REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 201 OF 2009

GEORGE WANJOGU GIKONYO…….....……
APPELLANT

VS

REPUBLIC …….....……..….
RESPONDENT

(ARISING FROM THE JUDGMENT OF SENIOR RESIDENT MAGISTRATE NYERI, VIDE NYERI C.M.'s CRIMINAL CASE. NO. 931 OF 2008)

JUDGMENT

The appellant herein, George Wanjogu Gikonyo, was tried and convicted for the offence of robbery contrary to section 296(1) of the Penal Code. He was sentenced to serve three (3) years imprisonment. Being dissatisfied the appellant filed this appeal in which he put forward the following grounds in his petition:

1. ***The Learned Senior Resident Magistrate erred in law and fact in not holding that the prosecution had not discharged the very heavy burden of proof beyond all reasonable doubt that the Appellant had robbed and a miscarriage of justice was there occasioned.***
2. ***All the ingredients of the offence charged, to wit, robbery as listed in the charge sheet were not proved or established. A miscarriage of justice was thereby occasioned.***
3. ***In so far as there were grave contradictions in the evidence of the prosecution, the Learned Senior Resident Magistrate erred in not considering the same and attaching to the same due weight in such a serious charge and a miscarriage of justice was thereby occasioned.***
4. ***The Learned Senior Resident Magistrate erred in law in not finding and holding that there were doubt in the prosecution case which doubt ought to have been resolved in favour of the Appellant. A miscarriage of justice was thereby occasioned.***
5. ***Considering all the evidence on record and the circumstance of the case the sentence meted out is manifestly harsh, excessive and against the weight of the evidence adduced.***

When the appeal came up for hearing, Miss Ngalyuka, learned Senior State Counsel conceded the appeal.

Before considering the merits of the appeal, let me set out in brief the facts of the case which was before the trial court. The prosecution's case is that on 26th April 2008, Bernard Maina Nderi, the complainant, had gone to look for a rental house within Muthinga area. He hired motor registration no.

KAU 001E driven by the appellant to transport him and his goods from Nyeri town to Muthinga. On the way it is said that the appellant diverted the motor vehicle to Thunguma area where it is alleged that the complainant was assaulted and robbed of his money, mobile and other properties by the appellant and his conductor. The appellant and his accomplice are said to have fled the scene when another motor vehicle which was following them flashed its headlights. The complainant was examined and treated by Dr. Ageri who filed the P3 form which was produced in court. The appellant stated in his defence that he ferried passengers on the material day after which he took the motor vehicle to the owner before leaving for his home using another matatu. The trial magistrate formed the opinion that the complainant had sufficient opportunity to identify his assailant on two occasions. He also concluded that the appellant with another assaulted the complainant before robbing him. He also concluded that the evidence of the complainant was corroborated by the evidence of one John Waweru Kamwe (P.W.3). The trial magistrate did not believe the evidence of the appellant.

On appeal, Mr. Wahome, learned advocate for the appellant argued three main grounds. The first ground argued is that the appellant was convicted on contradictory evidence of the complainant (P.W.2) and that of John Kamure (P.W.4). Secondly, it is alleged that certain crucial witnesses were not called upon to testify. Those witnesses included the good Samaritan who gave out the registration of motor vehicle registration No. KAU 001E and P.C. Barasa. It is the appellant's submission that P.C. Barasa should have been summoned to testify to explain the reasons why the appellant was arrested after a period of 3 months had lapsed from the date. Thirdly, it is further argued that the trial magistrate shifted the burden of proof to the appellant. I have re-evaluated the evidence. I think the most serious ground which was ably argued relates to the failure by the police to summon the evidence of the Investigating Officer. His evidence could have sealed the gapping loopholes. There was a missing as to how the complainant identified the appellant yet there was no identification parade. The good Samaritan who gave the complainant the registration number of the motor vehicle was not called to testify. There is also no evidence to explain why it took time for the police to arrest the appellant. The investigating officer could have shed if he had taken the witness box. The view I take is that it would appear there was something the police were hiding from the court by refusing to call those witnesses. In **Nguku =vs= R (1985) K.L.R.412** the court of appeal held interalia

"That where a party fails to produce certain evidence, a presumption arises that the evidence if produced, would be unfavourable to that party."

In a nutshell, I have entertained same doubt in my mind which should be given in favour of the appellant. I am satisfied Miss Ngalyuka rightly conceded the appeal. The appeal is allowed. The conviction is quashed and the sentence set aside. The appellant is hereby set free forthwith.

Dated and delivered this 25th day of March 2011.

J.K. SERGON
JUDGE

In open court in the presence of Miss Ngalyuka for the state and Mr. Wahome for the accused.

J.K. SERGON
JUDGE