



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI Criminal Application 81 of 2008

ANTONY KANGETHE MWANGIAPPLICANT

Versus

REPUBLICRESPONDENT

JUDGMENT

Anthony Kang'ethe Mwangi, the appellant herein and one John Muranguri Maina, were jointly tried on a charge of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence are that on 25th February 2007 at Likii bridge, Nanyuki township in Laikipia District within the Rift Valley Province, jointly with others not before court robbed Mr. Anthony Mwai Kirima of the one cell phone make Motorola C118 valued at Kshs. 4000/-, one cigarette outer of safari, Kshs. 600/-, one outer cigarette of safari Kshs. 400 and Kshs. 5000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Anthony Mwai Kirima.

At the end of their trial, Miss Ndungu, learned Senior Principal Magistrate convicted the appellant and sentenced him to suffer death. Being dissatisfied, the appellant preferred this appeal. John Muranguri Maina was acquitted.

On appeal, the appellant put forward the following grounds:

1. *That the learned trial magistrate erred in points of law and fact in basing a conviction and sentence relying on the evidence of a single identifying witness (P.W.1).*
2. *That the learned trial magistrate erred in both points of law, and fact in basing a conviction and sentence yet failing to observe that the prosecution witnesses were riddled by many contradictions.*
3. *That the learned trial magistrate erred in both points of law, and fact in basing a conviction and sentence yet failing to observe that the charge sheet was defective.*
4. *That the learned trial magistrate erred in both points of law, by failing to consider my defence, in addition reasons of its rejection was not disclosed as stipulated by the provisions of section 169(i) C.P.C.*

The appellant was also permitted to file written submissions which he duly filed. Mr. Orinda, learned Senior Principal State Counsel opposed the appeal on the basis that the appellant was properly identified by the complainant who was were known to him prior to the incident.

We wish to set out the case that was before the trial court before considering the appeal. The prosecution's case was supported by the evidence of three witnesses. Antony Mwai Kirima (P.W.1.), the complainant, told the trial court that on 25th February 2007 at about 8.00 p.m. he met Antony Kang'ethe Mwangi the appellant herein at B.P Petrol station. The complainant said the appellant was somebody he had known for over three years. P.W.1 said they had lived together at Majengo Estate, Nanyuki township before moving to live in Likii Estate. P.W.1 stated that the appellant volunteered to walk with him to Likii Estate via Likii bridge. P.W.1 found out that the appellant too lived in Likii Estate. As they walked, the appellant is said to have requested P.W.1 to lend him a cigarette plus a match box. On reaching Likii bridge, P.W.1 said they met a person whom the appellant introduced to him as his friend from Nakuru town whom he had given accommodation the previous night. The man was standing while armed with a club. The duo crossed the bridge together. P.W.1 said the stranger suddenly hit him with the club on the left leg. The appellant is said to have persuaded that man to stop attacking P.W.1. At this juncture P.W.1

said the appellant begged him to give him some money. When P.W.1 refused to give him money the appellant and his accomplice knocked him down, produced knives and threatened to kill him. P.W.1 said he kept quiet for fear of his life. He alleged that the appellant robbed him of Kshs. 5,000/= from his rear trouser pockets, some cigarettes he was carrying on a paper bag and a mobile phone make Motorola C113. The appellant then fled the scene with those items leaving behind his accomplice. P.W.1 was ordered to leave the scene by the appellant's accomplice. P.W.1 reported the incident to Nanyuki police station. At the police station P.W.1 mentioned the names of the appellant to the police as his assailant. Joseph Runyenye (P.W.2), an Assistant chief of Likii sub location said that he was informed by members of the public on 27th March 2007 that some three people who were armed with a toy pistol and terrorizing people at staff village – had been arrested. P.W.2 informed the OCS, Nanyuki who in turn sent police officers to accompany P.W.2 to staff village to re-arrest those suspects. Upon reaching the house of Patricial (deceased), the three suspects fled by jumping over the fence when they saw P.W.2 approach them with police officers. The appellant was arrested behind the house of Patricia while his accomplice was arrested when he went to hide in the house of one Ndegwa. P.c. David Gitahi (P.W.3) confirmed having accompanied P.W.2 to staff village whereupon he arrested the suspects. P.W.3 said that when they reached Nanyuki police station he discovered that P.W.1 had booked a report of robbery against the appellant which had taken place on 25th March 2007. P.W.3 said that P.W.1 had mentioned the name of Kang'ethe (appellant) as one of the persons who had robbed him.

