



REPUBLIC OF KENYA

High Court at Nyeri

Criminal Appeal 235 of 2010

EPHANTUS WANJERE WAITHIRA.....APPELLANT

versus

REPUBLIC.....RESPONDENT

*(arising from the judgment of Hon J.Kiarie Senior Principal
Magistrate at Nyeri in Criminal Case No. 206 of 2009)*

JUDGMENT

The appellant herein was 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 the night of 4th March 2009 at about 1.00 a.m. At Ngare Nyiro area along Nyeri Nyahururu High Way in Nyeri District within Central Province jointly with others not before the court while armed with offensive weapons namely metal bars robbed Patrick Muriuki Maina of cash Ksh. 8000/- equity bank ATM card and a mobile phone make Nokia 1110 all valued at Ksh. 3000/- and at or immediately before or immediately after the time of such robbery used personal violence to the said PATRICK MURIUKI MAINA.

On count two he also faced a charge of robbery with violence contrary to section 296(2) of the Penal code the particulars of which were that on the night of 4th March 2009 at about 1.00 a.m. At Ngare Nyiro area along Nyeri-Nyahururu Highway in Nyeri District within Central Province jointly with others not before the court while armed with offensive weapons namely metal bars robbed MARTIN PETER GICHOHI of cash Ksh. 1000.- mobile phone make Nokia 8210 valued at Ksh. 2000/- and a driving licence and at or immediately after the time of such robbery used personal violence to the said MARTIN PETER GICHOHI.

Count three robbery with violence contrary to section 296(2) of the Penal Code the particulars of which were that on the night of 4th March 2009 at about 1.00 a.m. At Ngare Nyiro area along Nyeri-Nyahururu high way in Nyeri District within Central province jointly with others not before court while armed with offensive weapons namely metal bars robbed CHARLES GITONGA KARIUKI of cash Ksh. 3000/-, mobile phone make Nokia 1200 and a wrist watch make Cassio all valued at Kshs. 2880/= and a or immediately before or immediately after the time of such robbery used personal violence to the said CHARLES GITONGA KARIUKI.

He pleaded not guilty and was tried convicted and sentenced to suffer death.

Being aggrieved by the said conviction and sentence he filed his appeal and in his home made grounds of appeal stated in brief as follows:

- a) His identification was under difficult conditions and therefore possibility of error or mistake existed.**
- b) The identification parade was faulty the witness having seen the same prior to holding the parade.**
- c) His defence was not considered.**

When this matter came up for trial before us the appellant who was not represented filed amended grounds of appeal and written submissions which he relied upon and which we have heard the advantage of looking at.

The state through Mr. Kaigai opposed the appeal herein and submitted that the evidence against the appellant was overwhelming. P.W.1 and P.W.3 stated the circumstances of the robbery and that they spent over three (3) hours with the victims who were beaten.

P.W.1 was able to pick the appellants in an identification parade and that he was able to recognize the appellant since the same went ahead of the lorry and counted the money and that the cabin lights were on at the time.

This being a first appeal we are required to reevaluate the evidence tendered before the trial court and to come to our own decision on the same though taking into account the fact that we did not have the advantage of seeing and hearing the witness.

We have therefore looked at the evidence presented before the trial court and have analysis the same against the appellant submissions herein.

The appellant has raised the issue of his identification and has submitted that the complainant did not give their description of the attackers in the initial report to the police.

P.W.1 testified that it was 1.00 a.m. when they were attacked and that the attackers were with them upto 5.00 a.m. that the police from Mweiga took them to the police station where they made their statements and that the appellant was brought to the police station and he was able to identify him. That during the period of the attack he was able to recognize the appellant by his face and that when the appellant tied him up he looked at him keenly and that he had some marks on his face under the eyes that were scars from cuttings.

P.W.2 Cip CHARLES IMANENE testified that he conducted IP Parade and that before the parade P.W.1 and the applicant had not met at the police station.

We are therefore satisfied that the circumstances prevailing were not difficult for the appellant to be identified by the witnesses. P.W.3 CHARLES GITONGA also testified and confirmed that he was able to identify the appellant since he took his mobile phone and wrist watch and asked him for the pin number of the phone.

P.W.3 testified that when the appellant house was searched sim card in respect of Cr/C No. 306/09 was recovered.

There is therefore no evidence that the appellant was mistakenly identified.

We have further not found any inconsistency in the prosecution's case against the appellant. We however agree with the appellant that there was a missing link into the prosecution case as to how the appellant was arrested. We however hold that the appellant was not prejudiced by this missing link.

In the final analysis we find no merit on the appellant's appeal herein and hold that the prosecution case against the same was proved beyond reasonable doubt and therefore dismiss the same.

Dated and delivered at Nyeri this 22nd day of November 2012.

J. K. SERGON
JUDGE

J. WAKIAGA
JUDGE

Miss Ngalyuka for the state.

Ephantus Wanjere Wachira.

J. WAKIAGA
JUDGE