



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CRIMINAL APPEAL NUMBER 466 OF 2006

BETWEEN

DAVID OWINO OTIENO.....
APPELLANT

AND

THE REPUBLIC OF KENYARESPONDENT

[An appeal from the Judgment of Learned Principal Magistrate Mrs. Wasilwa dated 21st August 2006, in Chief Magistrate's Court at Kibera Criminal Case Number 5960 of 2005]

Appeal before Justices Monica Mbaru and James Rika

Appellant David Owino Otieno present in Person

Mr. O'mirera Senior Assistant Director of Public Prosecutions present for the Respondent

JUDGMENT

1. The Appellant was charged on 12th August 2005 before the Lower Court with the offence of robbery with violence, contrary to Section 296 [2] of the Penal Code. In the alternative, he was charged with the offence of handling stolen property, contrary to Section 322[2] of the Penal Code. Details of the offences were as follows:-

Robbery with violence:

On the 10th day of May 2002 at Forest Edge Langata within Nairobi Area Province, jointly with others not before the Court, while armed with knives, robbed John Wambua Nguku of one wrist watch make rhino, umbrella, a coat, national identity card and a work ticket, all valued at Kshs. 1,050, and at or immediately before, or immediately after the time of such robbery killed Peter Ouma Ndege.

Handling stolen property:

On 10th day of May 2002 at Forest Edge Langata within Nairobi Area Province, otherwise than in the course of stealing, dishonestly undertook the retention of a wrist watch and an umbrella valued at Kshs. 300, knowingly or having reason to believe it to be stolen or unlawfully obtained.

2. The trial leading to the judgment subject matter of this Appeal appears from the proceedings to have been a re-trial [see page 15 and 16 of the proceedings]. It is not clear when or why an order for re-trial issued.

3. The prosecution called a total of 6 witnesses, and 10 exhibits. The Complainant in the hand-written and typed proceedings is named as John Wambua Mbugua. He testified that he worked with a Security Firm called Mark Patrol Firm Limited. On 10th May 2002, he reported for his assignment at Mokoyoti Road in Langata. At Forest Edge Road, he saw two men ahead. They were tall and slender. They wore jean trousers, while one wore black sports shoes and a white shirt. The evidence states the other, had pull neck and white sports shoes. The two reached where the Complainant was. The one in a white shirt said, “ *this is one of them.*” The one in a white shirt jumped on the Complainant, and hit him on the cheek. The Complainant fell down. The assailants ordered the Complainant to give them money. He testified that by that time, he did not see his assailants carrying a weapon.

4. When the Complainant fell down, the assailant in a red pull neck drew a knife from his trouser. He identified one of the assailants as the accused person on the dock at the trial, the Appellant herein. The Appellant had the knife. The two assailants threatened the Complainant that if he did not give them money, they would finish him off. The Complainant feared he was going to be killed and decided to scream. Some members of the public answered to the scream. The robbers stole the Complainant’s coat, rhino watch, maroon umbrella, and wallet which had the Complainant’s identity card, boarding card, job card and guards book. A boy came from a nearby house running to the aid of the Complainant. The boy had a panga. He met the robbers who surrounded and stabbed him, killing him on the spot. The Complainant was in his evidence able to identify the photograph of the deceased boy, and the panga he carried. The robbers ran away in the direction of the Dog Section within the vicinity.

5. A motorist approached the Complainant who narrated what had just happened. The motorist drove to the Dog Section Facility and alerted the Police Officers within the Facility. Police Officers drove to the scene immediately. They asked if the Complainant could identify the robbers. They told the Complainant they had arrested a suspect as they came to the scene. The Officers took photographs and removed the body from the scene. The Complainant went to the Police Station and found his umbrella with his initials J.W. [John Wambu]. He was able to identify his watch which bore same initials J.W. Other items he found recovered at the Police Station were the knife, the panga and the wallet. The wallet was devoid of its contents. The Police organized an identification parade comprising 8 individuals. The Complainant was able to identify the Appellant, who was still wearing a red pull neck, blue jeans and white sports shoes. He identified his face. It was about 30 minutes from the time the Complainant was attacked. He described to the Police in the first report that the robber was tall and slender. The report was read and confirmed in Court.

