IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 152 of 2006 & 249 of 2008

JOHN MWANGI KARANJA …… APPELLANT

versus

REPUBLIC……..…. RESPONDENT

(Being an appeal from the conviction and sentence of T. W. MURIGI, Senior Resident

Magistrate in the Senior Resident Magistrate's Criminal Case No. 1693 of 2005 at NYERI)

REPUBLIC OF KENYA

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CRIMINAL APPEAL NO 249 OF 2008

JUSTIN MUNA KARANJA …...…… APPELLANT

versus

REPUBLIC……. RESPONDENT

(Being an appeal from the conviction and sentence of T. W. MURIGI, Senior Resident

Magistrate in the Senior Resident Magistrate's Criminal Case No. 1693 of 2005 at NYERI)

JUDGMENT

At the hearing of these two appeals an order was made for their consolidation. Criminal Appeal No. 152 of 2006 is the lead file. The appellants both of whom were charged with 3 counts or robbery with violence contrary to Section 296(2) of the Penal Code. They were both convicted as charged. Both appellants were found at the trial in the lower court to be under 18 years old and on being convicted were sentenced to be detained in prison at the president's pleasure under Section 25(2) of the Penal Code. Being dissatisfied with that conviction and sentence the appellants have appealed against both. This is the first appellate court and as such we are expected to submit the lower court's evidence to a fresh and exhaustive examination. We need to weigh conflicting evidence and draw our own conclusion. In doing so we need to make allowances for the fact that the trial court had advantage of hearing and seeing the witnesses. See the case of **OKENO VS REPUBLIC (1972) EA 32.** The evidence adduced in the lower court was as follows:-

PW 1 stated that on 22nd June 2005 at about 1 am whilst at her home sleeping, she heard robbers making noise and a stone was used to break down her grandson's house. Her grandson was screaming asking for assistance because the intruders were threatening to kill him. PW 1 switched on the security light and the lights in the house. She opened the door and her grandson and the intruders entered. The first person who entered the home was the second appellant who she called Karanja. He began to demand money from her. She was able to observe him with the aid of electricity in the house. When she did not produce money he began breaking the window in the kitchen. The first appellant was also present in the house. She knew the two appellants as brothers. She knew their mother. There were other robbers who were outside the house. She could not identify them. The robbers were armed with sticks and axes. When she was unable to produce money to the robbers the 2nd appellant took 3 umbrellas, two watches and mobile phone. PW 1 said that the robbery took place for quite sometime because the 2nd appellant kept on demanding for money. In respect of the two appellants she said that she had known them from the time they were small children. On being cross examined she confirmed that she informed the police about the identity of the two appellants. She said that she knew the appellants as Karanja and Muna. PW 2 suffered a violent robbery where he and his wife were attacked with rods, axes, sticks and pangas. The robbers stole from them kshs. 400. They were however unable to identify the robbers. Similarly PW 3 was unable to recognize the robbers who took from him kshs. 30. He however stated that the robbers were very furious since on being informed on mobile phone about their presence in the vicinity he raised an alarm for other neighbours to hear. As a result the robbers came and cut the barbed wire, broke down his burglar proof and attacked his wife. PW 3 was saved by the fact that he hid himself. PW 4 was the arresting officer. The court on hearing that evidence found that the prosecution had found a prima facie case and proceeded to put the appellant on their defence. The first appellant in his defence stated that he was a resident of Nairobi where he was involved in hawking business. He did not state where he was on the day of the robbery but he stated that on 6th August 2005 he had gone home and had met with his brother, the co-appellant. On the following day the headman came to their home in the company of two police officers and were arrested. He denied the charge before the court. The 2nd appellant in his defence confirmed that the first appellant had on 6th August 2005 come home from Nairobi. On the following day, the police in the company of the headman came and arrested them. He too denied the offence. Generally the grounds raised by the appellants in their appeal was that the lower court considered evidence which had discrepancies, failed to note that the prosecution witness had not produced P3 to prove their injuries, failed to note that the prosecution's case was weakened by the failure of the attendance of the sub-chief and the investigating officer. The appellants also raised a ground that the learned magistrate had failed to indicate that there was interpretation of the evidence in a language they understood. The learned trial magistrate in her considered judgment found that the appellants had been identified by PW 1 by aid of electricity light which was on all the time. The court also found that PW 1 knew both the appellants from their childhood. She rejected the appellants' defences and noted that they had failed to state where they were on 22nd June 2005 the day of the robbery. The robbery took place at 1 am. PW 1 said that she had switched on the house lights and security light. Both appellants entered the house. There was close proximity between them and her. She had known them for a long time. The conviction of both the appellants was on the basis of PW 1's evidence. She was single identifying witness. She was however very categorical that the electric light was on. She recognized the appellants and gave their names as Muna and Karanja. Even though the trial magistrate did not subject that evidence to the test referred to in the case of MAITANYI VS REPUBLIC (1986) KLR 198 we find that she was satisfied that the evidence of recognition was free from possibility of error. The robbery after all took place for over 30 minutes. Having re-examined the lower court evidence we find that the evidence against the appellants was clear and convincing. There were no discrepancies. The fact that the chief and the investigating officer did not give evidence does not weaken the strength of the prosecution case. PW 1's evidence was unshaken in cross examination. She stated that those who answered her call of distress during the robbery when they arrived she told them that she recognized both the appellants. We are satisfied that the case against the appellants was proved beyond reasonable doubt and that accordingly they were properly convicted. In respect of the complaint that there was no indication in the lower court record of interpretation we note that PW 1 gave her evidence in Kikuyu. The appellants in their defence gave evidence in Kikuyu. The appellant's complaint that there was no interpretation is wholly unjustified. In the case *FRANCIS MACHARIA GICHANGI AND OTHERS vs REPUBLIC Criminal Appeal No. 11 of 2004 (unreported)* the Court of Appeal had this to say after quoting section 77(1)(b)

and (f) of the constitution:-

"*These place an implied duty on the accused to inform the court whether or not he is able to follow the proceedings. In an appropriate case where there is no complaint at the trial this court may well infer that there was interpretation where the proceedings show the accused understood the nature of the charge against him and the evidence presented in support thereof notwithstanding absence of a note regarding interpretation."*

In this case the only prosecution witness who identified the appellants was PW 1. she gave her evidence in Kikuyu . The appellants in their defence spoke Kikuyu. The appellants had a responsibility to inform the court if they did not understand the evidence of the other witnesses where the court failed to indicate their language. Having failed to the complaint we are entitled to infer that they understood the language or that there was interpretation. That ground of appeal is therefore rejected. In the end the judgment of this court is that these two appeals have no merit and the same are dismissed.

Dated and delivered this 30th day of January 2009

MARY KASANGO

JUDGE

M. S. A. MAKHADIA

JUDGE