



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 66 of 2008

FRANCIS WACHIURI NDERITU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in the Senior Resident Magistrate's Court at Karatina in Criminal Case No.969 of 2006 dated 31st March 2008 by L. Mbugua, Senior Resident Magistrate)

JUDGMENT

FRANCIS WACHIURI NDERITU, the appellant herein, was tried on a charge of robbery with violence contrary to *Section 296 (2)* of the Penal Code. The particulars of the charge are that on the 5th day of October, 2006 at Wariruta Trading centre in Nyeri District within Central Province, together with another not before court robbed **SAMUEL KIBOI MAINA** of Sh.10,000 and a mobile phone make motorolla G13 valued at Kshs.2,000 and at or immediately before or immediately after the time of such robbery used or threatened to use actual violence to the said Samuel Kiboi Maina. The Appellant underwent a full trial after which he was convicted for simple robbery contrary to *Section 296 (1)* of the Penal Code under *Section 179* of the Criminal Procedure Code and sentenced to serve five (5) years imprisonment. Being dissatisfied, he has now appealed to this Court.

On appeal, the Appellant put forward a total of six (6) grounds in his Petition of Appeal. We have carefully considered these grounds and we think the same may be summarized to three main grounds:

- (i) *That the conditions for identification were not favourable a positive identification free from error.*
- (ii) *That the evidence tendered did not prove the offence the Appellant was convicted for.*
- (iii) *That the Appellant's defence was wrongly rejected.*

It is the submission of Mr. Makwa, learned State Counsel, that the Appellant was placed at the scene of crime being in company of another who attacked the Complainant. The learned State Counsel urged this Court to find that there was ample evidence to prove the offence of robbery with violence contrary to *Section 296* Penal Code since the Appellant was in company of another.

We have carefully considered the recorded evidence. It is apparent from the recorded evidence that the identification of the Appellant was that of a single identifying witness. That witness is the Complainant herein (P. W. 1). P. W. 1 told the trial Court that on 8th October 2006 at about 11.00 p.m. he heard a lady who operates bar adjacent to P. W. 1's kitchen soup run into her bar and locked herself. Shortly, P. W. 1 said he heard some people who claimed to be watchmen ordering the unnamed lady to open her door. P. W. 1 opened his door, peeped and saw the Appellant and another. The duo walked away when they saw him. P. W. 1 said the duo grabbed him and accused him of interfering with their business. He claimed other watchmen came but did not assist him. P. W. 1 said he lost Ksh.10,000/= and a motorolla cell phone. P. W. 1 claimed he sought for the assistance of his friend to take him to the Police who declined because he was drunk. He claimed the Appellant and his accomplice went back to his place whereupon they told him they had reported the incident to the village elder. He claimed he managed to sneak out to book a report at Kiamachimbi Police Station before returning back. P. W. 1 stated that the Appellant and his friend went back to issue threats against him the next day. P. W. 1 then reported the matter to the area chief. We have re-considered the evidence of P. W. 1 and we think the same cannot be used to sustain a conviction for the following reasons:

First, it is clear that the complainant alleged he was attacked by the Appellant and his accomplice when he went to rescue a lady whom he was unable to name nor call to testify. P. W. 1 said he went to seek for the assistance of a friend to take him to report to the Police. He said his friend who operated a bar was too drunk to take him to the Police Station. The Complainant claimed that the Appellant and his accomplice went to warn him but he was able to escape whereupon he managed to report to Kiamachimbi Police Station. There is no evidence that the Police took any action. It would appear from the evidence of P. W. 2 that the Police did not take the complaint of P. W. 1 seriously because the Police did not visit the scene immediately. The record shows that the Police swung into action only after the Complainant booked a report with the area assistant chief (P. W. 3). So many questions have remained unanswered in our minds. First, why didn't the Complainant report to the Police in the first instance? Secondly, who assisted him reach the Police station the second time round. Thirdly, why didn't he summon the evidence of the unnamed lady. Fourthly, was this a love triangle gone sour? We are unable to believe the evidence of P. W. 1. as the same left too many questions unanswered hence the same is unreliable.

The second reason why we believe the evidence of P. W. 1 cannot sustain a conviction is that the conditions for identification were not indicated. The incident took place at 11.00 p.m. at night. What assisted the Complainant see the Appellant and his accomplice? No evidence was laid to prove the form of light which made P. W. 1 recognise the

Appellant.

The record shows that L. Mbugua, learned Senior Resident Magistrate, took over the Appellant's trial from where P. C. Tororey, learned acting Principal Magistrate had left without strict compliance with the provisions of *Section 200* of the Criminal Procedure Code. In short, the learned Senior Resident Magistrate did not explain to the Appellant the right to recall witnesses who had testified before P. C. Tororey for cross-examination.

In the end we are satisfied that the appeal should succeed. Consequently the appeal is allowed. The conviction and sentence are quashed and set aside respectively. The Appellant is set free forthwith unless lawfully held.

Dated and delivered this 13th day of January 2010.

J. K. SERGON
JUDGE

M. S. A. MAKHANDI
JUDGE

In open court in the presence of Mr. Makura learned State Counsel and the appellant in person.

J. K. SERGON
JUDGE

M. S. A. MAKHANDIA
JUDGE