



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 558 & 560 OF 2009

(An Appeal arising out of the conviction and sentence of A. ONGERI - SPM delivered on 30th November 2009 in Kiambu CMC. CR. Case No.1294 of 2009)

BENSON RAHEU KIMANI.....1ST APPELLANT

PAUL MBURU WANGARE.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants, Benson Raheu Kimani and Paul Mburu Wangare were charged with the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 23rd August 2009 at about 10.00 a.m. at Mumwe Village in Kiambu East District, the Appellant jointly with others not before court, while armed with dangerous weapons namely a panga and a pistol, robbed Paul Njenga Kimani of a mobile phone, a power saw, assorted clothes, one binoculars, four pairs of shoes, one LG CD changer system, cash Kshs.2,000/- and immediately before or immediately after the time of the such robbery threatened to use violence to the said Paul Njenga Kimani. The Appellants were alternatively charge with the offence of **Handling Stolen Goods** contrary to **Section 322(2)** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the Appellants, otherwise than in the course of stealing, dishonestly received the properties listed in the main count knowing or having reason to believe them to be stolen property or unlawfully obtained. When the Appellants were arraigned before the trial magistrate’s court, they pleaded not guilty to the charge. After full trial, they were convicted of the main count of **Robbery with Violence** contrary to **Section 296(2)** of **Penal Code**. They were sentenced to death as is mandatorily provided by the law. The Appellants were aggrieved by their convictions and sentence. They filed their separate appeals to this court.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the basis of a single identifying witness in respect of an identification that was made in circumstances that was not conducive to positive identification. They were aggrieved that they had been convicted despite the fact that the items that were robbed from the complainant were not found in their possession. They faulted the trial magistrate for convicting them for the offence yet the circumstances of their arrest raised reasonable doubts as to whether they were the ones who had indeed robbed the complainant. They were aggrieved that the trial magistrate had not taken into account their respective defences before arriving at the decision to convict them. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the sentences of death that was imposed upon them.

During the hearing of the appeals, the two separate appeals filed by the appellants were consolidated and heard together as one. Both Appellants presented to the court written submission in support of their respective appeals. They also made oral submission urging the court to find that the prosecution had not established a case against them to justify the conclusion by the trial court that they were guilty as charged. It was their case that they were victims of mistaken identity. Miss Matiru, on behalf of the State, submitted that the prosecution had indeed established that it was the Appellants who robbed the complainant and further that the Appellants had been apprehended soon after the said robbery while in possession of the robbed items. She urged the court to dismiss the appeals because the prosecution had established its case to the required standard of proof.

Before giving reasons for our decision, it is imperative that we set out the brief facts of this case. On 23rd August 2009 at about 10.00 a.m., the complainant Paul Njenga Kimani was relaxing at his home in Mumwe Estate in Kiambu. He was alone at the time. He told the court that three men entered his house through the door which was unlocked. Two of the men were armed. One was armed with a pistol while the other was armed with a panga. They demanded that he gives them the money in his possession. He gave them Kshs.2,000/- and his mobile phone make LG. They also took his LG CD player. The robbers asked the complainant to provide them with a carton box to carry the items. He gave them the carton box. They then ransacked his wardrobe and took away five pairs of shoes, five T-shirts, one suit and one blazer. They also took one power saw. After they had ransacked the house, they herded the complainant into a toilet and locked him inside the same. The robbers then left the house. The complainant managed to open the door of the toilet after which he pressed the alarm button. The Diplomatic Police based at Runda arrived at the scene two minutes after the alarm was raised. The two police officers were PW2 PC Andrew Embon and PW3 PC Joram Karanja. The complainant told them what transpired. The police were able to identify the part of the fence where the robbers had made good their escape. That path led into a coffee plantation.

The police followed the path and saw two men walking in the coffee plantation. One of them was carrying a carton box. The police fired in the air in a bid to secure their surrender. The two robbers ran away. PW2 and PW3 testified that they pursued the two men without losing sight of them. The shot that was fired in the air attracted members of the public who assisted the police to apprehend the two men. The two men are the Appellants in this case. The policemen testified that while they were chasing the two men, one of them, the 1st Appellant dropped the carton box. The carton box was retrieved. In the carton box were the properties that had been robbed from the complainant. The two men were escorted back to the house of the complainant. The complainant was able to positively identify them. In his testimony, the complainant described the clothes that the men who robbed him had worn. He told the court that one of them was wearing a white cap. Upon their apprehension, the 1st Appellant was wearing a white cap. The properties which were recovered from the 1st Appellant were produced in court as evidence. PW4 PC Oloo Kasera, then based at Kiambu Police Station was the investigating officer in this case. After the arrest of the Appellants, they were taken to Kiambu Police Station where they were detained. After concluding his investigations, PW4 determined that there was sufficient evidence to charge the Appellants.