6. PW2 PC Richard Muniyoro worked at the Dog Section Langata at the material time. He and PC Muriithi were requested by the duty officer to proceed to the scene of the crime after the report was made. The two Officers took different paths to the scene of the crime. About 500 metres from the Dog Section main gate, a man emerged from the left side of the forest crossing to the right side. PW2 challenged the man to stop. The man refused to stop. PW2 cocked his AK47 rifle and the man was compelled to stop. PW2 thought the man was armed, and shot in the air. The man fell down and threw something behind as he went down. PC Muriithi joined PW2 on hearing the sound of the gunfire. PC Muriithi searched for the object thrown away by the man, and found it; it was a knife. PW2 did a quick search on the suspect and recovered an umbrella and a cap. The Officers took the suspect to the Police Station and placed him under custody. They later visited the scene with the O.C.S Langata Police Station who took charge of the investigations. PW2 was able to identify to the Court, the exhibits retrieved from the scene of crime. PW3 PC Stephen Kariuki confirmed that a further search on the Appellant at the Langata Police Station led to the recovery of a wallet and a watch. The Investigating Officer PW5 corroborated the evidence of PW1, PW2 as well as PW3. PW6 PC Edward Muhoro made a report exhibiting photographs from the scene of the crime. Upon evaluation of the whole evidence the trial Magistrate placed the Appellant on his defence.

7. The Appellant made a short, unsworn statement. He testified he is a carpenter, and was going to his

workplace at Otiende Shopping Centre. The Appellant had a running stomach. He was confronted by a Police Officer who ordered the Appellant to stop. The Appellant stopped, and the Officer fired in the air. Another Officer came with a dog. The dog bit the Complainant on the leg. The Officers took the Appellant to the Dog Unit, and placed him in the cells. He was later moved to Langata Police Station. He was asked if he was at the scene of the crime. He denied being at the scene. He was surprised to be told he was one of the robbers. He was then charged with the offence.

8. The trial Magistrate was satisfied that the Appellant was arrested within 30 minutes of the robbery. He was identified positively by the Complainant as the person who robbed the Complainant, and killed Peter Ouma Ndege. It was around 6.00 a.m. and with sufficient daylight to enable the Complainant positively identify the assailant. Items stolen from the Complainant were recovered from the Appellant. The Appellant was able to identify the umbrella and the watch by his initials J.W. The trial Court also observed the demeanor of the Complainant to be full of candor. He described his attacker as tall and slender, a description confirmed in the OB. The robbers were armed, and not only used violence on the Complainant, but also killed another person. The Appellant was found in the forest area moments after the robbery, and when challenged to stop by the Police Officer, attempted to run away prompting the Officer. The Court was not persuaded by the Appellant's explanation that he went to the forest as he had a running stomach, commenting that after the arrest, the Appellant's stomach problem appears not to have persisted. The trial Court noted that prosecution was based on the identification by a single witness, and warned itself on the dangers of convicting on the basis of such evidence. The trial Court was persuaded the prosecution's evidence overall, was overwhelming, to justify conviction for the offence of robbery with violence.

9. The Appellant filed his first Petition of Appeal on 30th August 2006. There are two other sets of 'Amended' Petitions, handwritten, which seem to have been forwarded to the Court subsequent to the initial Petition. It is impossible to say from the Court file when these were received. The series of Petitions filed by the Appellant nevertheless replicate similar grounds of Appeal which may be summarized as follows:-

- a. **The trial Court failed to observe Section 77 [2] of the retired Constitution of Kenya; and Sections 85 [2] and 211 of the Criminal Procedure Code;**
- b. **The trial Court failed to resolve material contradictions in the prosecution's case in favour of the Appellant;**
- c. **The charge sheet was defective, and evidence adduced by the prosecution did not support the details in the charge sheet;**
- d. **The trial Court failed to consider the defence mounted by the Appellant; and,**
- e. **The trial Court relied on the identification evidence of a single witness; failed to appreciate that the stolen umbrella and watch were not found in the Appellant's possession; and the exhibited knife's ownership was not proved beyond reasonable doubt**

10. Section 77 [2] of the old Constitution dealt with securing protection of the law for accused persons in criminal trials. It related to fair trial. There is nothing in the record from the lower Court which would lead any reasonable tribunal, to find that proceedings were in any way carried out, in disregard for the protections created under Section 77[2]. The Appellant's presumption of innocence until proved guilty; his right to be informed of the offence in a language understood by him; his right to adequate facilities to conduct his defence; the opportunity to appear in Court and defend the charges in person or through an Advocate; and the right to equality of arms between him and the prosecution, were not shown to have been in any way compromised. The first ground of appeal has no merit and is rejected.

11. Section 85 [2] of the Criminal Procedure Code deals with the power of the Director of Public Prosecutions to appoint Advocates of the High Court or other persons employed in the Public Service, as Public Prosecutors. It is not relevant in this Appeal. Page 40 of the proceedings indicates the trial Court explained to the Appellant his right, under Section 211 of the Criminal Procedure Act. He selected to give unsworn statement and to call no witness. There was no material departure in the trial from the provisions

of Section 211 of the Criminal Procedure Code. This ground of appeal fails.

