



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 125 OF 2009

FRANCIS MWANGI MUNGAI..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 879 of 2007 in the Chief Magistrate's Court at Thika – L. Wachira (SRM) on 20th March 2009)

JUDGMENT

1. The appellant, **Francis Mwangi Mungai** who was convicted and sentenced to suffer death for the offence of attempted robbery with violence contrary to **Section 297(2)** of the **Penal Code**, filed an appeal on grounds that the learned trial magistrate failed to find that there existed a grudge between him and the complainant, and that there was no positive identification. He further argued that the evidence was contradictory, and that his defence was disregarded.
2. The particulars of the offence were that on 11th day of February 2007 at Kiganjo village in Thika District within Central province, jointly with others not before court, while being armed with dangerous weapons namely a pistol and a panga attempted to rob one Francis Mwangi Kimani of a motor vehicle registration number KYJ 302 Toyota Hilux pick-up valued at Kshs.400,000/= and at immediately before the time of such attempted robbery, threatened to use actual violence to the said Francis Mwangi Kimani.
3. Miss Venda the learned state counsel opposed the appeal on behalf of the respondent, arguing that the complainant and the appellant had known each other for 20 years and that the complainant saw and identified him by his car headlights. She also argued that the complainant's evidence was corroborated and that his defence was considered in the judgment. Lastly, she averred that the sentence imposed upon the appellant was the proper one under **Section 297** of the **Penal Code**.
4. This being the first appeal we have scrutinized and re-evaluated the evidence afresh to draw our own inferences and reach our own conclusion. Upon such re-evaluation, we are of the view that

this case may be determined on the question of identification.

5. The prosecution's case was that **PW1** was reversing into his gate on 11th February 2007 at 10 p.m. when two men suddenly appeared before him. He recognised the first man who was armed with a machete, with which he was banging on the bonnet of **PW1**'s truck as his neighbour of 20 years. That man is the appellant now before us. **PW1** did not identify the second man who was armed with a pistol and was behind the appellant. He drove off at a speed and went to his brother's house for help. They reported to the police whom they led to the appellant's house. The appellant was arrested and charged.
6. **PW2**, the wife to **PW1** testified that she had opened the gate for her husband to drive in, when she saw two men appear before him. According to her, the appellant had the machete but he was the one behind the second man who had the gun and who confronted **PW1**.
7. The circumstances of identification were therefore that there was no light except that which was coming from **PW1**'s head lights. **PW1** said that he had switched the lights off and switched them back on when the intruders arrived. From the testimony of **PW1** and **PW2**, the attack appears to have occurred in a span of a few minutes creating a real doubt as to whether there was sufficient time and light for the two witnesses to make a proper impression and identify the appellant.
8. It was not lost on us that there existed a feud between **PW1** and the appellant according to the appellant's testimony. **PW1** acknowledged that he and the appellant were locked in a feud over a road of access which entailed the appellant digging a trench on the road at night while **PW1** filled it up in the day on several occasions. The area chief had tried without success to arbitrate on the said feud.
9. We are therefore, of the view that the circumstances of identification were such that, the possibility of error was very real. We also opined that even if indeed, the appellant was one of the two men on the road leading to **PW1**'s house that night, it might have been pursuant to their long existing feud, and not with intentions of robbing him. **PW1** himself did agree in cross-examination that in the 20 years that he had known the appellant he did not know him to be a thief.
10. Reasons wherefore we find that that conviction cannot stand. The appeal is found to be meritorious and is allowed. The appellant is hereby set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this 13th day of August 2013.

A.MBOGHOLI MSAGHA

L. A. ACHODE

JUDGE

JUDGE