REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL 552 OF 2009

DENIS MWANGI WANJIRU……..……...……APPELLANT

VERSUS

REPUBLIC……..…… RESPONDENT

(An Appeal arising out of the conviction and sentence of A. Ongeri SPM in Criminal Case No. 1011 of 2009 delivered on 18TH November 2007 in the Chief Magistrate's Court at Kiambu)

JUDGMENT

The Appellant was charged with 3 offences. Two of the offences were of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offences were that on the 30th day of June 2009 at 9:30 p.m. at Banana Township in Kiambu District within Central Province, jointly with others not before Court and while armed with dangerous weapons namely a pistol, robbed G W N of cash Kshs.9,800/=, two mobile phones make Nokia, Toshiba DVD, 5 bottles ¼ richot, 3 bottles ¼ Kenya cane, 3 bottles ¼ napoleon and 6 empty glasses all valued at Kshs.23,170/=, and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said G W N.

Secondly that on the 30th day of June 2009 at 9:30 p.m. at Banana Township in Kiambu District within Central Province, jointly with others not before court, and while armed with a dangerous weapon namely a pistol, robbed John Njau Gachigwa cash Kshs.800/= and Noka 2310 valued at Kshs.5,000/= all valued at Kshs.5,800/=, and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said John Njau Gachigwa.

The third offence was that of an indecent act contrary to section 11(6) of the Sexual Offences Act No 3 of 2006. The particulars of the offence were that on the 30th day of June 2009 at 9:30 p.m. at ***[particulars withheld]*** Bar in Banana Township unlawfully, indecently assaulted one by the name G W N by touching and inserting his fingers in her vagina.

The Appellant were arraigned in court on 22nd July 2009 and he pleaded not guilty to all the charges against them. He was tried, convicted of the two charges of robbery with violence, and sentenced to death for one of the offences of robbery with violence. The sentence for the second offence was to remain in abeyance.

The Appellant being aggrieved by the judgment of the trial magistrate appealed both his conviction and sentence. His main grounds of appeal were that there was non-compliance with section 214 of the Criminal Procedure Code after some of the charges against him were withdrawn and consolidated with another case, there was no evidence of positive identification, and that the magistrate relied on

insufficient and contradictory evidence to convict him and failed to consider his defence.

Ms Matiru for the State opposed the appeal, and submitted that the Appellant entered and robbed a bar belonging to PWI who was with a customer PW2, and the electric lights were on at the time. Furthe, that PW1 recognised the Appellant as he was a water vendor in the neighbourhood. Pw1 saw him later and recognised him, and the Appellant in his defence was not able to remove himself from the scene of the crime.

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called three witnesses. PW1 was G W N the complainant, who testified that she owns a bar at Karuri market and that on 30/6/2009 at 9.00pm she was in the said bar with one customer when the Appellant entered. She stated that the electric light was on and that she recognised the Appellant as she used to see him in Banana Town, and he used to bring water to some women in the plot where she used to stay.

PWI further testified that the Appellant checked the bar and went out. He then returned with two other men, removed a gun, told her to lie down and demanded money. One of the other men entered the counter and robbed PW1 of kshs 7,900, assorted alcoholic drinks, empty glasses and a DVD. She produced the receipts for the DVD, a Nokia phone 3310 and her bar licence in court. PW1 further testified that the Appellant also robbed her of Kshs 2,000 that was in her back pocket and two mobile phones, a Nokia 3310 and 2600. Further, that he inserted a finger in her vagina.

PW1 further stated that the assailants then left and she closed the bar and went to Karuri Police Station with the customer to report the crime. She further stated that after two weeks, she saw the Appellant at a matatu stage at Banana and on a later date saw him enter a plot at Gachorui near Restoration Church in Karuri. She inquired from a lady in the plot in which house the Appellant was staying and reported it to the police who arrested him.

PW2 was John Njau Gachigwa, who testified that he is a mechanic and stays at Karuri. He testified that on 30/6/2009 at about 9.30pm he was at a bar belonging to PW1 drinking a beer. He testified that the Appellant entered the bar, and that he used to see the Appellant in Karuri, and he identified him in court. He stated that there was electricity in the bar, and that the Appellant went out and came back later with two men, and had a gun. Further, that the Appellant ordered them to lie down, and took Kshs 800/= and a Nokia 2310 phone that were in his pockets. The assailants then put off the lights and started ransacking the bar, and after they left, PW1 and PW2 closed the bar and went to Karura Police Station to report the incident.

