



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NUMBER 225 OF 2009

BETWEEN

PETER KAMAU NJOROGE.....
APPELLANT

AND

THE REPUBLIC OF KENYARESPONDENT

[An Appeal from the Judgment of the Learned Principal Magistrate K.Muneeni, dated 22nd May 2009 in the Chief Magistrate's Court at Kiambu Criminal Case Number 193 of 2009]

Appeal before Justices Monica Mbaru and James Rika

The Appellant Peter Kamau Njoroge appearing in person

Prosecution Counsel Ms. Nyauncho appearing for the Respondent

JUDGMENT

1. The Appellant was charged with four counts of robbery with violence contrary to section 296[2] of the Penal Code. He was convicted and sentenced on all counts. The details of the offence were as follows:-

COUNT 1

On the 16th day of July 2008 at Ndacha Nachu in Kiambu District of Central Province, jointly with others not before Court, while armed with dangerous weapons namely pistol, pangas, rungun, spears, bow and arrows robbed Peter Njoroge Ng'ang'a of one bicycle make raja size 22, one mobile phone Nokia 1110, one leather belt, one pair of shoes, and cash of Kshs. 6,200- all valued at Kshs. 12,500 and at or immediately before or immediately after the time of such robbery used actual violence against the said Peter Njoroge Ng'ang'a.

COUNT 2

On the 16th day of July 2008 at Ndacha Nachu in Kiambu West District of Central Province jointly with others not before Court while armed with dangerous weapons namely pistol, panga, rungun, spear, bow and arrows, robbed Teresia Wambui of one crate of tusker, sixteen bottles of guinness, eight cartons of spirits, half crate of citizen, one crate of soda, one calculator, thirty five CDs, one

remote control, two jeans trousers, two t-shirts, two bags, one bicycle, one crate of pilsner and cash of Kshs. 1,200- all valued at Kshs. 13,960 and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the said Teresia Wambui.

COUNT 3

On the 16th day of July 2008 at Ndacha Nachu area in Kiambu West District of Central Province jointly with others not before Court while armed with dangerous weapons namely pistol, pangas, rungun, spears, bow and arrows robbed Samuel Mbugua of three siemens mobile phones, one nokia mobile phone, two motorola mobile phones, one erickson mobile phone, one vcd royal, two motorola batteries, one sharing machine, a pair of sports shoes, two jean trousers, one jacket, two mavins- all valued at Kshs. 33,300 and at or immediately before or immediately after the time of such robbery threatened to use actual violence.

COUNT 4

On the 16th day of July 2008 at Ndacha Nachu area in Kiambu West District of Central Province, jointly with others not before Court, while armed with dangerous weapons namely pistol, pangas, rungun, spears, bows and arrows robbed Francis Githinji of mobile phone make nokia 1200, identity card, and cash of Kshs. 100 – all valued at Kshs. 1,200 and at or immediately before or immediately after the time of such robbery used actual violence against the said Francis Githinji

2. PW1 Elder Peter Njoroge Ng'ang'a closed his restaurant at 9.00 p.m. on 16th July 2008. As he went out, he was met by six men. One had covered his face. Others had not. They hit him with a rungun. They stole his phone, nokia 1110, shoes, leather belt and cash of Kshs. 6,200. They forced him to take them to the bar next to his restaurant which was owned by his friend. His friend was not in. The robbers took PW1 back to his joint. They pointed a pistol at him. They hit him with the handle of a panga and with a gun butt. The lights were on. The robbers looked for the switch, intending to put off the lights. They were not able to do so, the switch being at the counter. He saw their faces well and could identify them if he saw them. They forced him to lie down and he could not see their faces. At one point, they tied his hands. He saw the face of the Appellant. He was the man who tied his hands. They went ahead and robbed from the adjacent businesses. They stole PW1's raja bicycle. They tied the hands of their victims. One of the girls who were attacked by the robbers managed to untie her hands and freed the others. They called the Police. Two days later, the Appellant appeared in PW1's hotel partly covering his face with a hat. He ordered for food and was graciously served. He was fidgety, and kept peeping at PW1. Once he sensed his cover was about to be blown, he threw the money for his bill at PW1 and took to his heels. PW1 and the other complainants gave chase. They arrested the Appellant and handed him over to the Police.

