REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 21 OF 2009

ISSAC THUO MWANGI…….. APPELLANT

VERSUS

REPUBLIC ……..….. RESPONDENT

(Appeal from original conviction and sentence in Criminal Case No. 134 of 2007 in the Senior Resident Magistrate's Court at Githunguri – L.K. Mutai)

JUDGEMENT OF THE COURT

Mr. Omirera – State Counsel

The charge –

1. Isaac Thuo Mwangi (the Appellant) was charged with robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge are that on the 14th day of January 2007 at Kagaa village in Kiambu district within Central province jointly with others not before court robbed PAUL MIHANG'O NJIHIA of cash Kshs.500/= and a mobile phone make Motorola valued at kshs.3000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said PAUL MIHANG'O NJIHIA.

Facts

2. PAUL MIHANG'O NJIHIA (PW1) was on the 14th January 2007 at Kagaa village in Githunguri where he had gone to visit his grandmother with his cousin Waweru (PW2). On their way back home, PW1 was left by the roadside by PW2 who went to buy cigarettes when 4 men approached him, 2 were armed with pangas, warned him not to scream. He was pulled to a nearby bush where he was robbed of his Kshs.500/= and a cell phone Motorola C113, he was cut severally on his head with a panga, he held onto the person cutting him and started screaming and calling his cousin's name. PW2 responded and held the appellant and the jacket that the assailant wore. PW1 was taken to the nearby Githiga Health centre while PW2 went to report to the police reported the matter. PW1 also made the report and recorded his statement and was given a PW2 from by the police and was referred to the hospital. The robbery and assault took place during the day a PW1 was able to properly identify the people who attacked him and PW2 knew one of the attackers, the appellant, very well. He also identified the appellant when the police arrested him. In his unsworn defence, the appellant stated that he was arrested on 24/1/07 at his home and charged with the offence of robbery with violence which he did not commit.

3. PW3, Njuguna Ndarwa treated PW1 at Githiga health Centre who noted that he had injuries to his head and left eye and both hands inflicted by a sharp object. He issued him with a P3 form. PW4, Joel

Mutinda, a government analyst, on 31/1/07 received blood samples from Githunguri police station taken from PW1 as sample 'A', the appellant as sample 'B' and a grey/blue jacket as sample 'C', he did analysis and formed a conclusion that sample 'A' was blood group 'O', sample 'B' was blood group 'B' and sample 'C' was moderately stained with blood group 'O' and that the blood in sample 'C' matched the blood group of the person in sample 'A'. PW5, PC David Nzungi on 14/1/07 at 2.30p.m. received a report by PW1 that he had been seriously assaulted and robbed and together with PC Mwariri accompanied PW1 to the scene and found blood stains, there was a cap that was identified as belonging to the appellant, they went to the appellants home but he was not there. He was later arrested on 28/1/07 when they found him sleeping in his house. His house was searched and under the bed a phone Motorola C113 was recovered, the SIM card was blocked and PW1 identified the phone as his stolen phone.

Grounds of appeal

4. The appellant on 22/1/2009 filed three (3) grounds of appeal; these were essentially two grounds as by then the appellant had not received the record of proceedings. These grounds as outlined by the appellant challenge the conviction and sentence of the trial magistrate in that there was one single identifying witness without any corroboration and that the prosecution did not prove the case against him beyond reasonable doubt noting various shortcomings. In his written submission that the court adopted, the appellant added another ground that the charge was defective based on the O.B. record that contravened section 214 of the Criminal Procedure Code.

Submissions

5. In submissions the appellant supported his appeal that the trial magistrate should not have relied on the evidence of PW1 and PW2 as there was no other independent witness to corroborate their evidence with regard to his identification and as the person they saw at the scene of crime. That the credibility of this evidence was faulted noting the lapse of time from the date when the robbery with violence is alleged to have been committed and the date the appellant was arrested. That when they reported to the police, there was no description of the persons who attacked PW1 with regard to his physical appearance following a crime that was said to have been committed in broad day light. That in the case of ***Said Waziri and M'ikinyua versus Republic, Crim. App. No.90 of 1985*** **it** was held that;

> *In view of the circumstances prevailing during an attack and the brevity of the opportunity for identification there is need to look for corroboration of the evidence of identification.*

6. That from the OB report, the initial report was made by PW2 and not PW1 the complainant and therefore did not tell the court the truth. That the only evidence that should have been considered was that of PW1. That the charge was defective, in the OB the report was of simple assault but not of robbery with violence. That PW1 was not robbed of anything as he alleged in court and he, the appellant was not found in possession of anything.

7. The learned state counsel opposed the appeal and submitted that the trial court correctly convicted the appellant. The issue contested is that of identification. PW1 was robbed during board day light, PW2 responded immediately and found him holding unto the appellant who extricated himself but left his jacket behind. There was evidence of recognition as opposed to identification and since PW2 had worked with the appellant, he knew where he was staying. The Jacket was subjected to forensic analysis and the blood stains found to be that of PW1 and the appellant. In defence the appellant gave a sham explanation.

