



CRIMINAL

- Prosecution's case is weakened by contradictions

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 234 OF 2009

DAVID MUTEMBEI1ST APPELLANT

CONSOLIDATED WITH CRIMINAL APPEAL CASE NO. 232 OF 2009

LAWRENCE MWITI STEPHEN2ND ACCUSED

CONSOLIDATED WITH CRIMINAL APPEAL CASE NO. 233 OF 2009

PETER MWONGERA KIRIMI.....3RD ACCUSED

(An appeal against the judgment of S.M. Githinji SRM in Criminal Case No. 1451 of 2006

at Nkubu delivered on 15th October 2006)

JUDGMENT

The appellants were charged together before the lower court with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. They were convicted by the lower court as charged and were sentenced to the mandatory death sentence. They have now appealed against conviction and sentence before this court. This is the first appellate court. To that end, we are guided by the principles enunciated by the case of **Gabriel Njoroge Vrs. Republic (1982 – 88) 1KAR 1134** where it was held:-

“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 on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the 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 nor heard from the witnesses and make due allowance in this respect (see Pandya Vrs. R. [1957] E.A. 336, Ruwala Vrs. Republic [1957] EA 570.)”

PW1 on 17th July 2006 at 1am was asleep in his shop with his wife. They heard the windows and the doors being broken. Although they stated that they were broken with an axe they did not state how they came to know that it was an axe. They began to scream. PW1 gave the people outside through the window Kshs. 6,000/=. The robbers did not enter the shop because they noticed some people coming. Later on, a police officer came to their shop and they began to follow the robbers. The police officers fired in the direction where the robbers were. The robbers entered the tea bush. The members of public and police officers including PW1 surrounded the tea bush until the following day. The following day, they were able to arrest the three appellants. Kshs. 940 was recovered from the first appellant. On being cross examined by the 3rd appellant, this witness stated that the 3rd appellant before being arrested began to throw money at the students who had come to assist in their arrest in an attempt to evade arrest. PW2 stated that on that night at 1am he heard of the robbery taking place at the shop of PW1. He was amongst the people who surrounded the tea bush. The police also joined them. When they began to look for the robbers in the tea bush, the school students who had come to assist killed one of them. Those that were arrested began to name their accomplices. He stated that he arrested the 1st appellant who had hidden money in his stomach. On being cross examined by the 1st appellant, he stated that PW1 did not know the robbers. PW3 on that night at 1am was in his home in his bedroom. They were sleeping with his wife. He heard the dogs barking and the bull was disturbed. He looked outside and saw one tall man and one short man. He said the moon was bright. His wife managed to escape. Those persons outside his house when they heard the neighbors coming into the direction of his house, they ran in different directions. He said that he was one of the people who surrounded the tea bushes. On being cross examined by the 1st appellant, this witness said that he did not know whether they, the appellants, were amongst the people who were outside his house. PW4 was a police constable. On that night at 1am, he was within Kiraine Police Station. The O.C.S. called another officer and told them about the robbery at Kasarani market. They proceeded to that place to the shop of PW1. They saw several stones outside the shop. They noted the windows were broken. They received information from PW1 that he had been robbed Kshs. 6,000/=. This officer together with others joined members of public who were large in number. This officer then stated:-

“They suspected the robbers were hiding in the tea plantation. They had guarded the whole night. At 6am students from Nkuene Secondary School joined into (sic) search. At about 8am some suspects were got.”

He then stated that they arrested 5 suspects in total and took them to the police station. As they were driving away, the 1st appellant was seen throwing money at the student in an attempt to evade being arrested. PW5 a housewife stated that she was woken up by barking dogs. She was in the company of her husband, PW3. She saw through the window one tall and one short man. The two were strangers. She left through a secret door and when she was outside she began to scream. Neighbors began to come to their homestead. She did not follow the members of public who were chasing those people. PW6 chief inspector of police stated that on that night a robbery was reported at the place of PW1. They rushed where they found villagers in large numbers. He also stated:-

“It was suspected for (sic) robbers. It was suspected the robbers were hiding in a thick tea plantation. We stood guard with villagers till morning.”

He was there at 6am when the villagers began to search the tea plantation. One of the robbers was killed by members of the public whilst the other appellants were arrested. The appellants were put to their defence at the end of prosecution's case. 1st appellant stated that on 17th July 2006 he woke up at 6am. He milked his grandmother's cow and gave the milk to his grandmother. After taking breakfast he left the home at 6am. At Kithirune stage, he saw a vehicle which needed three passengers to be full. He travelled in that vehicle to Kithirune and arrived there at 10am. As he walked after alighting from the vehicle he was stopped by 7 people. They asked him for his name then began to refer to him as a thief. They began to beat him. It was then that the police arrested him. The 1st appellant's evidence was corroborated by DW2 to the effect that he had gone to buy maize at Kithirune. The 2nd appellant also gave sworn testimony. He stated that he was arrested as he left home in the morning. He was on his way to Kithirune tea factory. It was at 7.30am. He met a lot of people on the road. He tried to deny that he was one of the robbers but he was taken to the police station. The 3rd appellant also said that on that day at 9am he was going to Githongo to get French beans seeds to plant. When he reached Kasarani area he met police officers. One of the officers called him and questioned him and he told them where he was going. He was told to enter the police vehicle and he

complied. The learned counsel Mr. B. Gitonga for the appellants in support of the appeal stated that the evidence adduced by the prosecution's witnesses was contradictory and could not be relied upon. On our part, in our re-evaluation of the evidence, we find that the prosecution's evidence did not point to the appellants as being the robbers. PW1 was robbed at 1am. It is not clear after the robbery at what time the persons who were being chased who eventually entered the tea bushes. PW1 in evidence stated that when the police came to receive his complaint, they went out to follow the robbers. He was in their company. The police fired at people who were ahead of them. In our view, it would not be surprising that if there was gun fire that persons would seek refuge in a tea bush if indeed the appellants were found in the tea bush. Since there is no information about the time laps between the robbery of PW1's shop and the time the persons were being chased, in all probability, the persons that were chased and arrested were not the same persons that robbed PW1. There doubt in our minds whether indeed those persons were the appellants. The charge that the appellants faced in the lower court related to the robbery of PW1's shop. There was no robbery in the home of PW2. Mr. Gitonga, learned counsel was indeed correct that there were few contradictions which create doubt on the guilt of the appellants. PW1 talked about weapons that were recovered from the appellants. No other witness talked about those weapons. It will be recalled that the police officers who responded to the robbery at the shop of PW1 all stated that the members of public chased people that they suspected to have been robbers. The appellants therefore were chased because they were merely suspected to be the robbers. We find that the evidence of the prosecution was too weak to have been relied upon for a conviction. It is for that reason that we allow the appellant's appeal against conviction and sentence. We hereby order that the appellant's conviction be quashed and their sentence be set aside. We order the three appellants be set free unless they are otherwise lawfully held.

Dated and delivered at Meru this 28th Jan 2011

LESIIT, J.

JUDGE

KASANGO, M.

JUDGE

Read, signed and delivered at Meru this 2011.

In The Presence Of:

Kirimi/Mwonjaru Court Clerks

Appellant Present

Mr. Kimathi For the State

LESIIT, J.

JUDGE

KASANGO, M.

JUDGE