When put to his defence, the appellant denied having committed the offence. The appellant alleged that he had come back from his place of work, Sagana. On arrival at Nanyuki, the appellant said he was arrested by P.W.2 and P.W.3 when he had gone to fetch a hand cart to transport his luggage. He said he was arrested when he identified himself as Mr. Kang'ethe.

Having given in brief the case that was before the trial court, we now wish to consider the appeal. It is the submission of the appellant that the learned Senior Principal Magistrate erred when he convicted him on the evidence of a single identifying witness. Mr. Orinda was of the view that the evidence of the complainant sufficiently put the appellant at the scene of crime. We have carefully re-considered the evidence of identification. We agree that the trial magistrate relied on the evidence of the complainant to convict the appellant. That evidence is the evidence of a single identifying witness. There is no doubt that the complainant met the appellant at B.P. petrol station. The duo had a chat before proceeding towards Likii Bridge where the complainant (P.W.1) was robbed. The complainant stated both in his evidence in chief and on cross-examination that he had known the appellant for over 3 years. They had lived together in Majengo Estate. P.W.1 stated there was light where he met with the appellant. We are satisfied that the evidence of identification by P.W.1 is that of recognition. The complainant (P.W.1) said he mentioned the name of the appellant. That piece of information was corroborated by the evidence of P.W.3 who said that the name of the appellant had been reported to the police. Though the learned Senior Principal Magistrate, did not warn herself of convicting the appellant on the basis of a single identifying witness, we are nevertheless satisfied that the appellant was convicted on sound evidence of identification by recognition.

The appellant has also complained that he was convicted on contradictory evidence. It is stated that the complainant stated that he was robbed of a mobile phone make Motorola C113 yet the charge sheet talks of Motorola C118. We have critically considered that submission. We agree that there was contradiction in respect of the make of the mobile phone. We do not think that issue is a fatal defect. The fact remains that the complainant was robbed of a Motorola mobile phone make C118. P.W.1 clarified the contradiction when cross-examined. He stated that a mistake may have occurred when recording the statement. In any case there is evidence that the complainant was robbed of Kshs. 5000/=. We have come to the conclusion that there is no serious defect on the charge sheet which can be used to defeat the trial court's decision.

The last point argued by the appellant is to the effect that the trial magistrate erred when she failed to consider the appellant's defence. We have perused the decision of the learned Senior Principal Magistrate and it is clear that the appellant's defence was considered by the trial magistrate. The learned trial Senior Principal Magistrate may not have critically considered the appellant's defence. This being the first appellate court, we are enjoined to reconsider the appellant's defence. We have already stated the form of defence the appellant adopted when he was called upon to defend himself. He indirectly relied on the defence of alibi. He stated that he was in Sagana and that he had just arrived in Nanyuki when he was arrested by the police as a suspect. We are unable to accept his defence. We are satisfied that the complainant told the truth. There is no evidence to show that the complainant had any grudge against the

appellant. We think the appellant's defence was a make up story. We dismiss it as untenable.

In the end we find no merit in the appeal. We dismiss it in its entirety.

Dated and delivered this 25th day of January 2010.

J.K. SERGON
JUDGE

M.S.A. MAKHANDIA
JUDGE

In open court in the presence of the appellant and in the absence of the learned State Counsel.

J.K. SERGON
JUDGE

M.S.A. MAKHANDIA
JUDGE