Determination of the issues

8.the appellant was charged under section 296(2) of the Penal Code and convicted The appellant ground that the there was no proper identification and the the court relied on evidence of a single identifying officer on the basis that the initial report was done by PW1 and related to simple assault and not robbery. On whether there was proper identification and whether there was sufficient evidence to charge the appellant under section 296(2) of the penal Code will be addressed jointly.

9. We have examined the proceedings of the lower court and re-evaluated the evidence as required of this court noting the principles outlined in the case of ***Mohamed Rama Alfani and Another versus Republic, Criminal Appeal No.22 of 2002*** and find that on identification, the attack of PW1 took place during the day, it was along the road and since he was standing, he had a chance and opportunity to clearly see people approaching him to be able to positively identify them. This is corroborated by PW2 who rescued him and held the appellant who was trying to extricate himself from the hold of PW1, he knew the appellant well and therefore had no difficulty in recognising him.

10. We find that the appellant was positively identified. The identification evidence against the appellant was sound, and the finding of the trial magistrate was correct in basing the guilt of the appellant on it. This evidence on identification is supported by PW1 who was on 14/1/07 attacked during the day when he was waiting along the road as he waited for his cousin who left him by the road to go and buy cigarettes and while waiting was attacked by 2 men as he stood by the road and they stood across the road and could see them well as it was during the day and had time to observe them as they approached him. They crossed the road to where he was and pushed him to the bush where they were joined by two other; all had pangas and warned him not to scream. His cousin returned and heard his screams, and calls, he run towards the bushes and found PW1 holding onto the appellants and he intervened but he extricated himself and run off but left him with his jacket. PW1 gave evidence that he was robbed off money and his Phone Motorola C113. We find that this evidence of PW1, the complaint is supported by the evidence of PW2 and that of PW3 and PW4 who treated the appellants and issued a P3 form and the other did a forensic analysis of the jacket left behind by the attackers of PW1. This evidence corroborate the assertions of PW1 that he was assaulted with dangerous weapons they were sharp and cause him grievous harm and upon analysis of the jacket, it revealed that it had the blood of PW1 and the appellant. To this evidence of injury and harm, PW5 upon arresting the appellant searched his house and found a phone that had the SIM card blocked that PW1 was able to identify as his. This was a person who was well known by PW2 and PW1 was able to describe him even before he was arrested.

11. Further evidence by PC Richard Mwaura (PW6) of Githunguri police station is that on 14/1/07 he booked the report at the station and received a jacket that was blood stained. He learnt that the complainant had been assaulted and was at Githunguri health centre where he immediately went and found PW1, the complainant to have deep cut wounds. PW2 assisted the officers as he knew the appellant and later arrested the appellant, they took blood samples from him which was sent to the government analyst and upon positive results that linked the appellant to the jacket recovered after the robbery and assault, and they decided to charge him with the offense of robbery with violence.

12. On whether the charge is defective, there was a wrong record on the O.B. and that this should have been a case of simple robbery. We find that in a case where the Court of Appeal was faced with the same questions on whether a charge sheet citing section 296(2) was sufficient held in ***Simon Materu Muniala versus Republic [2007] eKLR, Criminal Appeal 302 of*** **2005** and held;

> *… the ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence is which more than one person takes part or where dangerous weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case.*

13. Our reading and evaluation of the evidence leaves no doubt in our minds that the appellant is the one who attacked PW1 in the company of others, they used dangerous weapons, pangas to assault and wound him and issued threats to him where the appellant left his jacket behind as he extricated himself from the hold of PW1 and PW2. We have no doubt that this jacket recovered belonged to the appellant as confirmed by the forensic analysis of PW5. PW1 also identified the phone recovered from the house of the appellant as his stolen phone. There was a report of the robbery and violence immediately at Githunguri police station and we find the charges against the appellant were based on the investigations and the results of the medical examination and the forensic analysis as held in the case of ***Arum versus Republic, Crim. App. 85 of 2005.*** These investigations led to the charges against the appellant, that of

robbery with violence under section 296(2) of the Penal Code that contain the ingredients as outlined above. It cannot therefore be found that the charge was defective on the basis that PW1 only reported a simple assault. There exists ample evidence for the finding that the ingredients of section 296(2) were all existing in this case when the appellant attacked PW1 together with others not arrested, they were armed with pangas being dangerous weapons and cause serious harm and further robbed him his property.

14. In conclusion, having carefully analysed and determined all the issues raised, were are of the view that the appellant was correctly sentenced by the trial court. On our part, we have examined all the evidence afresh and satisfied that the grounds of appeal raised by the appellant have no basis. We therefore reject this appeal, uphold the conviction and sentence. It is so ordered.

Signed dated and delivered at Nairobi this 18th Day of November 2013.

M. Mbaru **J. Rika**

Judge **Judge**