PW3 was Cpl Francis Opagala who testified that he was attached to Karuri Police Station and that on 30/6/2009 while on duty, he was called by the officer at the report office and informed that there had been a robbery in a bar at Banana township. He went to the bar with the complainant who showed him where she was seated with PW2 when the assailants entered the bar, and that she also informed him that she could identify one of the assailants. He further testified that on 18/7/2009 PWI went to the police station and informed him that she knew where the assailant was staying, and that they went to the place at Gochorwe village at 3.am on that day and arrested the Appellant who was identified by the PW1. PW3 produced as exhibits the receipts for the DVD and mobile phone belonging to PW1.

The trial court found that the Appellant had a case to answer and complied with section 211 in this respect. The Appellant gave unsworn evidence and did not call any witnesses. He stated that he stays in Karen at Gachurue and works on construction sites. He testified that on 30/6/2009 he was at his place of work at Banana town and went home as usual, and that on 19/7/2009 he was arrested at 3.00 am after being identified by PW1 and later charged with the offences herein. He stated that he did not know anything about this case.

We have considered the arguments made by the Appellant and the State. On the first issue before the court as to whether there was non-compliance with section 214 (1) of the Criminal Procedure Code, we have perused the record of the trial court and note that it is indeed the case that on 3/8/2009 the prosecutor asked to withdraw counts IV,V and VI under section 87(a) of the Criminal Procedure Code, so as to

consolidate the charges with Criminal Case 982 of 2009. . We also note that section 214(1) of the Criminal Procedure Code provides as follows:

"(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that -

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

It is our finding that section 214(1) is inapplicable in this appeal as there was no alteration of a charge, only the withdrawal of some charges. The subsisting charges were not altered in any manner. In addition the effect of withdrawal of a charge is clearly stated in section 87 (a) of the Criminal Procedure Code, and if the withdrawal is made before the accused person is called upon to make his defence as in this appeal, then he shall be discharged of the charges.

The second issue for determination is whether the Appellant was positively identified. It was submitted in this respect by the Appellant that this was not a case of identification or recognition, but that he was framed, and that PW1 and PW2 were coached by one Elizabeth with whom he had a long standing grudge with. We are guided by the law on identification as stated in **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, *inter alia*, that:

"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".

Both PW1 and PW2 testified that they knew the Appellant before the robbery and were able to recognize him not only during the robbery, but also thereafter when PW1 saw him. In addition he was identified by two witnesses, and there circumstances of his identification were not difficult in any way as there was electric light in the bar at the time of the robbery and ample time for PW1 and PW2 to see him as he entered the bar twice. The said Elizabeth whom the Appellant sates coached PW1 and PW2 was also not called to give evidence. It is thus our finding that there was a positive identification of the Appellant in the circumstances of this appeal.

We are also in this respect guided by the Court of Appeal decision in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

On the last issue as to whether the evidence was insufficient and contradictory to convict the Appellant on a charge of robbery with violence. The Appellant in this case were charged with and convicted of two counts of robbery with violence under section 296 (2) of the Penal Code which reads thus:

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death"

We are guided by the decision in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** which sets out what constitutes robbery with violence under section 296(2) of the Penal Code as follows:

1. **If the offender is armed with any dangerous or offensive weapon or instrument, or**
2. **If he is in the 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.**

We are also alive to the requirement that proof of any one of the above ingredients of robbery with violence is enough to base a conviction on under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**. PW1 and PW2 testified that there were three persons who robbed them, including the Appellant, whom they recognised. In addition they stated that the Appellant was armed with a gun.

Upon re-evaluating the evidence, we noted that the evidence of PW1 and PW2 corroborated each other, and the court did not note any inconsistencies or contradictions in the said evidence. We thus find that the offences of robbery with violence were met and proved beyond reasonable doubt and the Appellant's conviction was safe.

We accordingly uphold the conviction of the Appellant for two charges of robbery with violence contrary to Section 296(2) of the Penal Code, and the sentences for these convictions are found to be legal. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF NOVEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE