REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

NO. 455 OF 2008 CONSOLIDATED WITH CRIMINAL APPEAL CRIMINAL APPEAL NO. 10 OF 2009

SIMON WACHIRA MAINA…… …1ST APPELLANT

RAPHAEL MAURICE MURIU NGOYA ….....2ND APPELLANT

VERSUS

THE REPUBLIC …….....RESPONDENT

(From original conviction and sentence in Criminal Misc Case No. 4988 of 2007 in the Chief Magistrate's Court at Kibera – Mrs. P.M. Wanjala (PM) on 29th May 2007)

JUDGMENT

These appeals are consolidated. The two appellants were charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal code. It was alleged in the particulars of the charge that on 7th July, 2007 at Uthiru, Nairobi, jointly with others not before the court, armed with dangerous weapons namely a pistol and a panga, they robbed Rachel Ruguru of cash Kshs. 6,000/= and assorted personal effects and that, at or immediately or immediately after the time of such robbery they used actual violence on the said Rachel Ruguru. They denied the offence but after a full trial both were convicted and sentenced to death. These appeals arose from the said conviction and sentence.

The evidence adduced before the trial court was that P.W. 1 was asleep in her house when she heard gunshots. Soon thereafter her door was broken with a stone and two people entered followed by a dog. It was her evidence that she knew the people well and the dog that followed them. This was a single room residence and there was a lamp on the table with the light on. She testified that she knew the first appellant who used to work as a watchman and from time to time escorted her to her house. She also knew the second appellant who was employed as a gardener near her house. She had known him for two years.

The 1st appellant carried a gun while the 2nd appellant carried a panga. The 1st appellant asked for Kshs. 20,000/= and threatened to kill her. He took a gunny bag into which he stuffed several clothes belonging to P.W. 1. The 2nd appellant on the other hand, assaulted her for about 15 minutes before they left.

P.W. 1 screamed but no one came to help her because it transpired later that her neighbours' houses were locked from outside. On the following day, her room was opened by a passerby and immediately she went to her employer P.W. 2 and narrated the ordeal she went through in the hands of the attackers. She disclosed the names of her attackers who were also known to P.W. 2. She was then taken to Kenyatta National Hospital for treatment. Subsequently the two appellants were arrested with the aid of P.W. 1.

In his defence the 1st appellant said he is a sign writer and owned a pool table. He alleged that P.W. 1 was his lover and is the one who led the police to arrest him. Later he was joined by another person whom he had never known and charged together in this offence. The 2nd appellant told the court that he was arrested for cutting glass in somebody's land and brought to court. He was charged alongside someone he did not know and denied the offence.

The learned trial magistrate believed the prosecution case and proceeded to convict the two appellants. The appellants have raised several grounds in their appeals. The 1st appellant has complained that there was no proper identification to prove that he is the one who robbed the complainant and that the complainant did not give his name when the report was first made to the police. It is also his case that no one heard the gun shot except. P.W. 1 and although she said a stone was used to break her door her neighbours did not hear the noise. Further the charge sheet was amended and this caused him prejudice and finally there existed a grudge between him and P.W. 1.

The 2nd appellant on the other hand, raised the issue of his identification as being inconclusive and that the evidence of P.W. 5, Doctor Kamau, was at variance with the particulars of the charge with respect to the dates of the injuries sustained by the complainant.

As the first appellate court, it is our duty to evaluate the evidence adduced before the learned trial magistrate and come to independent conclusions. In convicting the appellants, the learned trial magistrate said as follows,

> "**From the evidence on record I am satisfied that the accused persons jointly with others not before the court are the ones that attacked the complainant and injured her badly as well as robbing her. She suffered grievous harm as per the doctor's evidence. Other witnesses evidence confirms that she was indeed attacked. P.W. 2 and P.W. 3 confirmed this. She was admitted in hospital for about 2 weeks. She had serious injuries. She is the one who led the police to arrest the accused persons. The accused persons were well known to her. In fact accused 1 also claims that she was his lover and they used to do business. They were neighbours at their place of work and accused 1 used to escort the complainant before this incident. I believe that the evidence adduced by the complainant about the two accused persons is correct.**
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> **I believe that they robbed her and they also cut her on the head causing serious injuries on her. I find both of them guilty of the offence they are charged with and convict them accordingly under Section 215 of the criminal procedure code."**

