REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Criminal Appeal 86 of 2007

GEORGE WALUSUMBI……..…….…….. APPELLANT

-AND-

REPUBLIC ……..……..…….RESPONDENT

(Being an appeal from the Judgment of Senior Resident Magistrate, Ms. T. Mwangi dated 30th April, 2007 in Cr. Case No. 404 of 2006 at Mombasa Law Courts)

JUDGMENT

Theappellant was charged with robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). It was alleged that the appellant, while in the company of others not before the Court, on ***27th January, 2006*** at about 10.30 p.m., at Likoni Flats, Likoni Location in Mombasa District, and while armed with dangerous weapons, namely knives and iron bars, robbed ***David Gatune Kimani*** of Kshs.10,000/=, one Siemens cellphone valued at Kshs.17,000/=, one Identity Card and one ATM card, and at or immediately before or immediately after the time of such robbery, used actual violence to the said ***David Gatune Kimani.***

The learned Magistrate's finding was thus expressed:

"I am therefore satisfied that [the] prosecution did prove its case beyond reasonable doubt. [The] accused person, without any justification, attacked and injured [the] complainant. He also robbed [the complainant] of his property. I therefore find him guilty as charged, and convict him accordingly under Section 215 of the Criminal Procedure Code."

The appellant herein chose to say nothing in mitigation; but the Court, after treating him as a first offender, sentenced him to death under s.296(2) of the Penal Code.

In the grounds of appeal, the appellant stated (in summary) as follows:

(i) there was lack of positive identification: for it was night-time; no source of lighting was indicated in the evidence; it was a sudden and terrifying attack; the duration of observation of suspects was not stated; the complainant did not give the names of his assailants to the Police;

(ii) the evidence leading to the appellant's arrest was unrelated to that of the material incident;

(iii) no physical evidence had been found on the appellant, upon arrest;

(iv) there was contradiction in the evidence of the prosecution witnesses;

(v) the investigation was ineffectively conducted;

(vi) it was wrong to discount the defence evidence.

At the hearing of the appeal, the appellant chose not to rely on his pre-written submissions, but instead, to respond to learned counsel ***Mr. Onserio***'s oral submissions for the respondent.

Mr. Onserio submitted that the appeal should be dismissed. Counsel urged that, from the evidence, it emerges that even though the offence in question was committed at night, there was sufficient electrical illumination at the time, making it possible to identify the suspects. Just before the attack, the complainant had met three persons who emerged from behind a tree, following him up to the point, a short while later, where they attacked, assaulted and robbed him. As the complainant screamed for help, church-goers who were in the neighbourhood, responded by pursuing and arresting the appellant; and immediately thereafter, the Police arrived. Counsel submitted from the evidence, that the complainant who was already familiar with the appellant's appearance, did not lose sight of the appellant, from the time of attack to the time of arrest; he used to see the appellant everyday at a dumping site close to the complainant's house. This evidence, ***Mr. Onserio*** urged, was not controverted – and so it should be taken as truthful; and the prosecution, thus, rightly relied on this as evidence of recognition.

Mr. Onserio submitted that the charge of robbery with violence had been proved; for the appellant and those accompanying him had been armed with knives and iron-bars, which were dangerous or offensive weapons; the complainant was injured with the iron-bar, the wound being pronounced medically to have been caused by a blunt object; actual violence had been used during the incident.

Counsel urged that the cross-examination during trial, by the appellant, did not shake the prosecution evidence, and, in spite of the case put forward in defence, it emerged that the prosecution had proved their case to the required standard.

The appellant, in his oral submission, urged that the evidence of his arrest stood to question, because those arresting him did not accompany him to the Police station. The appellant also contested the complainant's evidence that the complainant was able to identify him because he (the complainant) used to see him in the neighbourhood: the ground being that there were three persons involved in the material incident.

It is clear to us that this is a case to be decided essentially on the basis of assessment of evidence; and we enter upon this task by considering the trial Court's treatment of the evidence.

The trial Court established as a fact that the complainant (PW1) was on his way home when three men attacked him, with an iron bar, and a stone cast at him; he saw the attackers; in the scuffle, the attackers stole his effects, from his pockets; these attackers cut the complainant on the head, and these cuts were later stitched; the complainant raised alarm, and church-goers responded, giving chase which resulted in the arrest of the appellant herein.

Police Constable ***Zakayo Chirchir Rono*** (PW4) corroborated PW1's evidence: he and his colleagues were on patrol in the neighbourhood, at the material time; and ***they assisted in effecting the arrest*** of the appellant herein; the complainant was present at this crucial time of arrest.

The trial Court made its findings based on the merits of the prosecution evidence, as the appellant had exercised his right of silence, when accorded the opportunity to give his evidence.

It was the Court's finding that, even though the offence took place at night, the ***locus in quo*** "was well lit with street lights all around." The trial Court thus made its determination:

"I am satisfied from [the] evidence …that [the] complainant never lost [track] of the accused person

since he could clearly tell at what point he [accused] parted ways with his [accused's] accomplices at a junction. He further stated on oath that he used to know [the] accused…This piece of evidence was never controverted and I have no reason to doubt it either. From the cross-examination it is …evident that [the] accused person knew the complainant too, even prior to the material day. The issue of identification is therefore settled and the conclusion is that [the] complainant very vividly saw and was able to identify his attackers."

In our judgment, there is no problem of evidence in this case. The learned Magistrate, in our opinion, took into account all the weighty evidence, and had a clear view of the occurrence of the material incident. No doubts have been cast on the candour of witnesses; and it emerges from these witnesses that the suspects applied against the complainant dangerous weapons, injuring him, as they robbed him of his personal effects; the scene was well lit, and the complainant both observed and recognized the appellant herein as a suspect; there is an additional nexus between the criminal incident and the person who was arrested and charged – the complainant retained an ***unbroken view*** of the unfolding incident, from the time of commission of the offence to the time of arrest of the appellant herein; that the appellant herein was part of the gang of robbers, is confirmed by the evidence of the Police officer, PW4, who arrived at the scene without delay, and effected the arrest.

Apart from the truthful evidence of PW1 and PW4 showing the appellant as one of the robbers of the material night, the contemporaneity of events and perceptions converging upon him as the night thief, buttresses the prosecution case as a water-tight one which confirms guilt.

We dismiss the appeal; uphold conviction; and affirm sentence as was imposed by the trial Court.

Orders accordingly.

SIGNED: ……..…… …….

J.B. OJWANG **M.A. ODERO**

JUDGE **JUDGE**

DATED and **DELIVERED** at **MOMBASA** this 26th day of August, 2011.

M.A. ODERO

JUDGE