



REPUBLIC OF KENYA

IN THE HIGH COURT

ATMERU

Criminal Appeal 271 of 2009

MOSES GITONGA KIMATHI ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(Being an appeal against the judgment in Criminal Case No.1957 of 2006 at Nkubu SPM's Court before Hon. S. M.Githinji on 18<sup>th</sup> December, 2009)*

### J U D G M E N T

The appellant in this case was jointly with another person charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge sheet are as follows:-

***“On the 19<sup>th</sup> day of August, 2006 at Nkumari village, Kariene sub-location in Meru Central District within Eastern Province jointly armed with a dangerous weapon namely a panga robbed LAWRENCE MUNGATIA MAGAMBO of his cash Kshs.18,500/- and at or immediately before or immediately after the time of such robbery wounded the said LAWRENCE MUNGATIA MAGAMBO.***

After full trial, the appellant was found guilty and convicted by the trial Magistrate. Consequently, the appellant was sentenced to suffer death by the learned Magistrate. Being aggrieved by the judgment and sentence of the learned trial Magistrate the appellant has relied on the following grounds of appeal:-

***1.That the trial Magistrate erred in law and facts in basing a conviction on me relying upon the evidence of PW1 and PW2 without making a finding that both are members of the same family and relatives to the appellant.***

***2.That the trial Magistrate erred in law and facts and went ahead to convict the appellant without making a finding that there existed a strong grudge between my family and the family of the complainants(PW1 and PW3), in that there is a case of murder in High Court Meru of which my father(now accused 1) is the complainant.***

***3.That the learned trial Magistrate erred in law and facts by convicting the appellant without considering that the mode of my arrest did not support any evidence of my involvement in the alleged attack. I was arrested one year after the alleged attack and there was no warrant of arrest and yet the case was a case of recognition and not identification***

**4. That the trial Magistrate erred in convicting the appellant without making a finding that the prosecution case suffered a procedural irregularity for investigation officer and arresting officer did not appear before court to give their testimonies, thus creating a very big gap in the prosecution case.**

**5. That the learned trial Magistrate erred in law and facts in convicting the appellant without making a finding that there was no exhibits or weapons recovered that could connect me with the alleged robbery.**

**6. That the trial Magistrate erred in convicting the appellant without making a finding that Section 211 CPC were not complied with to the required standard.**

**7. That the trial Magistrate erred in convicting the appellant without making a finding that Section 211 CPC were not complied with to the required standard.**

During the hearing of the appeal, the appellant opted to produce written submissions to support his appeal. The appellant in his written submissions faulted the trial Magistrate's judgment on the grounds that the conditions at the time of robbery were not conducive for positive identification and recognition of the robbers and that the prosecution failed to prove the case against the appellant beyond any reasonable doubt. He further faulted the learned trial Magistrate in failing to note and hold there existed a grudge between the appellant and complainant and his family.

The appeal has been opposed by Mr. Mungai who appeared for the Republic. The learned State Counsel on his part submitted that the prosecution proved its case beyond any reasonable doubt. That on 19<sup>th</sup> August, 2006 the appellant jointly with an accomplice armed with dangerous weapons namely a panga robbed complainant Kshs.18,500/-.

According to State Counsel PW1 and PW2 testified that they were able to recognize the appellant. PW1 was a relative and a neighbor of the appellant and they grew together. The State Counsel submitted that at the time of robbery PW1 shouted the name of the appellant and his co-accused. According to the State Counsel the appellant was properly recognized at the scene of crime. He submitted that there was sufficient moonlight that day which the complainant said was a full moonlight. He submitted PW2 saw the assailants immediately after the attack and went to the complainant's rescue. That at the hospital complainant told PW2 what had been stolen from him. The State Counsel further submitted the trial Magistrate considered all issues and came to correct decision.

The learned State Counsel submitted that the appellant's defence was evasive and a mere denial. He concluded by urging court to uphold the conviction and the sentence.

Being the first appellate court, we have the duty to re-analyze and re-evaluate the evidence that was tendered in the lower court before reaching our own independent conclusion. We also do appreciate and are alive to the fact that we did not see or hear the witnesses during the trial. Those are some of the basic principles which are set out in the case of **GABRIEL KAMAU NJOROGE – V- REPUBLIC(1982-88) 1 KAR at page 1134.**

In this particular case, PW1, Lawrence Mungatia Magambo, introduced himself as a businessman, and a distributor of Mafuko loaves of bread at Kariene Market.

He recalled that on 19<sup>th</sup> August, 2006 at around 11.00 p.m, he was about to arrive at his home when as he was about to open the door he heard people behind and turned directing his torch beam on them. He first saw co-accused of the appellant who had an axe and a club and who he recognized as his relative. The Complainant also said he saw Moses Gitonga, the appellant who had a panga. The Complainant stated that he knew the appellant, as they had studied together at Kariene Primary School for six years and also his cousin who lived near his home. The Complainant had a torch of 4 batteries which he had them that very day. Apart from that there was also bright moonlight which was a full moon. The complainant saw the appellant when he was about 1.5 meters away from him. The appellant and his accomplice demanded money from the complainant and told him if he raised a voice they will kill him. He struggled

with the assailants preventing them from cutting him. The appellant's accomplice hit him on the left ribs with a club. He sensed danger and called the assailants by their names and shouted saying they were killing him. The appellant then cut the complainant with a panga near his left eye; damaging his eye. The appellant took Kshs.18,500= from complainant's inner coat pocket. The Complainant fell down unconscious later to gain consciousness at Nkubu Mission Hospital. The Complainant was visited by his brother at the hospital, PW2, and he told PW2 the names of the assailants. He was discharged from hospital on 28<sup>th</sup> August, 2006 and later recorded statement at Kariene Police Station and was issued with P3 form which was filled at Meru General Hospital.

According to the complainant the appellant went underground and was not arrested until later in December, 2007. During cross-examination of the complainant, PW1, by the appellant he stated that he was able to see the appellant at the time of the attack.

The Complainant admitted there was a case at Meru between him and the appellant's father filed against complainant after the robbery incident. The complainant testified that the appellant cut him and he made statement on 30/08/2006.

The Complainant stated he does not know from where the appellant was arrested as he was not there and confirmed that the appellant is his relative. The Complainant testified that he had no grudge with the appellant's father and he denied he had fixed the appellant. The Complainant confirmed that he saw the appellant and his co-accused at the time of robbery and that at the time of robbery he talked to them. The Complainant testified that he gave appellant's name to the police

The testimony of PW2 Elias Mwenda Magambo, is that he recalled that on 19<sup>th</sup> August, 2006 at about 11.00pm, he was at home with his wife Alfine Gacheri and his cousins, when he heard his brother Lawrence Mungatia screaming saying he was being killed. PW2 picked a torch and rushed outside to his brother's house which was 20 feet away and he was able to see two persons attacking PW1. PW2 testified he saw his brother's assailants who he had known before and he named them as Moses Gitonga the appellant with his co-accused; both of whom he had known since birth. Appellant had a panga, which was blood stained and the complainant was lying on the ground. That when PW2 asked the assailants why they were killing PW1 they escaped. The PW2's torch had 3 new batteries and there was also bright moonlight and he was able through use of torch beams to see the appellant and his co-accused. The complainant was lying on the ground unconscious, PW2 and his cousins took the complainant to Kariene Police Station whereby they made a report. They were given treatment note and took the complainant to Nkubu Mission Hospital whereby he was admitted.

PW2 visited the complainant at hospital the following day at 2.00p.m and the complainant told PW2 Kshs.18,500/- was stolen from him by the appellant and his co-accused. PW2 stated there was enough light and he was able to see the appellant's weapons before the appellant and his co-accused escaped.

On being cross-examined by the appellant PW2 testified that he did not have any cases against the appellant's father. He testified that police made a mistake in stating 11.00 a.m. instead of 11.00 p.m. PW2 testified that the appellant had blood stained panga and that he saw appellant at the scene of crime. He stated Elijah Magambo came after appellant and his co-accused had escaped and he told him what he had seen.

In being re-examined PW2 confirmed the incident took place at 11.00 p.m and it was the police who wrote statements as he narrated what had happened.

In his testimony, PW3 Elijah Magambo, testified that he knows the appellant, who is his nephew. He recalled that on 29<sup>th</sup> August, 2006 he was in his house and was about to sleep, when he heard screams from the house of Mungatia and proceeded therewhere he found the complainant lying on the ground. He called Mwenda who was at his house and when the appellant and his co-accused saw him they walked away. Pw3 testified he was able to see the appellant through bright moonlight.