When the Appellants were put on their defence, they told the court that they were victims of mistaken identity. They both narrated how, while they were going on with their usual business on that Sunday, they heard a gunshot after which they heard people shouting “**thief! thief!**”. They were surprised and shocked when they were arrested on allegation that they had robbed the complainant. They denied participating in the robbery of the complainant. They reiterated that they were victims of mistaken identity as nothing that was robbed from the complainant was recovered in their possession.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot

excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the Appellant on the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

In the present appeal, as is required of us, we have reconsidered the evidence that was adduced before the trial court. We have considered this evidence in light of the submission that was made before us by the Appellants and by Miss Matiru on behalf of the State. We have also taken into consideration the grounds of appeal put forward by the Appellants. The prosecution relied on the evidence of identification and that of the recovery of the stolen items to secure the conviction of the Appellants. As regard the evidence of identification, the complainant testified that he was robbed at 10.00 a.m. It was during the day. He interacted with the robbers for about half an hour as they were robbing him. He was able to clearly see them because they were not wearing any form of disguise. He did not resist the robbery. The robbers were armed with a panga and a pistol. They threatened him using the pistol and the panga. They robbed him of his mobile phone and Kshs.2,000/-. They also robbed him of personal clothing and shoes. The robbers asked him to provide them with a carton box. The robbers used the carton box to ferry the robbed items. They locked the complainant in a toilet. The complainant managed to free himself from the toilet immediately after the robbers had left his house. He pressed an alarm button. The police arrived at his house two minutes after the alarm was pressed.

The police officers who responded to the alarm were PW2 and PW3. They were able to locate the position in the fence of the complainant's compound where the robbers had made good the escape. The police officers went in hot pursuit of the robbers. Behind the fence was a coffee plantation. The police saw two men walking in the coffee plantation. One of the men was carrying a carton box. The police fired a shot in the air in a bid to secure the arrest of the men. The two men however, dropped the carton box and started running. PW2 and PW3 testified that they chased the two men. They did not lose sight of them. Members of the public, who had heard the gunshot, assisted the police to apprehend the two men. They were apprehended about 800 metres from the house of the complainant. The two men are the Appellants in this case. After their arrest, the carton box was recovered. In the carton box were the properties which had been robbed from the complainant. The complainant was able to identify the Appellants upon their arrest.

Although the Appellants have argued that they were victims of mistaken identity, upon evaluation of the evidence adduced by the prosecution witnesses, we are convinced beyond any reasonable doubt that indeed the Appellants robbed the complainant and were arrested soon after the robbery. They were identified by the complainant about half an hour after the robbery. The robbery took place in broad daylight. It cannot therefore be said that their identification by the complainant was made in circumstances that were not conducive for positive identification. The Appellants did not wear any disguises when they robbed the complainant. Soon after the robbery, the police who responded to the alarm raised by the complainant, pursued the Appellants and were able to apprehend them. If there was any doubt that the Appellants had been properly identified, that doubt was removed when the items which were robbed from the complainant were found in their possession. The police who chased and arrested them testified that when they shot in the air, the 1st Appellant dropped the carton box in which the properties of the complainant were recovered. It was clear from this evidence that the Appellants were not victims of mistaken identity but were the actual robbers. We have carefully considered their defence. It does not raise any issue that would dent the otherwise strong case brought against them by the prosecution.

The ingredients of the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** were proved: the Appellants (were more than one), robbed the complainant, in the course of the robbery they threatened him with a dangerous weapon namely a panga and a pistol. In the premises therefore, we

find no merit with the two appeals lodged by the Appellants. We hereby dismiss them. We uphold their conviction and the sentence that was imposed upon them by the trial court. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF DECEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE

DATED, COUNTERSIGNED AND DELIVERED ON 6TH DAY OF DECEMBER 2013.

W. MUSYOKA

JUDGE