



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANGA
CRIMINAL APPEAL NO. 350 OF 2013
(Originally Nairobi Criminal Appeal No. 447 of 2009)

SIMON KAGONI WAMBUI

APPELLANT

v

REPUBLIC

RESPONDENT

(Appeal from conviction and sentence by L.W. Gicheha, Senior Resident Magistrate in Thika Chief Magistrate's Court Criminal Case No. 3893 of 2008 on 16 October 2009)

JUDGMENT

1. Simon Kagoni Wambui (Appellant) was charged before the Thika Chief Magistrate's Court on 18th September 2008 with 2 counts of robbery with violence contrary to section 296(2) of the Penal Code. In the first count he was accused of robbing Samuel Mutua of Kshs 3000/- together with others not before court while armed with dangerous weapons and threatening to use personal violence on him.
2. On the second count the Appellant was accused of robbing Joseph Mwangi Wairimu of Kshs 2600/- and a pair of shoes all valued at Kshs 3000/- while armed with a dangerous weapon, a panga and immediately at the time of robbery threatening to use personal violence on him.
3. After a trial spanning around one year he was convicted on both counts and sentenced to death on 16th September 2009.
4. The Appellant was aggrieved with the conviction and sentence and on 21st October 2009 he filed a Petition of Appeal listing some 5 grounds.
5. On 25th September 2013 the Appellant's advocate on record, Mr. Mbiu Kamau informed the court that he desired to file an application to amend the Memorandum of Appeal. By the time of hearing the appeal on 17th October 2013 no such application had been filed.
6. We proceed to re-evaluate and analyse the evidence before the trial court in light of the grounds of appeal and the respective parties' submissions.

Identification

7. Ground 1 of the Appeal referred to mistaken identity of the Appellant. The Appellant submitted

- that PW 1, Joseph Mwangi Wairimu (complainant in count II) testified that he was able to recognise one of the attackers and had seen him before but he did not state how he came to know his name as Simon. The Appellant challenged his identification because the robbery allegedly took place at night and the distance from the security lights and its intensity was not brought forth in evidence.
8. Mr. Naulikha for the Republic submitted that the issue of distance from the light should have been raised before, the trial court during cross examination and that regarding the recognition of the Appellant, though the complainant agreed he did not know the Appellant before he was able to recognise him and led the police to where he stayed and pointed him out when he was coming out of a toilet. Further, it was submitted that the scene of the robbery was well lit from electricity light.
 9. As the first appellate Court we are enjoined to re-evaluate and analyse the evidence tendered in the lower court.
 10. The evidence on identification came from PW 1 and PW 2 Samuel Mutua Mwangi, (complainant in count I) who were the complainants. PW 1 testified that he was able to recognise one of the two men who attacked them and who was holding a panga as Simon. He had seen him before and that he described the clothes the attacker had been wearing to the police and that he was found in those clothes the next day when being arrested.
 11. It is PW 2 who had seen the compound the attacker entered and led the police to the next day. The witness stated there was electricity on the road. The witness did not state the time of the attack.
 12. PW 2 stated that he did not give the description of the Appellant though he was wearing a red jacket. He testified they were attacked at about 10.00 pm while coming from PW 1's mother's home.
 13. He was able to identify the Appellant because he had seen him before and where he was living though he did not know his house. On the morning of the arrest the Appellant was found with a red jacket.
 14. PW 3 narrated what PW 1 and PW 2 had told him. The complainants had told him they could identify the attackers from their faces. Nothing was recovered and the red jacket was not produced in court.
 15. The Court of Appeal has stated in numerous decisions that evidence of recognition should be treated with great caution and a witness may be honest but mistaken and that evidence of recognition should be credible and free from possibility of error (see Court of Appeal decision in *Dzombo Chai v R*, Mombasa Criminal Appeal No. 256 of 2006).
 16. Considering the evidence of the witnesses and evaluating the same in comparison with the guidelines given in authority on identification, it is our view that it was not safe to convict the Appellant on the basis of the material presented in Court. Both the investigations and prosecution were dilatory.

Sufficiency/contradictory/inconsistent evidence

17. Grounds 2 and 3 related to contradictory evidence and non production of an exhibit (a panga).

Phone

18. The Appellant's counsel submitted that the evidence was not sufficient to justify a conviction.
19. In this regard reference was made to the part of the trial court's judgment that PW 2 (Samuel Mutua Mwangi) was robbed of a phone. We have gone through the evidence of PW 2 (one of the complainants), PW 3 (Administration Police officer to whom PW 2 reported to on the night of the attack and carried out the arrests) and PW 4 (Investigating Officer) and none of them made reference to PW 2 stating that he was robbed of a phone. The charge sheet also did not refer to a phone.

Kshs 2600/-

20. The Appellant's counsel also challenged the conviction by submitting that the trial court found that PW 1 (Joseph Mwangi Wairimu) was robbed of Kshs 2,600/- while the witness testified that he was robbed of Kshs 1,600/-. The evidence bears out though, that the witness informed the

police he had been robbed of Kshs 2,600/-. The charge sheet on the other hand particularizes robbery of Kshs 2,600/-.

21. PW 3 who arrested the Appellant testified that one complainant was robbed of Kshs 7,600/- and the other one property valued at Kshs 1,800/-.
22. PW 4 who investigated the case on the other hand testified that the complainant was robbed of items valued at Kshs 3,000/-.
23. The Appellant faced two counts of robbery with violence. Each count related to a different person. The evidence of PW 4 the Investigating Officer was not clear on which complainant was robbed of items valued at Kshs 3000/-.

Injuries to complainants

24. Another submission related to the finding of the trial court that the complainants were not injured during the robbery while the evidence of PW 1 was that he was injured in the leg.
25. It was further submitted that the charge sheet made no reference to the use of violence but PW 1 testified that he was injured.
26. Mr. Naulikha in response submitted that the inconsistencies were immaterial and that an offence was committed. And further that the figures were not important, what was important was that money was lost. The discrepancies, he argued, should be disregarded.
27. It is clear from the record that there were inconsistencies as between the particulars outlined in the charge sheet, the testimony of witnesses and the trial court's judgment as regards the amounts of money stolen from the two complainants; items stolen and use of violence and injuries sustained.

Non production of an exhibit

28. No submissions were made on this ground and nothing turns on it in the instant case.

Shifting burden of proof

29. The Appellant submitted that the trial court shifted the burden of proof to the Appellant by requiring the Appellant to cast doubt in the prosecution's case when the Court stated that it had considered the accused defence and did not find that it raised any reasonable doubt. Again nothing turns on this ground in the present appeal.

Conclusion and Orders

30. Having re-evaluated and analysed the evidence, grounds of appeal and submissions by the Appellant and the Republic, it is our considered view that the proceedings were riddled with material inconsistencies, poor investigations and prosecution which rendered the conviction unsafe.
31. In the circumstances, we allow the appeal, reverse the conviction and sentence of the trial court and order that the Appellant be set free immediately unless otherwise lawfully held.

Delivered, dated and signed in open court in Muranga on this 28th day of November 2013.

A. Mbogholi Msagha

Judge

Radido Stephen

Judge

Appearances

Mr. Mbiu Kamau for Appellant

Mr. Solomon Naulikha for Respondent