



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 132 of 2007

SAMUEL GITHINJI WAITHERAAPPELLANT

- AND -

REPUBLICRESPONDENT

***(An Appeal from the Judgment of Senior Resident Magistrate Ms. M. W. Mwai dated 7th March, 2007
in Criminal Case No. 1493 of 2006 at Limuru Law Courts)***

JUDGMENT

The appellant was charged with robbery with violence contrary to s. 296 (2) of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the appellant jointly with others not before the Court, and while armed with offensive weapons namely iron bars, on 7th May, 2006, at Kiraca Village in Kiambu District of Central Province, robbed **Jackson Ngure Gitau** of Kshs.2,000/=, and at , or immediately before, or immediately after the time of such robbery, used actual violence upon the said **Jackson Ngure Gitau**.

It was the complainant's (PW1) evidence that he was in the company of **Bedan Mwangi** (PW2) on 7th May, 2006 at about 7.30 p.m., when as they walked (PW2 pushing a bicycle) along, they found standing at a road junction someone they knew, the appellant herein. Then suddenly, others emerged from the nearby bush and started battering both PW1 and PW2, attacking them with machetes, clubs and sticks. The appellant for his part, hit the complainant with a metal bar, fracturing his hand; and the attackers robbed the complainant of Kshs.2,500/=; PW2 was robbed of Kshs.5,000/=. PW1 and Pw2 reported the matter to the Police, and went to hospital for medical attention. The two gave the name of the appellant herein to the Police, and this led to the arrest of the appellant.

PW2 testified that on the material evening, six people had been at the side of the road, and had ordered him and the complainant to stop, beaten up and robbed him and the complainant. PW2 was felled to the ground, and was injured; by the time he rose to his feet, the attackers had disappeared. PW2 said he was able to identify the appellant herein as one of the robbers. PW2 had known the appellant before the material date, and he had given the appellant's name at the time of reporting to the Police. PW2 testified, just as did also PW1, that it was not dark at the *locus in quo*, at the material time, and he was able to see and identify the appellant, and he even noted the clothes worn by the appellant.

The evidence of PW3 refers to a date several months after the date when the incident is said to have taken place ? it refers to 18th September, 2006, as the date when the complainant came to **Police Constable Obadiah Koech** (PW3) and he was complaining of having been assaulted, and he had an injured hand. The complainant had said to the police officers he could identify those who assaulted and robbed him;

and on that basis the Police arrested the appellant herein.

PW4, **Dr. Githuka** of Tigon Hospital said he examined the complainant in June, 2006. He found the complainant in “fair general condition”; “there were no bruises and he had recovered by the time I saw him which was [nine weeks] after.” PW4 testified that the injury had been caused by a blunt object, and it could be classified as harm.

The appellant herein when put to his defence, denied the charge in an unsworn statement.

The learned Magistrate noted that the appellant had been arrested *four months* after the offence was committed, and that since there was no physical evidence found on the appellant, the prosecution had relied on the evidence of identification by PW1 and PW2. It was noted that there was evidence pointing to the fact that the complainant and PW2 had been robbed on the material date; the two made a report to the Police, and there is evidence that they had suffered injury.

Was the appellant positively identified? The trial Court treated this as the crucial question. It was noted that the offence was committed at night; and that the two witnesses did not mention any source of light that enabled them to see the appellant herein; but they had said it was not dark, and they were able to identify the appellant herein; and they recognized the appellant as a person known to them. On the same night, PW1 and PW2 reported to the Police that they were able to recognize their assailant, and they did give his name as **Githinji**, a popular man who played football.

From that finding on fact, the learned Magistrate made his determination as follows:

“It seems to me that the complainant had no doubt that it is [the] accused and others who robbed him. His testimony was corroborated by that of PW2. The Police [officer] [PW3] visited his house [several times] and his whereabouts were not known. It is only later [that] he was seen by PW3 ... and when the accused saw him [the accused] started running away.

“From the above evidence ... I am convinced beyond doubt that the complainant and PW2 were able to identify and indeed to recognize the accused person as one of those who robbed them. The essentials of the offence have already been established and it is in evidence that there was a group of about six men who were armed with dangerous weapons ... and they did use actual violence on the victims.... I thus find the accused guilty of this offence, and he is accordingly convicted.”

The trial Court sentenced the appellant to death, as provided by law.

In the grounds of appeal, it was contended that there had been no condition favouring a positive identification, at the time of the material incident; that the prosecution evidence was contradictory; that the burden of proof had been shifted to the appellant; that evidence of first-report was not produced during the trial.

The appellant came to Court with pre-written submissions, and had little to add orally ? merely that he did not commit the offence charged.

Learned State Counsel **Mrs. Obuo** contested the appeal. She noted the testimonies of PW1 and PW2, which indicated that even though the incident took place at 7.30 p.m., it was not dark at the time ? and these two witnesses did identify and indeed recognize the appellant herein. PW1 testified that the incident was executed, with the appellant standing in close physical proximity to him, and he thus was able to perceive the appellant. Counsel urged that the circumstances for identification were not unfavourable. Upon the incident taking place, PW1 and Pw2 had immediately reported to the Police, and had given the name of the appellant herein as one of the culprits. Counsel urged that there had been no mistaken identity.

Counsel urged that the evidence of PW1 and PW2 had been corroborated by the arresting officer, PW3; when this witness tried to arrest the appellant at the appellant’s home, he ran away; and when later, PW3

met the appellant out along the road, he ran away, and had to be chased over a distance of 200 meters; and such conduct was inconsistent with the conduct of an innocent person ? and such conduct corroborated the testimonies of PW1 and PW2, to the effect that the appellant was one of the robbers.

Counsel urged that the prosecution had proved their case beyond reasonable doubt; the evidence was consistent and credible; the ingredients of robbery with violence were present.

Our review of the evidence and the treatment of the same by the trial Magistrate carries pointers of fact, and a conclusion which this Court must adopt. We find that PW1 and PW2 did all things showing not only that they had known the appellant before the robbery incident, but that they truly perceived him as one of the perpetrators of the offence, on the material evening. We are prepared to accept PW1 and PW2's identification of the appellant as conclusive; but beyond that, PW2 provides important circumstantial evidence ? in the shape of the appellant's avoidance behaviour betraying guilt, and thus strongly corroborating the direct evidence. This proof is not at all dented by the defence case.

We dismiss this appeal; uphold the conviction; and affirm sentence as imposed by the trial Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 17th day of February, 2009.

J. B. OJWANG M. WARSAME

JUDGE JUDGE

Coram: Ojwang & Warsame, JJ.

Court clerk: Huka & Erick

For the Respondent: Mrs. Obuo

Appellant in person