



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Criminal Appeal 141 of 2009

ANDREW MWANGI

KAGO.....APPELLANT

-versus-

REPUBLIC.....RESPONDENT

*(Judgment arising from the Senior Resident Magistrate's Court at Karatina*

*in Criminal Case No.100 of 2008 by L. Mbugua – Ag. P.M.)*

### J U D G M E N T

Andrew Mwangi Kago, the Appellant herein, was tried and convicted for the offence of Robbery with Violence Contrary to Section 296(2) of the Penal Code. The particulars of the offence are that: ***on the 19<sup>th</sup> day of February 2008, at Karindundu in Nyeri District within Central Province, jointly with others not before Court while armed with dangerous weapons namely: rungus robbed Michael Wambugu Mwangi of cash Ksh.4,500/=, a wrist watch and personal documents all valued at Ksh.4,700/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Michael Wambugu Mwangi.***

The Appellant was sentenced to suffer death. Being aggrieved, the Appellant preferred this appeal.

On appeal, the Appellant put forward the following grounds:

***“1. The Learned Trial Magistrate gravely erred in both points of law and facts and or misdirected himself in both in failing to find that there was no evidence of identification made at the scene which would lead to a later positive identification of the stranger.***

***2. The Learned Trial Magistrate gravely erred in both points of law and facts, and or misdirected himself in both in relying and basing my conviction on the uncorroborated evidence of P.W.1 which was highly doubtful in the face of the other evidence adduced.***

***3. The Learned Trial Magistrate erred in both points of law and facts and or misdirected himself in both in failing to put into consideration or into account the prosecution's failure to avail essential***

*witnesses more especially as those who arrested me.*

**4. That the Learned Trial Magistrate gravely erred in both points of law and facts and or misdirected himself in both in failing to find that the chase and arrest alleged was not consistent as those who did it were never availed to establish and prove the case.”**

When the appeal came up for hearing, the Appellant was permitted to rely on written submissions. Miss Maundu, Learned State Counsel opposed the appeal. She was of the view that there was evidence showing that the Appellant was arrested at the scene of crime and that his defence was considered and properly rejected.

We wish to start by setting out in brief the case that was before the trial court. The prosecution’s case is supported by the evidence of four (4) witnesses. It is the evidence of Michael Wambugu Mwangi (P.W.1), the complainant that on 19<sup>th</sup> February 2008, he was at home when at 9.30 p.m. he went out of the house to call his wife who had gone to visit a neighbour. P.W.1 said he was hit on the left side of the head while calling his wife. He claimed he managed to see two assailants who beat him all over the body as he continued to scream for help. P.W.1 said one assailant took away his wrist watch, Identification Card, Voting Card and Kshs.4,500/=. It was alleged by the complainant that the assailants were armed with metallic rods. P.W.1 said he held one of the assailants by the leg in the ensuing struggle as he continued screaming and that is when he was hit with a metal rod forcing him to release the grip. P.W.1’s neighbours responded to P.W.1’s distress calls and managed to arrest the suspect P.W.1 had held. Esther Njeri Wanjohi (P.W.2) told the trial court that she was within the vicinity when she heard someone scream saying “*thief, thief.....*”. She rushed to the scene and found a crowd which had already gathered tying the suspect (Appellant) with a rope. P.W.2 said she called the police who responded almost immediately by visiting the scene whereupon they re-arrested the suspect. P.W.1 went to hospital where he was treated. P.C. Macknon Cheya (P.W.4) stated that having received information from the Flying Squad Officers about the robbery. P.W.4 confirmed having rushed to the scene where they rescued a suspect (Appellant) who was being subjected to mob-justice at Karindundu area. P.W.4 stated that he interviewed the complainant (P.W.1) at the scene and he informed him that he was attacked by the Appellant who was in company of others who had escaped. When placed on his defence, the Appellant denied the offence. He stated that on the fateful night, he left his place of work at 7.30 P.M. to visit a friend’s home where he stayed upto 9.00 p.m. On his way home, the Appellant averred that he heard screams and went to the roadside to check and that is when some two drunk men came by and accused him of being the thief. It is then that members of the public came, beat him senselessly before taking him to the police. The trial magistrate considered the evidence from both sides and came to the conclusion that the Appellant was apprehended at the scene of crime by members of the public who answered to the complainant’s distress calls.

Having set out the case that was before the trial court, we now turn our attention to the merits or otherwise of the Appeal. We have already enumerated the grounds of appeal put forward by the Appellant. We have carefully considered those grounds and we think that the Appellant has simply raised one main ground that is to say that there was no evidence to show how he was arrested and that his case is that of mistaken identity. We have critically re-evaluated the evidence of the four Prosecution Witnesses. It is clear from the judgment of the then Learned Senior Resident Magistrate that she heavily relied on the evidence of P.W.1 and P.W.2 to convict the Appellant. According to the evidence on record, P.W.1 held the Appellant tightly but lost grip and released him when he was hit with a metal rod. P.W.1 said that his neighbours responded to his screams and managed to arrest the Appellant about 40 Metres from P.W.1’s house. On the other hand, P.W.2 said that she immediately rushed to the scene when she heard screams. When she reached the scene, she found the Appellant had already been apprehended by members of the public. It is clear in our minds that the person who was held by the complainant managed to disengage himself and managed to flee from the scene. According to the evidence of P.W.1, the Appellant was arrested about 40 Metres from P.W.1’s residence. It would appear, there was a chase by P.W.1’s neighbours. Unfortunately, the people who chased and arrested the Appellant were not called to testify. It is obvious the Appellant was not arrested while under tight grip of P.W.1. The Appellant had managed to disengage himself and fled the scene. There was a break in the chain of causation. This lends credit to the Appellant’s defence that his case may be that of mistaken identity. In a nutshell, we have

entertained some doubt which we shall give to the Appellant.

In the end, we allow the appeal. We quash the conviction and set aside the sentence of death. We hereby direct that the Appellant be released forthwith unless lawfully held.

**Dated and delivered this 8<sup>th</sup> day of June 2012.**

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**J. K. SERGON**

**JUDGE**

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**J. WAKIAGA**

**JUDGE**