



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 14 OF 2007

BENARD KARIUKI MBURU.....1st
APPELLANT

RAJAB IDD MUBARAK.....2nd
APPELLANT

VERSUS

REPUBLIC.....RESPOND
ENT

JUDGMENT

RAJAS IDDI MUBARAK and **BENARD KARIUKI MBURU** are the appellants in Criminal Appeal numbers 15 and 14 respectively. The two appeals were consolidated at hearing and Criminal Appeal No. 14 became the pilot file. These two appellants were the 1st and 2nd accused persons respectively in Kitale CM. Criminal Case No. 5555 of 2005 wherein they were charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code, that on the 29th day of November 2005 at 9.00 p.m. at Moi's Bridge Trading Centre in Uasin Gishu District within Rift Valley Province jointly while armed with offensive weapons namely a panga and iron bar robbed **JAMES MWANGI MUNGAI** of cash Kshs. 1,000/= and a bunch of keys and at or immediately before or immediately after the time of such robbery wounded the said James Mwangi Mungai. The prosecution case was made up of the evidence of four witnesses. That of the complainant was that he was walking home to Umoja Estate Moi's Bridge at about 9.00 p.m. when near the Cereals Board building he saw two people emerge from the nearby trees and one of them held his jacket and cut him on the forehead with the panga he was holding. The other person had a metal bar with which he hit the complainant on his left leg. The person who had the panga and who had cut the complainant on the forehead also had a knife with which he stabbed the complainant in the front left scapula and at trial he showed court the scar left by that stabbing. The complainant bled from the two injured points of his body. He was hit on his left shoulder and he fell down. This happened on the road. The attackers took the complainant's Kshs. 1,000/= and they left. He said it was dark but that there were lights illuminating the road where he was attacked which lights were coming from the Cereals Board building. He recognised the two attackers from those lights which were flashing on and off. He said he was stabbed when those lights flashed on and he recognized his attackers as Rajab and Kariuki whom he knew well as he used to see them at the Moi's Bridge Trading Centre where Kariuki was a porter of potatoes and Rajab used to walk about. His further evidence was that it was Rajab who hit him with the metal bar and it was Kariuki who cut him with the panga and stabbed him with the knife. That it was Rajab who took his money. The attackers then left him and he went home from

where his wife (PW 3) took him to hospital where he was treated and stitched on his cut wound. They then went to the police station reaching there at about 11 p.m. and he reported the incident and told police that it was Rajab and Kariuki who had attacked him. He recorded his statement with the police later as on 29.11.2005 he was not feeling too well after the attack. He maintained that version of his evidence in cross examination and wondered why in his statement the police did not record that there were lights emanating from the Cereals Board building at the place where he was attacked.

The clinical officer who filled his P3 form gave evidence as PW 2 and confirmed therein that the complainant was injured sustaining a cut wound on the head measuring 8 cm long and another on the left clavicle and had a right knee that was tender at the joint.

PW 3 was the complainant's wife and she confirmed that her husband told her of his attackers as being Rajab and Kariuki whom she knew from the Moi's Bridge Trading Centre where she worked. In fact Kariuki was her porter from time to time. She said that she took her injured husband to a private clinic and later they went to the police station where he reported the incident but asked that he records his statement the next day as he was not feeling well. She said that her husband said that the Karis who cut him was the one who carried luggage at the market and when he told her his height she knew whom he was talking about. He told her that Kariuki was with Rajab at Cereals Board where they attacked him. The witness said that there was light at that place which came from the Cereals Board place. She maintained her story of the existence of lights at the Cereals Board during cross-examination by the appellants.

PW 4 was No. 59004 Police constable James Ngumbao who said he received the complainant's statement on 30.11.2005 at 10.00 a.m. He said that the complainant had made a prior report and this time he interrogated him on the identity of the attackers and the complainant said that he knew the attackers by name. He recorded the complainant's statement and issued him with a P3 form. He noted a visible forehead and right shoulder injury on the complainant. The witness arrested the 1st accused. The 2nd accused was arrested by members of the public for alleged attack (robbery) on one Samuel Lipese. He turned out to be the very person the complainant herein had said had robbed and injured him. The witness produced the OB which proved the date of arrest. The witness said that there was no identification parade as none was necessary since the complainant had said that he knew his attackers and the witness also said he knew Rajab.

Upon this evidence the accused persons were found guilty of robbery with violence and sentenced to suffer death as by law provided. They were dissatisfied and filed these appeals.

The first appellant's appeal (No. 14 of 2007 Benard Kariuki Mburu) raises the grounds that there was no recognition of the assailant as the prevailing circumstances were not favourable for such recognition, that this was a single witness which was unsafe to rely on and the rest of the evidence was hearsay and uncorroborated and that the defence evidence was not given due weight and the burden of proof was shifted on the appellant.

The second appellant's appeal (No. 15 of 2007 Rajab Idd Mubarak) raised basically similar grounds. The appellants had their lengthy written submissions which they relied on fully. The gist of the same is that recognition could not have arisen as there were not favourable circumstances to enable it and further that the complainant did not make this information, that he recognized his attackers, at the first time he reported it to the police and duly made it later when he recorded his statement. That the attack on complainant made it difficult to recognize his attackers. That any other evidence was hearsay and uncorroborated. They both submitted that the complainant gave their names to the police when they were already in police custody and there was possibility of their being framed or the complainant could have been coached to lie and implicate the appellants as his attackers. They attacked the complainant's evidence as being contradictory as regards identification of them at parade or at the cells. Although the second appellant in his submissions said that he gave unsworn evidence the record shows that he gave sworn evidence and so also did the 1st appellant.

