



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 262 OF 2010

CONSOLIDATED WITH NOS. 263 & 265 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 2700 of 2009 of the Chief Magistrate's Court at Mombasa – R. Kirui, PM)

JEREMIAH NYAGAH 1ST APPELLANT

EDWARD MUTURI 2ND APPELLANT

MWANIKI NYAGA 3RD APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellants were all charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. They were convicted as charged and sentenced to death. They now appeal against conviction and sentence.
2. In a nutshell the evidence adduced at the trial Court was that Charles Onyango Awiti (Onyango) on 3rd August 2009 at 10.00am was in the company of Nasoro Badi (Nasoro). They were on their way home from a funeral function. Nasoro was left behind as he relieved himself whilst Onyango continued walking. Onyango met three people who he was able to see because as he stated- ***“there was enough moonlight.”*** He said that he knew the three by appearance because he had met them during the day. As he passed them one of them hit him on the back of his neck and he fell down. He lost consciousness. He did not regain his consciousness until Nasoro lifted him up. He noticed that he was bleeding and noted that he had been robbed off his Nokia phone, shoes and wallet containing Kshs. 650/-.
3. On being cross examined by the Appellant Edward Muturi he said-
“You must be the one who hit me.”
4. On being cross examined by the Appellant Jeremiah Nyaga he said ***“I had met you in the estate during the day.”***

5. He also was cross examined by appellant Mwaniki Nyaga when he said-

“I saw you. I identified you from appearance I do not know your name.”

6. Nasoro while relieving himself on the night in question heard something fall down. When he came out into the road he found three people and saw that Onyango was lying on the ground. Two of those people were holding Onyango down while one of them was standing by. They were a few metres away from him and the night had a full moon. He observed them then noted that one had a piece of metal on the side of this body and a torch on the other hand. It was then that he retreated and went to seek help from where the funeral function was taking place. Nasoro then stated-

“I knew the three people before that night. I even knew their names and I saw them clearly. The one standing is known in the village by his nickname “Kaburu”. The one nicknamed Kaburu is the 1st accused. He is the one who had the piece of metal. I knew him very well in the estate and used to meet regularly. I also know his voice very well. The other one is known as “Cassava” in the village. I know him as ‘Cassava’. He is the 2nd accused. I know him very well before. He is a resident of the estate and I normally used to meet him. He is the one who was holding the complainant by his shoulders. The 3rd one is called Mwaniki. He is known by that name in the village. I also know him very well as I used to see him at Shonda. He resides there. He is the one who was holding the complainant by his legs. He is the 3rd accused in Court. Kaburu is also called Muturi. He is the 1st accused. He is the one I talked with that night.”

7. Nasoro in company of others arrested the three Appellants the following day and took them to Inuka Police Post. This arrest was confirmed by Cpl Michael Situma the investigating officer.

8. The doctor who prepared the P3 form was called before the prosecution closed its case.

9. The Appellant Jeremiah Nyaga denied the charge in his defence. He stated that he was in the business of selling water that he was arrested on 4th August 2009 on the basis that the water cart had hit someone's stall.

10. The Appellant Edward Muturi also in his defence denied the charge and stated that he was arrested on 4th August 2009 at his place of work at Matiboni.

11. The appellant Mwaniki Nyaga also denied the charge and stated that he was arrested on 4th August 2009 while at Shonda Village.

12. The Appellants in their grounds of appeal submitted that the offence of robbery with violence had not been proved because there was no evidence of injury of Onyango. In order to respond to this submission we wish to refer to the case **CRIMINAL APPEAL NO. 217 OF 2007(R) JAIRUS MUKOLWE OCHIENG -VS- REPUBLIC** where the Court of Appeal discussed what constitutes an offence under Section 296(2) of Cap 63. Their Lordships stated-

“In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with section 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or properly at or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section;

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

Analyzing the first set of circumstances the essential ingredient, apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in Section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.

In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly.”

13. In this present case the evidence of both Onyango and Nasoro pointed

to the Appellant's being armed. There was also evidence that the Appellants were in the company of more than one person. Proof of either of those two ingredients suffices to prove the offence. We therefore reject the Appellant's submission in this regard.

14. The Appellant's other ground raised in their appeal was that the

identification was under difficult circumstances and could not be relied upon. As stated above, Onyango was able to recognize the Appellants as people he had seen earlier in the day. However Nasoro stated that he knew each one of the Appellants and recognized them by means of the full moon. He said that he was only a few metres away from the appellants. He proceeded to give each of the Appellants nicknames and described what he saw them doing. We do however caution ourselves over the evidence of identification as was held in the case **WAMUNGA -VS- REPUBLIC [1989]KLR 424** where the Court stated-

“... It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

15. Having so cautioned ourselves we are satisfied that the Appellants

were recognized more particularly by Nasoro whose evidence came out very clearly as one of recognition. We are satisfied that the evidence was sufficient to be relied upon for a conviction.

16. We have considered the Appellants defences and we find that they fail

to shake the prosecutions evidence. We have noted that the Appellants in their defences alluded to issues that were not put to the prosecution witnesses when they cross examined them. The Appellants did not question Nasoro on the place of their arrest in their cross examination yet in their defences they contradicted Nasoro's evidence on the place of their arrest. On the whole we find that the conviction of the Appellants was supported by the evidence and we accordingly dismiss the Appellants appeals.

Dated and delivered at Mombasa this 26th day of November, 2013.

MARY KASANGO

M. MUYA

JUDGE

JUDGE