



REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 199,118 of 2010

BENARD MUTISO MUASYA ..... 1<sup>ST</sup> APPELLANT

JOHN MUNGAI NJAGI ..... 2<sup>ND</sup> APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*From original conviction and sentence in Cr. Case No. 679 of 2009 at the Principal Magistrate's Court Siakago by S.M. Mokuu – Principal Magistrate on 16<sup>th</sup> AUGUST 2010*

JUDGMENT

**BENARD MUTISO MUASYA & JOHN MUNGAI NJAGI** hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> Appellant were charged with two counts of Robbery with Violence contrary to section 296(2) Penal Code. The particulars as stated in the charge sheet were as follows;

**ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE:**

1. **BENARD MUTISO MUASYA 2. JOHN MUNGAI NJAGI:** On the 11<sup>th</sup> day of May 2009 along Gitaru – Kivaa road, in Mbeere District within Eastern Province, jointly with others not before Court, robbed NANCY NJERU MBARU of her ks.13,700/= and at or immediately before or immediately after the time of such robbery used actual violence on the said NANCY NJERI MBARU by cutting her right forearm while armed with a panga.

**COUNT 2**

**ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE:**

2. **BENARD MUTISO MUASYA 2. JOHN MUNGAI NJAGI:** On the 11<sup>th</sup> day of May 2009 along Gitaru – Kivaa road, in Mbeere District within Eastern Province, jointly with others not before Court, robbed ANISA KOI his mobile phone make Nokia 1600 valued at ks.3000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said ANISA KOI while armed with a panga.

After a full hearing they were convicted on both counts and sentenced to death on 1<sup>st</sup> count while

sentence on the 2<sup>nd</sup> Count was held in abeyance. They were aggrieved by the Judgment and have appealed against both conviction and sentence. The 1<sup>st</sup> Appellant raised the following nine (9) grounds of appeal;

- 1. That the learned trial Magistrate erred in both point of law and fact by not putting into consideration the report that was made by the complainant had no names of the Appellant nor his description.**
- 2. That learned trial Magistrate erred in both points of law and fact when convicting the 1<sup>st</sup> Appellant by not considering the mode of his arrest from the date the crime was committed.**
- 3. That the learned trial Magistrate erred in both points of law and fact when convicting the 1<sup>st</sup> Appellant with contradicted evidence on the charge sheet which shows the amount robbed from the complainant as ksh.13,700/= while in the report it shows 12,900/= and in chief evidence it shows ks.32,700/=.**
- 4. That the learned trial Magistrate erred in both points of law and fact by not considering the evidence in the PW3 form which shows that the complainant went to seek medical treatment on 22/6/2009 from the date crime was committed 11/5/2010.**
- 5. That the learned trial Magistrate erred in both points of law and fact by relying on PW2's evidence that he led to the arrest of the Appellant hence he had not recognized the Appellant during the robbery.**
- 6. That the learned trial Magistrate erred in both points of law and fact by not putting into consideration that PW's evidence was contradicting when he told the Court that he escorted the complainant to hospital while the P3 form shows that the complainant went to hospital alone.**
- 7. That the learned trial Magistrate erred in both points of law and fact by relying on PW4's evidence who told the Court that he followed an order from Kiambere police station to arrest the Appellant yet he did not produce the order before Court.**
- 8. That the learned trial Magistrate erred in both points of law and fact failing to consider that nothing like exhibit or weapon was recovered in the 1<sup>st</sup> Appellant's possession.**
- 9. That the learned trial Magistrate erred in both points of law and fact relying on the evidence of the blue shirt which had not been given in the first report as a description of the alleged attires that was worn by the robbers.**

The 2<sup>nd</sup> Appellant also raised the following seven (7) grounds of appeal;

- 1. That learned trial Magistrate erred in law and fact in convicting the 2<sup>nd</sup> Appellant when prosecution did not prove its case beyond reasonable doubt.**
- 2. That learned trial Magistrate erred in law and fact in relying on the evidence of the prosecution witnesses notwithstanding that it had several irregularities, omissions and contractions thereto.**
- 3. That learned trial Magistrate erred in law and fact in ignoring the defence case.**