For the Republic learned Senior State Counsel Mr. Mutuku supported the conviction and sentence as

properly entered stating that the evidence of the complainant and his wife as regards the attack and the attackers was fool-proof and that the trial court properly directed itself and warned itself of the danger of convicting on the evidence of a sole identifying witness.

We have carefully analysed the evidence tendered at the trial and have evaluated the same. We have come to the following considered conclusions. That there was a sole identifying witness who was the complainant. He said that his was recognition of the assailants as he already knew them from the market place where he traded and where the 1st appellant was a porter and the 2nd appellant used to walk about. We find that one of the appellants challenged the complainant on the issue of his prior knowledge of them. We accept that the complainant indeed knew the appellants before 29.11.2005. A lot of issue was taken as to whether or not there were favourable circumstances for identification at the scene of the crime. The complainant said that the light emanating from the Cereals Board building was enough illumination when it was on for him to identify his attackers. He said that he recognised the assailants on those occasions that that light flashed on and was able to differentiate which of the assailants, whose names he knew and gave to his wife first and later to the police, did what to him, he said it was Rajab who hit him with the metal bar and took his money while Kariuki cut him with a panga and stabbed him with a knife. His description of the scene and how the attack was managed was so vivid that it was believable. PW 3 confirmed that there was light at the scene that continuously flashed on and off. This aspect of the evidence was not disproved by cross-examination. The point taken by the appellants that the length of the time of the attack and the light flashing on were not given by the complainant and that the ambushed attack must have confused the complainant to affect his recognition sense was ably countered by the complainant's evidence that he indeed was able to and did recognize his assailants the appellants herein whom he previously knew, from those lights. We accept that and agree that the trial court evaluated that evidence correctly.

That the complainant did not give the names of the appellants on 29.11.2005 when he first reported to the police was taken as an issue weakening the prosecution case. The complainant gave those names to his wife PW 3 soon after he reached home after the attack. When he got to the police station at 11.00 p.m. on the night of the attack he asked that he be allowed to record his statement later as he was feeling not too good. He went the following day on 30.11.2005 at 10.00 a.m. and recorded his statement and gave the names of his attackers. It was pursuant to his report that the 2nd appellant was arrested later in the afternoon of that date. The 1st appellant was arrested early on 30.11.2005 at about 2.40 a.m. for a different robbery on Samuel Lepese. He was therefore not at the police station at 11.00 p.m. on 29.11.2005 when the complainant first went there. It was by no fault of the complainant that the 1st appellant was at the police station on 30.11.2005 when at 10.00 a.m. the complainant went to record his statement. If the 1st appellant was prone to committing robberies was no business of the complainant and all the complainant knew was that he was attacked by the 1st appellant and another. We think that the argument that the 1st appellant was arrested for a different offence by a different complainant does not lessen the fact of the present complainant's case against him.

We find that the trial court properly directed itself and warned itself against the danger of convicting upon a sole witness evidence. That court then was satisfied after so warning itself that evidence was cogent believable and unshaken by cross-examination and was safe to rely on for conviction. We are of a similar view.

We did not find evidence as alleged by the appellants that they were framed up by the coached evidence of the complainant to "quench the desires of the police". No reason was given for such framing up. It was not shown that Samuel Lepese abandoned his case against the 1st appellant so that the complainant in this case could allege that the 1st appellant attacked him. These were shown to be two clearly distinct complaints that just happened to relate to the same person, the 1st appellant and so his argument that he was already in custody for a different complaint does not affect the complainant's complaint in any negative manner. And he did not attempt to show that he was the only Kariuki or Karis at Moi's Bridge police station when the complainant made his report there.

The recovery talked of by the complainant and PW 4 was that of the stolen items and not of the iron bar

hence the appellants' argument in respect of non production of the recovered iron bar is neither here nor there. On our part we are fully satisfied that the complainant fully recognized his attackers and told his wife and the police who they were. When PW 4 said that he interrogated the complainant on the identities of the attackers and the complainant said that yes he knew them and gave their names that sealed the issue of identification by recognition. We will not give undue consideration to the issue of an identification parade as we believe the evidence of PW 4 as did the trial court that no identification parade was carried out as none was necessary since the complainant said that he knew his attackers and gave their names.

We think that we have covered all the relevant evidence raised by the prosecution.

We note that it is not true that the defence evidence was ignored.

On the contrary the trial court considered the same and delivered itself as follows:-

"There is not much to believe in the defence of the accused persons, I have already stated, the substance their defence may carry."

We note that the trial court considered the defence evidence at length at half of page 5 at the bottom thereof and at page 6 of her judgment. She analysed the same very well.

In the result we find nothing in the grounds of appeal and the submissions by the appellants to make us come to a different finding from that arrived at by the trial court. We find these appeals to be totally devoid of merit and accordingly dismiss the same and uphold the trial court's finding on conviction and sentence.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE THIS 4TH DAY OF APRIL 2011.

N.R.O. OMBIJA

JUDGE

P.M. MWILU

JUDGE

In the presence of:-

1st appellant

2nd appellant

For the Republic

Court Clerk

N.R.O. OMBIJA

JUDGE

P.M. MWILU

JUDGE