12. There were no material contradictions in the evidence marshaled by the prosecution to warrant interference by the High Court, with the conclusions made by the Learned Trial Magistrate. The evidence of the Complainant was consistent and persuasive. The Appellant was arrested within 30 minutes of the robbery, not far from the scene. His conduct on seeing the Police Officers from the Dog Unit was not consistent with the conduct of an innocent bystander. The Appellant attempted to run away, and was only restrained after PW2 fired warning shots in the air. He threw the knife away on being confronted by the two Police Officers. The knife was nevertheless recovered by the two Officers. The conduct of the Appellant on arrest was inconsistent with his position that he was an innocent passerby who had veered into the forest, under the compulsion of a running stomach. The evidence of the prosecution witnesses was consistent, credible and devoid of material contradictions.

13. There is no doubt a robbery took place. Assailants were armed with knives. Violence was visited upon the Complainant in the course of the robbery. Very unfortunately, a young soul named Peter Ouma Ndege answered to the Complainant's call for help, and was brutally murdered by the assailants. Evidence gathered by the Police from the scene of the crime included photographs of the deceased, his bloodied clothes and panga. More directly, the Appellant was found in possession of the Complainant's umbrella and watch, both identified by the Complainant in Court using his initials J.W. inscribed on the two items. These recoveries were made within minutes of the robbery. The Appellant was not able to say why he had possession of very recently stolen items.

14. There was sufficient evidence to support the charges, the only notable defect in the proceedings being the misnaming of the Complainant in proceedings as John Wambua Mbugua, while the charge sheet names him as John Wambua Nguku. At the hearing of the first prosecution witness, the Court seems to have recorded the PW1's name as John Wambua Mbugua- [page 20 of the proceedings]. At page 22, the Court again got the name of the Complainant incorrectly, recording it as John Wambu. These appear to us to be errors made by the trial Magistrate in recording the proceedings, rather than wrong information presented by the police to the Court in prosecuting the Appellant. The error did not in any way mislead the Appellant in the conduct of his defence, or occasion failure of justice. The Complainant was correctly and sufficiently identified in the charge sheet. He testified and the Appellant had the opportunity to confront him in Court on any aspects of his evidence, including his correct names. We find the misnaming of the Complainant by the trial Magistrate variously as John Wambua Mbugua and John Wambu, as opposed to his correct name John Wambua Nguku, not to have been a material defect that misled the Appellant in the conduct of his defence, or which occasioned failure of justice. Sufficient details of the Complainant were communicated to the Appellant through the charge sheet and evidence of successive witnesses. The Appellant was not impaired in defending the charges against him by this error. Both the charge sheet and the judgment on record correctly show the name of the Complainant to be John Wambua Nguku.

15. Identification of the Appellant by the Complainant was fair, lawful and in accordance with rules regulating identification parades. The attack took place at daybreak. There was sufficient light. The Appellant was noted by the Complainant to be tall and slender. This was in the first report contained in the OB, which the trial Court read and confirmed during the testimony of the Complainant. The Appellant was accosted from close range, and was able to identify the clothes his attackers wore. He was clear the Appellant wore a red pull neck, blue jeans and white sports shoes, the same attire he wore a short while later when the identification parade took place. The trial Court properly addressed itself to the evidence relating to identification, and cautioned itself on the danger of convicting on the evidence of a single identification witness.

16. There was no requirement that the prosecution establishes the ownership of the knife used in the robbery; it was sufficient that the Appellant had possession of the knife, and threatened to use, or used this knife violently to deprive the Complainant of his belongings. The Court must examine the evidence of a single identification witness carefully, particularly if such evidence is of a person who says he was not properly identified. This was the holding in the *C.A. Nairobi Criminal Appeal Number 51 of 2004 between Elizabeth Gitiri Gachanja & 7 Others v. the Republic of Kenya [2011] e-KLR*. The Court must

be satisfied there is no other co-existing evidence which would weaken or destroy the inference of the accused person's guilt. The trial Court was convinced the evidence of identification given by the Complainant and other circumstances surrounding the commission of the offence, showed the prosecution had proved its case beyond reasonable doubt. We find the lower Court exercised its mind correctly on both matters of fact and law. The Appellant's brief defence was considered in the Judgment of the lower Court. There is no merit in his assertion that the trial Magistrate disregarded what the Appellant said in his defence. In main, the Appellant conceded he was arrested by the two Dog Unit Police Officers within the vicinity of the scene of crime. His explanation was that he had a running stomach, and presumably searching for a safe place to relieve himself when arrested. This defence was found to be unconvincing. The Appellant avoided rebutting the presumption under Section 119 of the Evidence Act Cap 80 the Laws of Kenya, which was, that he was either the thief, or a guilty recipient of the Complainant's stolen items. His brief defence was unhelpful, correctly rejected, and the High Court does not have any material, upon re-evaluation of all the evidence, to fault the trial Court for that rejection. In sum:-

[a] The Appeal filed by the Appellant David Owino Otieno is rejected.

[b] The Conviction and sentence by the Lower Court are sustained.

Dated and delivered at Nairobi this 19th day of November 2013

Monica Mbaru

James Rika

Judge

Judge