During cross-examination of PW3 by appellant, he testified that he saw the appellant and his co-accused

walking away slowly through his torchlight and that Mwenda also saw the appellant and his co-accused. He testified Mungatia screamed loudly saying he was dying and should be taken to the hospital. PW3 testified complainant lost Kshs.18,500/= and that he had a cut on his face.

The testimony of, PW4, Dr. Isaac Macharia, is that he works at Meru General Hospital and that on 7/9/2006 he examined PW1, who was aged 22 years who alleged to have been assaulted by two people known to him. The complainant had sustained a compound fracture of nasal bone and compound fracture of the skull on left side of the head and was seen at hospital 2 hours after injury. That injuries were caused by sharp object and the complainant was admitted for 9 days. The degree of injury was maim. PW4 prepared a P3 form, signed it on 7th September, 2006 and produced P3 form as exhibit No.1. During cross-examination of PW4, he testified that the complainant had been cut by two persons known to him and the cut was by use of sharp object. He testified PW1 was able to talk and he was not unconscious when he saw him.

After PW4 had been cross-examined the prosecutor opted to amend the charge sheet to read 19<sup>th</sup> August, 2006 instead of 29<sup>th</sup> August, 2006. The appellant had no objection and court granted the application.

No plea was taken on amended charge. The court record show that the appellant is recorded as saying he did not wish to have any of the witnesses recalled for further cross-examination on date of the charge.

The court record show that immediately after the prosecution closed their case the court made a ruling that the accused had a case to answer and S.211 Criminal Procedure Code was complied with. Appellant opted to give sworn statement and opted to call no witness.

The appellant, Moses Gitonga Kimani, stated that he lives at Kariene and worked in the quarry. He recalled on 5/11/2005, he went to Mitunguu whereby he stayed for 2 years. That he returned home on 15/12/2007 and found people bereaved at home. He enquired from his father what had happened and he was told that they had been fixed and his brother was killed. That on 16<sup>th</sup> December, 2007 police were led by PW2 to him and he was taken to Kariene police Station where he was held for 4 days. He was subsequently taken to Nkubu Police Station where he was held for 3 days, before he was taken back to Kariene police station whereby he was held for 2 days. Later he was taken to Meru court and charge read to him. During cross-examination the appellant testified that he was arrested on 16<sup>th</sup> December, 2007.

This court has carefully considered the evidence which was tendered at the lower court. From the evidence on record, it is apparent that the complainant was able to recognize the appellant through torch beam which he had directed at the appellant and another. The complainant was able to see appellant's co-accused who had an axe and a club. He had known him since his childhood as he was his neighbour. He was able to see the appellant, Moses Gitonga, through use of torch light and bright moonlight from a close range of 1.5 metres from the complainant who was armed with a panga. He had known him as they had studied together at Kariene primary school for 6 years and as his cousin who lived near his home.

In addition to the above, appellant talked to complainant demanding money. The complainant saw appellant cut him with a panga. The complainant on sensing danger, called on accused names and shouted, saying he was being killed attracting the attention of his brother PW2, who was at his house which is 20 feet from that of the complainant, and together with other members of public rushed to the scene. PW2 was able to see the appellant and another attacking the complainant and he recognized the appellant and his co-accused who were known to him since birth through use of torch lights and through use of moonlight. On the other hand we find the evidence of PW3, doubtful because the court which had opportunity of hearing him and seeing him found that he could not even in court at a close range see and recognize the appellant and his co-accused who were only 3 metres from him. The trial court correctly disregarded his evidence and found him unreliable and we agree that the trial court acted correctly. This court concurs with the learned State Counsel that the circumstances during the robbery was favourable for positive recognition. The leading case of **REPUBLIC – VS – TURNBULL & OTHERS(1976) 3 ALL ER.** The above case sets down the basic principle to be considered when the issue of identification came into place. Also in the case of **ROBERT GITAU – V- REPUBLIC, Criminal Appeal No.63 of 1990 Nakuru**, the Court of Appeal held as follows:-

