



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL APPEAL 396 OF 2007

GEORGE NJIRU NJUGUNA..... 1ST APPELLANT
PAUL MUTHIURU KINYUA..... 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An Appeal from the Original Conviction and Sentence by the Senior Resident Magistrate Court at Githunguri in Criminal Case No.1279 of 2006)

JUDGMENT

George Njiru Njuguna was charged together with one Paul Muthiuru Kinyua with two counts of Robbery with violence contrary to section 296 (2) of Penal Code. The particulars of the first count was that on 10/11/2005 jointly with another already in the court while armed with dangerous weapons iron bars and hammers robbed Simon Mutugi Njau one mobile phone make Nokia 2600 one driving licence and cash Kshs.3,400/= all valued at Kshs.16,400/= and at or immediately before or immediately after the time of such robbery wounded the said Simon Mutugi Njau.

The second count was that on the same day at the same place they both while armed with dangerous weapons namely with iron bars and hammers robbed Daniel Kago Gichiri one mobile phone make Alcatel 310 and cash Kshs.1,150/= all valued at Kshs.6,150/= and at or immediately after the time of such robbery wounded the said Daniel Kago Gichiri.

While in prison Paul Muthiuri Kinyua died and his appeal abated under provisions of Section 360 Criminal Procedure Code. The prosecution evidence was that PW 1 Simon Mutugi Njau first complainant, a driver was on 10.11.2005 at 11.00 p.m. at Githunguri town and together with Kago second complainant they started walking home. They reached Kwa-wamuyu where there is a coffee plantation. Two men emerged ahead. One was Ngaku and Mururi. They held the two complainants and one Njiru (the appellant held a hammer and a metal bar Muthiuru joined them. Fifth person emerged but he was not identified by P.W. 1. P.W.1 testified that he was robbed Kshs.3,400/= which was in his wallet and his cell phone Nokia 2600 which was worth Kshs.8000/=. His driving licence and ID card were robbed. The robbers disappeared.

The second complainant Daniel Kago on the same date at about 11.00 p.m. testified that he was with 1st

complainant PW1 when on the way two men met them. One is Ngaku and Mururi Ngaku held him by the neck. Two other men emerged from the coffee plantation. They were Njiru and Muthuru. The second appellant had a hammer and 1st accused had a metal bar (the deceased appellant). The four robbed the second complainant of his cell phone Alcatel worth Kshs.5000/= and cash Kshs.1,150/=.

The four robbers were neighbours. There was plenty of moonlight. In total 5 men robbed the complainants. The 5th man was not identified. The 2nd complainant said he had known the appellant for 10 years. They disappeared after robbing them.

PW2 gave out the accused names to the police. They arrested the said Ngaku. Second complainant did not see the others until they were arrested. PW1 and PW2 identified the robbers after they were arrested.

Both complainants said they were not assaulted. And that they are their neighbours and well known for a long time. They gave their names to police. The properties robbed from the complainants were not recovered.

PW 3 was a police officer he testified that 2 complainants reported at Gitunguri Police Station that on 10.11.2005 they were robbed by robbers including the 2 accuseds. They told him that the robbers were armed with a hammer and rungu and that the first complainant was robbed cash Kshs.3400/=, driving licence and cell phone and the other complainant was robbed of his phone alcatel 310 and cash Kshs.1,150/=

He booked the matter in occurrence book. They alleged they had been beaten. He issued them with treatment cards. Another man called Ngaku was brought but was tried separately. Then in August 2006 the two complainants reported to have seen 2 accused persons. The PW 3 arrested the 2 accused persons and charged them. The accused were identified by the complainant.

The accused gave sworn evidence. 1st accused stated that he knew them. He placed the scene at a bar called Boston Bar. He was with his cousin and his girlfriend. They were drinking. Then PW 1 and PW 2 took a table near them. Then PW 2 came to their table and a commotion ensued over a girl. The accused were drunk. The complainants left at 10.30 p.m. the accused also left at 1.30 a.m.

The complainants and the accused came all from the same area and they knew each other very well. The appellant George Njiru Njuguna also gave sworn evidence how he with his girlfriend Tereza Wambui met his cousin 1st accused (deceased) at a club Boston bar. They drunk together. Then at 9.00 p.m. same 3 men entered including Mutugi, Kimani and Kago PW 1, and PW 2. They were drinking. Then Kago started a commotion about the girl. Then the complainants left at about 10.00 p.m.

The appellant called a witness Judy Wambui Kamau. She identified the 1st appellant (deceased) she was serving beer and there was a commotion in the bar involving the appellants. She learnt that the people were fighting over a lady. She served people until at about 1.00 a.m.

The trial Magistrate in his judgment found the defence evidence "tended to doubt its value" while the prosecution evidence revealed that the offence was committed at night. The complainants said they knew their attackers very well as they came from their village. There was plenty of moonlight and the situation was favourable for identification. PW1 said "I cannot really tell who robbed me since they all were on me." It was said that the robbers were armed with hammers and rungu.

The two appellants were identified by complainants. The appellants did not deny that they were not known to the complainant. The trial magistrate found that other than moonlight there was no other source of lighting but that the complainant saw and recognized the appellant at the scene. The police officer PW 3 did not take any action to apprehend the appellants. The report was made to him and after long time he was informed where the accused were for purpose of arresting them.

On the issue of identification the evidence is that the complainant could not identify who did what during

the robbery as they were attacked everywhere and 5 of them attacked them at same time and the complainant were held together and robbed at the same time. We find that the identification was in difficult circumstances and it was not satisfactory in the circumstances. We also find that the trial magistrate did not give sufficient consideration to the evidence of the appellants that the scene was outside in the coffee plantation while they talked of a bar. Both stories could have been true. Considering the weapons mentioned the appellant is said to have held a hammer and a metal bar. The complainants testified that they were not assaulted. Second accused had a hammer and 1st accused a metal bar. The evidence on the weapons was contradictory. The one witness said that said there was a hammer and rungu and the other said there was a metal bar. Both said they were not assaulted.

The 3 prosecution witnesses did not connect the appellant with the commission of the offence. The evidence of PW1 is the robbery was committed by 5 people, which was supported by PW2. The piece of evidence was contradicted by PW3. In the circumstances it is clear that the prosecution did not prove their case beyond reasonable doubt. We order that the appellant conviction shall be quashed and sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 28th day of May, 2012

J.N. KHAMINWA

M. WARSAME

JUDGE

JUDGE