



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Appeal 287 of 2011

CONSOLIDATED WITH

Criminal Appeal 288 of 2011

(from the original conviction and sentence of the Chief Magistrate's Court at Thika in Criminal Case No. 4339'A' of 2010 – B.J. Ndenda).

SAMUEL MUHIA KURIA..... 1ST APPELLANT

STEPHEN WAWERU NJEMA 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT OF THE COURT

The appellant, Samuel Muhia Kuria (1st Appellant) and Stephen Waweru Njema (2nd Appellant) were charged with robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on the 4th of September 2009 at Gatundu market in Thika District jointly while armed with dangerous weapons robbed Joseph Mucheru Ndutire of his cash Kshs.2,950/= and after such robbery wounded him. There were 6 witnesses called and after a full trial, the appellants were found guilty as charged. Being aggrieved by their conviction and sentence, each appellant filed a separate appeal against his conviction and sentence. At the hearing of the appeals, the two separate appeals filed by the appellants were consolidated and heard as one.

The appellants raised more or less the same grounds of appeal in their petitions of appeal. They were aggrieved that they had been convicted by the trial magistrate who had relied on the issue of identification without considering the circumstances prevailing at the locus quo that was not conclusive, the mode of arrest was not clear, no reasons were given as to why the unsworn defence was not considered and that they were convicted based on a case that was not proved beyond reasonable doubt. At the hearing of the appeal, the appellants with the leave of the court presented to the court their written submissions in support of their appeal. They urged the court to find these appeals to have merit and allow the same. On his part for the state Ms. Spira, State Counsel opposed the appeals and urged the court to uphold the conviction of the appellants by the trial court.

Facts

On 4/9/09 Joseph Mucheru Ndutire, the complaint (PW1) had come from a bar on his way home next to Flaming House. Both appellants accosted him, 1st appellant dipped his hand in his pocket and took his

kshs.2950/= a struggle ensued between the appellants and PW1 who shouted and a crowd of people responded whereupon the 2nd appellant knocked him on the head which started bleeding. He was able to identify the appellants as there was light from the adjacent bar. The members of the public who responded took PW1 to Gatundu District Hospital. Later PW1 identified the appellants in an identification parade, he said that the 2nd appellant had no front teeth and he recalled that he had earlier on seen him and the 2nd appellant in a bar where he was drinking beer. According to PW2 who responded to the PW1 shouts, 2nd appellant was immediately arrested, the crowd wanted to lynch him after he was found washing blood from his hands. Peter Mukua, Clinical officer Gatundu District Hospital (PW3) treated PW1 and filed a P3 indicating his injuries, while Corporal Ekiri Kirimoni (PW4) saved the 2nd appellant from an irate mob that wanted to lynch him upon arrest after the robbery and Sergeant Benjamin Wamlambua (PW5) investigated the case, Inspector Esther Mweu (PW6) conducted an identification parade following the laid down procedures and PW1 identified both the appellants positively as the ones who had robbed and assaulted him.

When the appellants were put on their defence, they gave their unsworn statement and both denied being involved in the robbery. The 1st appellant stated that he was drinking at the bar and while walking home he met a police officer who arrested him, an identification parade was done and he was arraigned in court. The 2nd appellant said that he was drinking at the bar when the police stormed inside and arrested him; an identification parade was conducted and was later arraigned in court.

Grounds of appeal

That the learned trial magistrate erred in law and in fact in that;

- i. *Relying on identification without considering the circumstances prevailing at the locus quo and was never conclusive*
- ii. *Convicted without being so impressed with the mode of arrest*
- iii. *Rejected the unsworn defence without explanation or perpper reasons contrary to section 169 CPC*
- iv. *made a wrong conclusion that the prosecution had proved its case beyond reasonable doubt*

Determination of the issues

As the first appellate court, this court can re-evaluate afresh the evidence on record and reach its own independent determination with regard to the conviction and sentence of the appellants. What we have to put into account in this respect it that we never saw or heard the witnesses and we have to keenly consider the grounds of appeal outlined by the appellants. On whether the standard of proof was beyond reasonable doubt, the evidence of the appellants was that there was a single witness who identified them, PW1 testified that he was drinking at Murera Bar at Gatundu Market and on his way out at the corridor between the bar and Flamingo House, somebody held him from behind using force, another person came and dipped his hand in his pocket and took Ksh2950/=. He grabbed 1st appellants hand and he shouted and struggled. 2nd appellant tried to rescue the 1st appellant but PW1 held onto him. There was light and he could see both appellants. A crowd responded and before escaping the 2nd appellant knocked him on the head. PW1 was able to describe his attackers to PW4 and when an identification parade was conducted, he clearly picked on his attackers.

Was this evidence on identification sufficient? The learned trial magistrate warned herself on finding a conviction based on this evidence and equally for this court we have carefully re-evaluated the evidence on record and warned ourselves of the inherent dangers on the reliance of a single witness identification to convict the appellant. We note PW1 had seen the appellants drinking in the same bar where he was, he held onto the 1st appellant when he was attacked and even though it was in the night, there was light on the corridor where he was attacked and could see what was happening to him. Members of the public

managed to arrest the 1st appellant immediately and upon his description of the 2nd appellant, he was arrested the same night as he washed his soiled hands. We are satisfied that PW1 positively identified the appellants. We are well aware of the decision in ***Abdalla bin Wendo and Another versus Republic 91953) 20 EACA 166***, where the East Africa Court of Appeal held that;

Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In the circumstances, what is needed is other evidence, whether be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of any error.

In this case, PW1 held onto the 1st appellant who was immediately arrested by members of the public and he was able to pick him from the identification parade. PW2 was able to immediately describe the 2nd appellant who was arrested as he washed his blood soiled hands. There were thus sufficient reasons, and circumstances to enable PW1 to positively identify the appellants. In any case, from our assessment of the evidence and submissions, both appellants were at the same bar as PW1, he had seen them and immediately after the attack and robbery, he described them and the immediate response of PW2 and PW4 ensured that both were arrested soon after committing the robbery.

We note that the iron bar alleged to have been used in the attack to PW1 was not recovered as to implicate the appellants, but our evaluation of all the evidence in whole is that the ingredients of section 296(2) on a joint attack, use of violence and robbery on PW2 did occur and the appellants were positively identified so as to link them to the crime. The learned trial magistrate had this to say at page 29, paragraph 10 to 20;

...it [the case] speaks for itself the testimony of PW1 is well corroborated by the testimony of PW2, PW1 not only did he see accused and recognise both accused 1 and accused 2 he even positively identified both of them at [the] identification parade conducted by PW6. The demeanour of both accused 1 and accused 2 left a lot to be desired again the defence of accused 1 and accused 2 is not anywhere near to the truth.

In conclusion, for the reasons stated we find the trial court made a correct finding based on the evidence before it. We have considered the appellants' submissions and find no merit in the appeals filed against their conviction and sentence. The appeals are hereby dismissed and the conviction of the lowered court upheld.

Delivered at Nairobi this 20th Day of December 2013.

M. Mbaru

Judge

J. Rika

Judge