***“It was held in Abdullah Bin Wendo and Another V R 1953 Volume KXX 166 and Cleophas Otieno Wamunga V R(Criminal Appeal No.20/89) that evidence of identification should be tested with great care especially when it is known that the conditions favouring a correct identification were difficult. The witness who testified that they could identify the appellant in circumstances of shock and fear could easily be mistaken because the duration of observation was short. We are doubtful whether the witnesses could have identified the appellant’s face in the manner described by the witness. We are also doubtful how the witnesses were able to identify the appellant in the identification parade. In this respect, the appellant complained that it was easy for him to be picked up because in the parade he was only one from the cell.”***

In the case of **Francis Kariuki Njeru & 7others – V- Republic Criminal Appeal Cr.No.6/2001(UR)** the court stated as follows:-

***“The evidence relating to identification had to be scrutinized carefully, and was only to be accepted and acted upon if the court was satisfied that the identification was positive and free from the possibility of error. The surrounding circumstances had to be considered and among the factors court was required to consider was whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.”***

In this particular case, we are satisfied that the trial Magistrate relied on the issue of recognition by the complainant and other prosecution witnesses. The witnesses knew the appellant and there was no evidence of any grudge to allege that there had been any malice whatsoever against the appellant at the time of commission of offence. The appellant did not allege any grudge against the complainant or against PW2. The fact that the complainant and PW2 are brothers cannot be the basis to allege a grudge. We do not find any evidence of grudge and the ground of the appellant having been framed in this case has no basis and is dismissed..

On the issue of compliance with Section 211 of Criminal Procedure Code, we find that the trial court complied with the said Section. The appellant was explained his rights and opted to give sworn statement and call no witness after Section 211 of Criminal Procedure Code was explained to him and we do not find any substance in the appellant’s claim on this point.

The appellant challenged the prosecution case on the grounds that he was convicted in absence of evidence of Investigating Officer and Arresting Officer.

The Investigating Officer and arresting officer did not appear before court to give evidence. In the case of **MICHAEL KINUTHIA MUTURI(CA) -V- REPUBLIC** Criminal Appeal No51/2008 Court of Appeal (Nyeri) held:-

***“Although no particular number of witnesses is required to prove a fact the failure to call certain witnesses in instances where the evidence on record is not sufficient to sustain a conviction will attract adverse inference. However in the instance case, the evidence on record was sufficient and therefore the omission by the prosecution to call the elders and the Investigating officer attracted no adverse inference.***

***On the aspect of shifting the burden of proof, the rights of the appellant under Section 211 of the Criminal Procedure Code were explained before he testified and there was no substance that there was any onus of proof placed on him. Besides, the appellant’s testimony did not relate to the date of the robbery but to the date of his arrest and therefore it did not displace the prosecution’s evidence on record.”***

We have carefully considered the evidence tendered at the lower court and found that the evidence on record was sufficient and therefore the omission by the prosecution to call arresting officer and the Investigating Officer attracted no adverse inference. The evidence on record was sufficient to sustain conviction and the trial Magistrate did not make any procedural error.

We have considered the appellant's defence. He did not in his defence respond on the particulars of the charge; but dealt on his arrest. The trial Magistrate found that he was evasive in his defence. We find the appellant's defence was considered and found to be evasive and we find that the trial Magistrate came to the right decision. The appellant we find after commission of the offence absconded from his area and the arrest after one year when he was found was justified and there was no need of warrant of arrest in respect of an offence as the one with which the appellant was charged with.

After evaluating and analyzing the evidence in this particular case we are satisfied that it was appellant with another who actually committed the offence of robbery with violence contrary to Section 296(2) of the Penal Code. We have no doubt whatsoever that the recognition of the appellant was positive and without any error at all. We do therefore agree and concur with the conclusion made by the learned Magistrate.

On the basis of the above, we therefore dismiss the appeal since the same has no merit at all. In the same breath, we hereby uphold the conviction and confirm the sentence that was imposed by the learned trial Magistrate.

R. O. A.

**DATED, SIGNED AND DELIVERED AT MERU THIS 12<sup>TH</sup> DAY OF JUNE, 2012.**

**J. LESIIT**

**J. MAKAU**

**JUDGE**

**JUDGE**

**Delivered in open court in presence of:**

**Mr. Mungai State Counsel**

**Appellant in person -present**

**J. LESIIT**

**J. MAKAU**

**JUDGE**

**JUDGE**