3. PW2 Teresia Wambui served as bar attendant. On 17th July 2008 at 9.00 p.m. she was going to bed after a hard day's work. A group of men entered her room. The Appellant entered her room. He asked her for the counter keys. The robbers took the keys from her pockets. The lights were on. She counted six robbers. They took her to the bar and took beers, spirit, calculator, 35 CDS, one DVD remote control, two pairs of jean trousers, two t-shirts, two bags, a bicycle, and cash of kshs. 1,200. The watchman, Mr. Peter Njoroge, Mr. Githinji, and Mr. Mbugua were all tied. Electricity lights were on. The robbers' faces were not covered. The bar owner untied himself. Police were called. PW2 told the Officers she could identify the robbers if she saw them. On the following day, the Appellant came to east from the restaurant. PW2 identified him. He was chased by members of the public and beaten. He confessed that he had been sent by one Mbugua to kill PW2's employer. Mbugua was a local bar owner. He and the Appellant were arrested.

4. PW3 Francis Githinji Njoroge was employed as a Guard. On 16th July 2008 at around 9.00 p.m. he was at the restaurant when robbers struck. He was punched, kicked and robbed of a nokia 1200 phone, cash of Kshs. 100. One of the robbers had a pistol. Electricity lights were on. The Appellant stood guard over the immobilized victims. The Appellant kicked PW3 in the mouth and broke his teeth. He tied PW3's hands with a wire. PW3 saw him distinctly, as he tied his hands. The Appellant was drinking the

stolen beer, which he spat on the victims as he executed the robbery. The robbers later took off. The victims managed to untie themselves, and screamed for help. Police came. The following day the Appellant was arrested. PW3 identified him.

5. PW4 Samuel Mbugua worked as a barber. On 16th July 2008, he was at his place of work, when he heard a commotion from an adjacent bar and restaurant. He peeped and noticed a group of men who were armed with rungs. He called the Police, but there was no answer. The robbers eventually got to him. They stole his cash-Kshs. 400, a customer's phone, three siemens mobile phones, one nokia phone, two motorola phones, one Erickson mobile phone, two jeans trousers, two muffins, two motorola phones, two motorola batteries, and VCD royal. The robbers left. PW4 was not able to identify them. Later, the Appellant was arrested as he ate from one of the affected businesses. He confessed the robbery had been arranged by a rival businessman Mbugua, who wished to subvert his competitors in the hope his own business would flourish.

6. PW5 APC James Partoipo worked at the Karai AP post. He was on patrol on 16th July 2008 when a member of the public called and said there were robbers at Ndacho Village who were terrorizing residents. He rushed there but found the robbers gone. He learnt that the robbers had invaded the businesses and stolen an assortment of items. The robbers were armed with guns and pangas. The victims told the Officers they could identify the robbers. He referred the matter to Kikuyu Police Station. On 18th July 2008, the business people who had been robbed called him saying they had seen one of the robbers. The Appellant was the robber in question and was instantly apprehended. PW6 Dr. George Kung'u Mwaura examined PW3 on 19th July 2008. The patient was found to have tenderness on the neck, on the chest, and had swollen wrists. Approximate age of injuries was two days. He on the same day examined PW1. The patient's nose and left wrist were swollen. His chest was tender. Approximate age of the injuries was two days. The type of weapon used was blunt. PW7 ASIP Odhiambo Nakwere was attached to the Kikuyu Police Station at the material time. The Appellant and another were brought to him by PW5, on suspicion of robbery which had taken place at Ndacha Village. He interviewed witnesses. No recoveries were made. The robbers were armed with pistols and crude weapons. PW1 gave the Investigating Officer a receipt for purchase of the mobile phone. On cross-examination, PW7 revealed there was no evidence to support the theory that the robbery was engineered by businessman Mbugua. Mbugua was not charged. Officer Nakwere denied that he had asked for a bribe of Kshs. 20,000 from the Appellant in exchange of immunity.

7. The Appellant elected to give an unsworn statement in defence. He testified he worked as a charcoal dealer at Ndacha. He was arrested on 18th July 2008. He had gone home on 17th July 2008. He went to the town centre to buy iron sheets. He took the iron sheets home. At 2.00 p.m. he went to PW1's restaurant and ordered for food. Some people suspected he was among the robbers. A friend of his gave him a ride on a bicycle. Some distance away, members of the public arrested him, alleging he was among the robbers. They beat him. They alleged he was sent to injure their businesses by businessman Mbugua. They cut his ear. They put a tyre around his neck. They bought paraffin intending to burn him alive. Police Officers came to his rescue, but as soon as they booked him in, demanded for a bribe of Kshs. 20,000. Mbugua paid. The Appellant was unable to raise the sum and was charged with the offence.

