



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 697 of 2001

JOSEPH KINYANJUI WAINAINAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No.21037 of 2002 of the

Chief Magistrate's Court at Makadara by Mrs. Juma – P.M.)

J U D G E M E N T

The appellant was charged under Section 296(2) of the Penal Code in that on the 26th day of October, 2000 at Kariandundu village within Nairobi area jointly with others not before court while armed with pistol robbed Harrison Mwangi Kimotho of Kshs.2,610/= at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Harrison Mwangi Kimotho.

After full trial the appellant was convicted and sentenced to suffer death as prescribed under the relevant provisions of the law. Being dissatisfied, the appellant filed grounds of appeal but what was argued before us is the supplementary grounds of appeal dated 23rd September 2008 filed by **Mr. Ondieki** learned counsel for the appellant.

The evidence of PW1 Harrison Mwangi Kimotho is as follows: That he stays at Kariandundu operating a shop business within the area. On 26th October 2000 at 7 p.m. while selling goods in his shop he was confronted by three people. One of the intruders stood on the left side of the counter, the other on the right and the last one in the middle. He says his shop has a window measuring about 5 x 4 metres for selling his commodities to his customers. The front part of the shop is protected through a grill and the only opening to the shop is through a small window. He says the man on the left produced a pistol and ordered him to produce all the money he had. Upon seeing the pistol, some of the customers ran away. He refused to give out any money to the intruders. It was that the man in the middle pushed his hands into the small window and pulled the shelf in order to remove the money which was inside the shelf. He removed some money and passed it on to his two other colleagues. PW1 then raised alarm and grabbed the man who had put his hands inside the shop. He held his hand until people came and assisted him. The attacker who happens to be appellant was arrested. The said man was arrested with coins amounting to Kshs.110/=.

PW2 Boniface Kairu Kimotho states that on the material day at about 7.00 p.m. while on his way to his home he heard screams in a nearby shop. He then saw people ran away from the said shop. He stated that two of the people running away from the shop had something in their hands and pockets. He went into the shop and found one person struggling with the owner of the shop while the owner of the shop was calling for help. He found the owner struggling with another person through the opening where the sales are usually done. He then assisted PW1 to arrest the person. He says the person who was arrested is the appellant. He also says there was ample electricity light at the shop and at the time of arrest the appellant had a black paper bag with coins. The coins were removed and counted and it was confirmed to be Kshs.110/=.

PW3 on his part says that as he was heading from his brother's house who stays near the shop of PW1 he heard screams coming from PW1's shop. It was the evidence of PW3 that he recognized Mwangi's voice calling out for help against thieves. He went into the shop and found one person being held from behind while his head was inside the counter. He says the person's hand was inside and the shopkeeper was holding his hand from inside. He then assisted in the arrest of

the appellant who was thereafter taken to Ruaraka Police Station.

PW4 confirmed that he re-arrested the appellant after he was brought to the police station.

The appellant gave un-sworn testimony stating that he operates a *matatu* from Babadogo to town. And says that as he was heading to his residence Kariandundu when he was arrested by village youths together with the complainant. He stated that the complainant who is his enemy ordered him to sit down accusing him to be one of the area thieves. He says he was thoroughly beaten and later taken to Ruaraka Police Station.

Mr. Ondieki learned counsel for the appellant submitted that there are material contradictions in the evidence given by the prosecution witnesses. And the contradiction that was brought to our attention is the time the incident may have occurred. The other issue raised by **Mr. Ondieki** is the issue of identification. He submitted that the trial court did not warn itself of the dangers in convicting on the basis of single identifying witness. And that the trial court should not have assumed PW1 knew the appellant. And that the testimony of PW1 should have been corroborated. **Mr. Ondieki** further submitted that it is normal for people to have coins in their pocket and the fact that the appellant was found to have coins means nothing and proves nothing. In short **Mr. Ondieki** advocate urged us to allow the appeal since there were material contradictions and since the entire evidence did not point to the guilt of the appellant.

This being a first appeal, we are expected to subject the whole evidence to exhaustive examination so that we may arrive at our own independent decision based on the weight of evidence. In our own assessment of the lower court's evidence we think the appellant committed the offence laid against him. It is clear the appellant with two others accosted the complainant on the material night and robbed him of Kshs.2,610/=. It is also clear from the evidence of PW1 that he was accosted by three people who wanted to rob him. He refused to cooperate with them and in the process of reaching to the shelf containing the money the appellant put his hand inside the shop in order to get all the money in the shelf. It was then that PW1 grabbed him and started screaming for help. PW2 and PW3 came to the rescue of the complainant wherein the appellant was arrested in incriminating manner. A search was conducted and the appellant was found with Kshs.110/= stolen from the complainant.

We think the factors implicating the appellant are quite credible, watertight and more consistent with his guilt rather than his innocence. We also think the trial court quite rightly overruled his defence as unsustainable in law in the circumstances and the facts put before the trial court by the prosecution. It is our position that there is no contradiction in the evidence tendered by the prosecution to warrant us to say that the case against the appellant was not proved beyond reasonable doubt. The totality of the evidence by PW1, PW2 and PW3 puts the appellant on the scene of crime beyond any doubt. The evidence of PW2 is that having heard screams from the shop of PW1, he responded to help him and found the complainant struggling with the appellant. He says that he held the appellant from behind while his head and his hands were inside the shop beyond the grilled counter. That evidence was supported and/or corroborated by the evidence of PW3 who also found that the appellant had been arrested by PW2 and PW1.

We therefore think the evidence of the three prosecution witnesses who witnessed the arrest of the appellant is beyond error or mistake. This case is not about identification but whether the appellant was arrested as he was trying to rob the complainant. The evidence of PW1 is that from the time the three intruders came to his shop to the time the arrest of the appellant, he did not lose sight of the appellant. This therefore means that from the time the appellant and his colleagues attacked the complainant to the time of his arrest the chain of events were clear, continuous and appropriate to the guilt of the appellant. It is therefore our position that the issue of identification put forward by **Mr. Ondieki** is utterly misplaced. It is clear in our mind that the appellant's attempt to escape from the scene of crime was thwarted by PW1 who grabbed him and PW2 and PW3 who assisted PW1 in the arrest of appellant. The evidence on record clearly shows that the appellant was arrested on the scene trying to escape after taking all the money that was in the shelf of the complainant. There is no evidence to show that the appellant was arrested away from the shop so that the possibility of error or mistake could arise. The evidence on record is that he was arrested red-handed with monies stolen from PW1. In our view the evidence by PW1, PW2 and PW3 is consistent and credible and we have no reason to doubt the same. In conclusion it is our decision that the case against the appellant was proved beyond reasonable doubt and the appeal has no merit. We dismiss the appeal, confirm both conviction and sentence.

Dated, signed and delivered at Nairobi this 27th day of January, 2009.

J. B. OJWANG

M. WARSAME

JUDGE

JUDGE