



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI Criminal Appeal 138 of 2008

PETER KARANJA WAMBUI.....
.....APPELLANT

VERSUS

REPUBLIC.....RESPON
DENT

(Appeal from the original conviction and sentence in the Senior Resident Magistrate's Court at Kigumo in Criminal Case No.2313 of 2007 dated 2nd April 2008 by S. M. Mukua, Senior Resident Magistrate)

JUDGMENT

PETER KARANJA WAMBUI, the appellant herein, faced a charge of robbery contrary to Section 296 (1) of the Penal Code. At the end of his trial, he was convicted and sentenced to seven (7) years imprisonment. He was unhappy with that decision hence this appeal.

On appeal, the Appellant put forward the following grounds in his Petition:

1. *The learned magistrate erred in law and fact in not considering the date the crime was committed on 19th March 2007 and the date the appellant was arrested 16/7/07 was too long, for accused well known to the complainant, not to have been arrested and no evidence tendered by P.W.1 and P.W.2 that appellant had disappeared or had led P.W.3 to arrest the appellant, for P.W.3 to find him had run away.*
2. *the learned magistrate erred in law and fact, not finding that those who arrested the appellant, didn't come to testify to clear reasons for his arrest at road block who could have given him over to PW. 4, who stated complainants was present, evidence not corroborated by either P.W.1 and P.W. 2.*
3. *The learned magistrate erred in law and fact, not considering the relationship between P.W.1 and P.W.2, and find that each were trying appellant to be sentenced not to the actual weight of the nature of the offence.*

When the appeal came up for hearing the Appellant was granted leave to file and rely on written submissions. Mr. Makura, learned State

Counsel, opposed the appeal on the ground that there was overwhelming evidence of P. W. 1 which proved that the Appellant had committed the offence of robbery against P. W. 1.

The prosecution's case before the trial court was brief. Kevin Mwangi Kahonge (P. W. 1), a student at Sagana Technical, told the trial court that on 19th March 2007 he had gone to fetch water for Karanja Karanja (P.W. 2) at a nearby water point. On the way P. W. 1 met with the Appellant a person he had known for about two (2) years. It is the evidence of P.W. 1 that the Appellant had asked him whether or not he knew him. Before he answered the question, the Appellant is said to have pounced at P. W. 1. He held him at the neck. The Appellant is said to have removed a Nokia 2310 Mobile Phone from P.W. 1's trouser. P. W. 1 said he purchased the same at Ksh.4,500/=. The Complainant (P.W. 1) further alleged that the Appellant assaulted and attempted to strangle him before robbing him of the aforesaid mobile phone. Michael Karanja Karanja (P.W. 2) said while he was grazing his cows, he saw the Appellant and the Complainant standing about 100 metres from where he was on 19th March 2007 at about 11.00 a.m. P. W. 2 said he saw the duo hold each other as though they were playing. Shortly, he saw the Appellant flee as P. W. 1 climbed the nearby ridge. He said the Complainant went where his mother was working. P. W. 2 confirmed that P. W. 1 had a mobile phone. P. W. 2 said the Appellant was somebody well known to him. The Complainant went to P. W. 2's shop to explain what had happened to him. A.P.C. Muli Likaso (P. W. 4) said on 16th July 2007 while he was escorting a G. K. vehicle from Maragua to Murang'a he was stopped at Maragua-Murang'a road block where upon the Appellant was handed over to him. He said the Appellant was a suspect for robbery at Maragwa ridge. P. W. 4 handed over the Appellant to P.C. Charles Nderitu (P.W. 3), the duty officer at Maragua Police Station on the same date. P. W. 3 confirmed that the Complainant had booked the report of the robbery which took place on 19th March 2007 at Kioo village. P. W. 3 said he issued the P3 form to the Complainant at the time of reporting. The Appellant was arrested at the road block while he was riding a bicycle. Rahab Muthoni (P. W. 5) said he examined the Complainant (P. W. 1) at Murang'a District Hospital on 19th March 2007. She found that P. W. 1 had minor bruises on the face. She produced the P3 form as an exhibit in evidence. In the P3 form P. W. 5 formed the opinion that the degree of injury sustained by the Complainant was harm.

The Appellant gave sworn testimony in his defence. He denied ever committing the offence. He denied ever meeting the Complainant. He said the Complainant was somebody not known to him. He blamed his uncle Michael Karanja Karanja, who was a witness in the case for fixing him.

On appeal, the Appellant argued that the evidence tendered did not establish the offence he was convicted for. He claimed that there was no evidence as to how he was arrested. I have carefully considered the evidence tendered by the prosecution. There is no doubt that the incident took place in broad day light on 19th March 2007 at Kioo Village. The Appellant claimed he did not know the Complainant (P. W. 1). That may be true. But the question which must be answered is whether or not the Complainant knew the Appellant. It is possible the Appellant did not know the Complainant and that is why he was brave enough to accost him, thinking that he was a stranger. The Complainant was able to state that he had known the Appellant for two years. I believe the evidence of the complainant. It is the Appellant who prompted P. W. 1 in cross-examination that had known the Appellant for a period of two years. The other identifying witness was Michael Karanja Karanja (P.W. 2). He said he saw the Complainant and the Appellant holding each other as though they were playing. He said he knew the Appellant very well. In his defence, the Appellant said that P. W. 1 was his uncle. The evidence on record therefore place the Appellant at the scene of crime. The Appellant has complained that there was no evidence as to how he was arrested. It is clear from the evidence of P. W. 3 that the Appellant had fled him home after the incident. P. W. 3 said that the Complainant had booked a report at Maragwa Police Station hence the Police were looking for the Appellant. P. W. 3 while under cross-examination by the Appellant, stated that

the Appellant was arrested at a Police road block mounted at Maragua-Murang'a while he was riding a bicycle. It is therefore clear that P. W. 3 clearly explained how the Appellant was arrested by the Police.

The question is whether or not the evidence tendered proved the offence of robbery. The particulars of the offence are that on the 19th day of March, 2007, at Kioo Village, in Murang'a south district of Central Province the Appellant robbed the Complainant of one mobile Nokia 2310 valued at Ksh.4,500/= and immediately after the time of such robbery used actual violence to the said Kelvin Mwangi Kahonge. I have carefully reconsidered the evidence of the Complainant (P.W. 1) and that of P. W. 2) The two witnesses merely stated that the Complainant owned a mobile phone make Nokia 2310. There was no recovery of the same. The Complainant (P. W. 1) did not adduce any evidence to prove ownership. He did not produce any receipt of purchase nor oral evidence from the shop he purchased the mobile. I therefore find that the evidence did not establish the item or property stolen. The P3 form indicates that the Complainant appeared before the O.C.S. Maragua Police Station on 23rd March 2007 where upon he claimed that he was assaulted by somebody known to him. The Complainant did not mention that he was robbed of a mobile phone. I, however, find that the offence of assault was proved. Consequently, pursuant to *Section 179 (2)* of the Criminal Procedure Code, I quash the Appellant's conviction for the offence of robbery under *Section 296 (1)* of the Penal Code and find him guilty for the offence of assault causing actual bodily harm contrary to *Section 251* of the Penal Code. The sentence of seven (7) years imposed against the Appellant on the offence of robbery is set aside and is substituted by one of three (3) years imprisonment to run from the date of conviction and sentence by the magistrate.

Dated and delivered at Nyeri this 12th day of February 2010.

J. K. SERGON

JUDGE

In open court in the presence of the Appellant and Mr. Orinda for the State.