8 Having recorded and evaluated this evidence, the Trial Magistrate was persuaded the Appellant was criminally responsible on all counts. The findings of the Lower Court were rather sketchy, and are compressed on half a page contained in page 15 of the proceedings. The entire findings may be replicated as follows;

“From the evidence, the incident took place at night. There were many robbers. Electricity lights were on throughout the incident. Further PW1-Ng'ang'a PW2 Wambui, PW3 Njoroge, saw the face of the accused during the robbery. Accused was also arrested by the complainant upon going to the business of PW1- Ng'ang'a. Since he had seen the man well, he picked him out when he went to eat there. The other complainants confirmed the man was among the robbers. Apparently all these victims stayed nearby each other. The conclusion is that even PW4 Mbugua who said he could not identify any of the robbers- the same robbers visited him. Accused was positively identified as one of the robbers. The

robbery was a chain, involving the four complainants [including Mbugua]. I find the accused guilty as charged on all counts. I convict him under Section 215 of the Criminal Procedure Code.”

9. The Appellant did not agree with these findings and conclusion and filed the following grounds in appeal:-

[a] The Learned Trial Magistrate erred by convicting the Appellant based on identification evidence that was not free from error.

[b] The Appellant was arrested, tried, charged and convicted on the basis of mere suspicion.

[c] The Learned Trial Magistrate erred in failure to find the Appellant’s conduct was not compatible with the conduct of a guilty person.

[d] The Learned Trial Magistrate failed to adequately consider the defence of the Appellant.

10. The Appeal was heard on 17th October 2013. The Appellant’s position was that visual identification was not free from error. This was not reliable evidence. The prosecution evidence revealed attacks were suddenly executed. PW1 stated he was forced to lie face down. He could not see the attackers’ faces. He claimed to have seen the Appellant’s face as he tied his hands. The attack took a short time and it was not possible to have positive identification. PW1 stated he could identify the robbers if he saw them. He did not give reason why he would be able to do so. He did not give a description of the attackers. PW2 stated the victims never indicated the features of the robbers to the police. She also stated she would be able to identify the robbers if she saw them. PW3 testified he tried to look at the Appellant. The Appellant hit him. The evidence of the prosecution witnesses was that they were not given the opportunity to look at their attackers. The Appellant was arrested on mere suspicion aroused by PW1. It was unlikely that a person who committed a crime would go back to eat at the scene of the crime. He explained in his defence how he happened to be at the eatery. The Trial Court did not give this adequate thought. The State through Ms. Nyauncho countered that the Appellant was properly identified. He robbed the complainants while armed with rungun, pangas, pistols, and spears. The attack took place within five minutes. There was sufficient electricity light enabling the victims to visually identify the Appellant. PW3 knew the Appellant before the robbery. There was medical evidence to show the complainants were injured. The full ingredients of the offence of robbery with violence were shown in the evidence of the witnesses. The State urged the Court to sustain the decision of the Lower Court.

11. Our role as the first Court to which the Appeal has been submitted, is to fully re-evaluate the evidence, make our own findings and reach our own conclusion. We must not merely scrutinize the record, but must weigh the full scales of competing facts. While doing so, we are called upon to caution ourselves that the Trial Court has the advantage of not only hearing the witnesses, but also observing them. This responsibility is well defined *in Okena v. the Republic [1972]; Shantilal M. Ruwala v. the Republic [1975] E.A. 570; and Peters v. the Sunday Post [1958] E.A. 424.*

12. It is uncontroverted that the traders of Ndacha Nachu village in Kiambu West were on 16th July 2008 invaded by a gang of about six robbers. While the charge sheet states the robbers were armed with dangerous weapons namely pistol, pangas, rungun, spears, bows and arrows, the evidence of the various prosecution witnesses does not seem to mention spears, bows and arrows. There is however no doubt the attackers were, according to the evidence of the prosecution witnesses, armed with a pistol, pangas and rungun. There was sufficient evidence the traders lost several of their wares, and no recoveries appear to have been made. All the elements required to establish the offence of aggravated robbery, were demonstrated to be present in the attack on the traders of Ndacha Nachu, on the night of 16th July 2008. There was more than one attacker; armed with dangerous weapons; actual violence was used, where the victims were injured; and property was violently and forcibly taken from the rightful owners. The question we are called to resolve is whether the Appellant was among the robbers? Was he properly identified?