This being a 1<sup>st</sup> appeal this Court is enjoined to reconsider and reevaluate the evidence adduced in the Court below and arrive at its own conclusions. We are not losing sight of the fact that we did not see nor hear the witnesses. We are guided on this by the case of *MWANGI -V- REPUBLIC [2004]2 KLR 28* where the Court of Appeal held;

- 1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate Court's own decision on the evidence.**
- 2. The first appellate Court must itself weigh the conflicting evidence and draw its own conclusions.**
- 3. It is not the function of the first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's evidence and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witness.**

The prosecution case was that on 11/5/2009 at 9.00am PW2 was carrying PW1 on his motorbike registration number KBF 986Y. They were headed for Matuu where PW1 was taking money to the Bank. After Kamburu junction a man emerged and jumped onto the road. He carried a panga and an acacia branch. He wore a blue shirt and cap. He shouted and was joined by four men armed with pangas, who emerged from the bush. PW1 who was pregnant fell off the motor bike and raised her hands in surrender. She was cut by a panga on her right hand. PW2 disappeared into the bush pursued by three of the attackers. The last of the attackers took PW1's handbag which hang on her shoulder and had shs.32,700/=. He emptied the contents and took off leaving the bag. She was rushed to Gitaru police post by some passersby. She was treated at Gitaru and later at Embu Provincial General Hospital. While in Court she identified the 1<sup>st</sup> Appellant as the person who cut her while the 2<sup>nd</sup> Appellant was the one who had taken her bag and cash and stood by her while she was in pain she knew the 1<sup>st</sup> Appellant who resided in her locality. PW2 led officers to arrest the two Appellants, whom he had known prior to the incident.

The investigating officer (PW3) established that out of shs.32,700/= PW1 was carrying only shs.12,900/= had been stolen. PW4 was the arresting officer. He effected the arrests on 2/7/09, and also recovered a blue hat, marvin, blue long sleeved shirt as clothes that were worn by the Appellants on the date of the robbery (EXB2-4). PW5 a doctor confirmed that PW1 had a compound fracture on her right forearm, bruises on head and knees (EXB1). The 1st Appellant in his sworn defence denied the charge and explained how he had been arrested on 2/7/2009 and kept in cells upto 9/7/09. And that there was no report against him at the police station.

The 2nd Appellant equally sworn denied the charges and explained his arrest. Both Appellants indicated that those who arrested them also took their hat, marvin and shirts.

When this appeal came up for hearing police constable No.37664 Edward Sang produced an abstract of occurrence book number 5 of 11/5/2009 which had been requested for by the 1st Appellant. The Appellants presented the Court with written submissions mainly expounding on their grounds of appeal. The learned State Counsel Mr. Miiri opposed the appeal submitting that the evidence was overwhelming.

We have analysed the evidence on record and also considered all the submissions presented to us by the Appellants and the learned State Counsel. The two appeals were consolidated as they arise from one Judgment.

The 1<sup>st</sup> issue that confronts us is that of establishing if indeed the offence of Robbery with Violence occurred. The first ingredient is of Robbery with Violence is stealing. The 2<sup>nd</sup> ingredient is as defined in section 296(2) Penal Code which provides;

**“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any”.**

PW2 indicated that she was carrying shs.32,700/= which she was taking to the Bank. Her

boyfriend (PW2) who was with her did not know how much she was carrying but he was taking her to the Bank. The investigating officer (PW3) established that what was stolen was shs.12,900/=. The charge sheet indicates that what was stolen was shs.13,700/=. This is the subject of count 1. In spite of these minor contradictions in the exact figure of how much was stolen we are satisfied that theft of money occurred. We are guided by the case of *NJUGUNA -V- REPUBLIC [2003]EA 206*. Both PW1 and PW2 have also by evidence confirmed that the attackers were armed with pangas and indeed PW1 was injured as confirmed by the evidence of PW5 and the P3 form (EXB1). We are therefore satisfied that a robbery with violence occurred as per count 1.

