIE -V- REPUBLIC [1984] KLR 739** the Court of Appeal held that ***the identification of an accused person in Court by a complainant is almost worthless without an earlier identification parade.***

The Appellant in his defence raised issues of a grudge arising out of a love relationship gone sour. His wife (DW2) came up with a similar allegation. Since the Appellant was not found with any of the allegedly stolen items the only evidence left was that of identification. I find this evidence on identification to be wanting as it was not supported by any other evidence.

After doing an evaluation of the evidence adduced and the grounds raised, I am satisfied that there is merit in the Appeal. I allow it. The conviction is quashed and the sentence set aside.

Appellant to be set free unless otherwise lawfully held under a separate warrant.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 23<sup>RD</sup> DAY OF MAY 2013.**

**H.I. ONG'UDI  
J U D G E**

**In the presence of;  
Mr. Miiri for State  
Appellant  
Njue – C/c**