13. The robbery took place on the night of 16th July 2008. According to PW1, the Appellant returned to

PW1's restaurant on 18th July 2008, wearing a hat that partly concealed his face. The Appellant ordered for food which was served to him. He was fidgety, and kept stealing glances at PW1. PW1 identified the Appellant, who started to flee. PW1, other complainants and general public gave chase. The Appellant was arrested. He informed the complainants where the stolen properties were, but changed his story when rearrested by the Police.

14. The general evidence on identification given by the various prosecution witnesses with respect to the actual attack was not consistent. PW1 testified the robbers forced him to lie down and he could not see their faces. He also testified he saw the Appellant. The Appellant was the person who tied his hands. In his first report to the Police, he allegedly stated he could identify the robbers, but does not seem to have given any description of the attackers. PW2 testified she told the Police if she saw the robbers she could identify them. Again she gave no description to the police. On arrest of the Appellant, PW2 appears to have played a major role, testifying she was the first to identify the Appellant, and then confirmed the identity with PW1 and PW4. She was clear in her evidence that the victims never indicated the features of the suspects to the Police.

15. In our view this evidence of identification fell far short of the standard required, and could not suffice in a case of robbery with violence. In cases where a suspect is arrested by a charged mob which has recently been victimized by robbers, there is always the possibility that an innocent man is mistaken for being among the perpetrators of the offence. PW2 for instance stated she saw the Appellant, and had to confirm the identity with PW1 and PW4. They were not certain about the person they suspected was an attacker, and had to look for validation from their midst. There is always the desire by victims to feel safe after an attack, and a need to feel someone has been punished for the offence, in order to achieve some closure. PW1, PW2, and PW4 consulted and determined they had a suspect, and summoned the other traders to give chase. The Appellant was being given a ride on a bicycle by another young man who tried to calm the mob, telling them his passenger may have been an innocent man. The crowd then theorized that the Appellant was sent to raid certain businesses by another trader Mbugua. This man was himself arrested but released after Police found no evidence that he had engineered the robbery. Such evidence of identification by an agitated group of victims is not likely to be free from contamination and suggestibility.

16. In ***Elizabeth Gitiri Gachanja and 7 Others v. the Republic [2011] e-KLR***, the Court of Appeal set the following standards in assessing of evidence in capital offences: *'evidence relied upon to convict in capital offences must be of high quality, credible and beyond reasonable doubt. If evidence is on identification of a person who says he was not properly identified, the Court must examine such evidence with the greatest of care before relying on it to convict.'* This was similarly the holding in the earlier decision of ***Anjononi and Others v. the Republic [1980] KLR***, where the Court said: *'the proper identification of robbers is always important in a case of capital robbery, emphatically so in a case such as the present one, where no stolen property is found in the possession of the accused.'*

17. In this case the Appellant was not found in possession of any item, despite the fact that his arrest by the crowd took place only two days after the incident, and a wide range of items were reportedly stolen. Notably, the prosecution witnesses stated the Appellant had revealed to them where they could find their items, but changed his story after the Police came to his rescue. Why were no stolen goods recovered, if the Appellant had given a lead? The Appellant was not arrested in a continuous chain of events; he was arrested two days after the incident. This, and the non-recovery of the stolen items, required that the evidence of the eyewitnesses be carefully examined before convicting. The quality of the identification evidence was low. Contrary to the submission of the State, there appears to have been no evidence given by any of the prosecution witnesses, that they knew the Appellant before the material night.

18. The Appellant's grounds that he was convicted on mere suspicion; that his behaviour on 18th July 2008 was not compatible with the behaviour of a guilty person; and that his defence was not considered, all have merit. The Trial Court as seen in paragraph 8 of this Judgment said nothing at all of the Appellant's defence. The circumstances of the Appellant's arrest as discussed above, also support the submission that he was arrested on mere suspicion. Lastly the uncontroverted fact that the Appellant went to eat at PW1's restaurant on 18th July 2008, two days after the robbery, did not seem to us to be

compatible with the conduct of a guilty person. This conduct, seen together with the overall deficiencies in eyewitness evidence, the manner of arrest, and the lack of recovery of the stolen properties in the possession of the Appellant, made it unsafe to convict him on a capital offence. To sentence him on all counts was contrary to the law. He ought to have been sentenced on one count, while sentencing on other counts was left in abeyance. ***We allow the Appeal. Conviction is quashed, and sentence set aside on all counts. The Appellant shall forthwith be set at liberty, unless otherwise lawfully held.***

Dated and delivered at Nairobi this 20th day of November 2013

Monica Mbaru

Judge

James Rika

Judge