In her evidence in chief, the complainant stated that she knew the two people who entered her house very well. She knew them by names and appearance and in fact gave their names. The lamp in her house was on. When the two people entered her house, a dog followed them inside. She knew the dog because on the occasions the first appellant escorted her to her house, he had the same dog. Even the dog knew her. The fact that that the first appellant used to escort her was not a one off incident. She had known him in the year 2005 and used to pay him when he escorted her. She saw the two appellants carrying a gun and a panga respectively. The fact that there was a demand for money means that there was communication between her and the appellants. She gave out Kshs. 6,000/= which they took. In fact the appellants may have known that she had some money with her because, the first appellant had heard her employer say he would P.W. 1 some money for the business. It is her evidence that she was attacked because she had recognized her attackers. She was subjected to a lengthy cross examination especially by P.W. 1. Our assessment of her evidence is that she remained firm and consistent.

The first appellant asked for the Occurrence Book entry which was produced. The report showed that the appellant reported an assault by four people, two of them known, who robbed her of money Kshs. 6,000/= and other personal effects. The two appellants have taken issue with the fact that the OB report did not mention their names. It is instructive that P.W. 1 mentioned the names of the appellants to P.W. 2, her employer, when she reported the attack on her the previous night. These two people were known to P.W. 2. It is enough in our view, that she said that the two people were known to her and mentioned their names to her employer while the incident was very fresh in her mind. The fact that she did not give their names to the police was not prejudicial to the appellants.

The complainant P.W. 1 remained consistent in her evidence about the people, who stormed into her house, robbed her and seriously injured her. These were not strangers to her and this is also reinforced by the evidence of P.W. 2 who also knew them very well. It is not necessary for one to be arrested in possession of the stolen items to confirm his culpability. Our assessment of the evidence on the issue of identification is that the two appellants were properly and positively identified by P.W. 1.

The other issues of the gun shots and the noise made by the stone when the complainant's house was being broken into are secondary and even if that evidence is discounted, the fact remains that it is the appellants who stormed into the house of the Complainant and robbed her. We have also not seen anything on record relating to the amendment of the charge.

The issue of any grudge between P.W. 1 and the 1st appellant finds no place in this incident and in any case, the first appellant did not raise this issue when he cross-examined the complainant at length. The record shows that P.W. 1 was recalled for cross-examination by the 1st appellant but again, the issue of any grudge was not explored. Even if it had been raised at that stage, we would hold that it was an afterthought in view of the evidence on record. P.W. 5, the police doctor examined the complainant over 3 weeks from the date of the alleged offence. He was not cross-examined on the said dates but going by his evidence, it tallies with the dates that the complainant was injured and admitted to hospital. That evidence is not prejudicial to any of the two appellants.

The learned trial magistrate alluded to the defences of the two appellants but did not make any analysis thereto. She should have done that. The omission however is not prejudicial to the appellants because, their respective defences could not dislodge the prosecution evidence, and especially that of P.W. 1. The appellants were with others who were never apprehended. They were armed with dangerous weapons namely a gun and a panga. They seriously injured the complainant. All these ingredients were proved by the prosecution. Any of them was sufficient to prove the offence under Section 296 (2) of the Penal Code.

In our Judgment the charge was proved against both appellants beyond any reasonable doubt. The conviction was well founded and sentence was justified under the law. Accordingly these appeals are hereby dismissed.

Orders accordingly.

Dated and Delivered at Nairobi this 24th Day of October 2013.

A. MBOGHOLI MSAGHA **FRED A. OCHIENG**

JUDGE **JUDGE**