The 2<sup>nd</sup> count of Robbery with Violence is a bit disturbing. The evidence of PW1 and PW2 confirms that the phone the subject of this count was owned by PW2 but was in possession of PW1. As a person there was no stealing from PW2 and neither was any violence meted out on PW2. When he saw the attackers he took off into the bushes. Therefore at the time of the commission of this offence PW1 was a “*special owner*” as defined under section 268(1) of the Penal Code. The theft of the phone ought to have formed part of the particulars in the 1<sup>st</sup> count as it was stolen from PW1 and not PW2. Charging the Appellants in count 2 was wrong as nothing was stolen from PW2 and he was also not injured nor threatened with any violence. We therefore find that the offence of robbery with violence in count 1 was proved while that in count 2 was not.

The next issue we now wish to consider is whether the Appellants were among the people that robbed PW1. Before us are several grounds of appeal raised. We are consolidating them and addressing the element of identification.

This incident occurred at 9am which was broad daylight. The eye witnesses are two i.e. PW1 and PW2. Both of them say they identified two people who they knew as they resided in the same place with them. Immediately after the robbery incident PW1 and PW2 were assisted by a driver of Kengen company and taken to Gatari Police Post and made a report. An abstract of the report vide Occurrence book No.5 of 11/5/2009 reads as follows;

***ROBBERY: Now to the post is one Administration officer who is attached at new site Kiminda area by the name of ANISA KOI APC NO.2003077747. He alleges that on his way to Matuu he was stopped by six men all armed with pangas few kilometres from Gitaru barrier towards Kivaa. His customer by the name of Nancy Njeru who he was carrying was cut on his left hand by those people seriously and she was taken to Gitaru dispensary and then to Embu General Hospital escorted by CPL David Otieno, boarding ambulance registration number KAY 042V driven by Kengen driver Gatumbu – further police information to follow.***

This report was made by PW2 who is an AP officer. He did not anywhere report that he knew any of the attackers as John and Mutisya let alone the Appellants. He did not say that if he saw the two he could identify them. This was on 11/5/2009 at 9.50am. PW1 and PW2 have insisted that they gave the names of the attackers to the police officers. It was the duty of the prosecution to avail such evidence to the Court for its consideration. Failure to do so confirms that the complainants are not sure of the identity of the attackers. This is what the Court of Appeal stated in the case of *SIMIYU & ANOTHER [2005]1 KLR 193*;

- 1. In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave description and purport to identify the accused, and then by the person or persons to whom the description was given.***
- 2. The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers' identity.***

The Appellants were arrested on 2/7/2009 from their homes. This incident occurred on 11/5/2009 and a report made. There is no evidence showing that the Appellants went underground after this incident. If indeed PW1 and PW2 knew them and had given the police their names why did it take the

police six weeks to arrest them? There is no reason given for this. PW1's admission in hospital could not be a good reason for the delay as she had allegedly given names to the police who ought to have acted.

Finally the marvin hat, shirts and PW1's sweater (EXB2-4) produced had no relevance to the case for the following reasons;

1. *They were not recovered from the scene or from the accused at the scene.*
2. *The witnesses had not mentioned anything about them to the police.*

They could not therefore be used to identify the attackers. The Appellants denied the charges. They were not found in possession of any stolen property. It was therefore the duty of the Prosecution to adduce evidence placing them at the *Locus quo*. This duty was not discharged. The result is that the appeal is allowed, the convictions on both counts quashed and sentences of death set aside. Both Appellants shall be released unless otherwise held under a separate lawful warrant.

**SIGNED AND DATED THIS 17<sup>TH</sup> DAY OF MAY 2013 AT EMBU.**

**LESIIT J.  
J U D G E**

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

**Delivered in open Court in the presence of;**

..... for State  
**Appellants**

**Njue – C/c**