



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

CRIMINAL APPEAL 499 & 501 OF 2005 (CONSOLIDATED)

PETER HINGA NGIGE 1ST APPELLANT

STEPHEN KAMAU NJUGUNA 2ND APPELLANT

- AND -

REPUBLICRESPONDENT

(An appeal from the judgment of Senior Resident Magistrate Ms. Mwai dated 19th

October, 2005 in Criminal Case No. 99 of 2005 at Limuru Law Courts)

JUDGMENT

The appellants herein and a third accused (who was acquitted on all the counts of the charge) were charged with the commission of several offences; but they were acquitted except in respect of the main charge: robbery with violence contrary to s. 296 (2) of the Penal Code (Cap. 63, Laws of Kenya).

The particulars were that the appellants jointly with others not before the Court, on 30th December, 2004 at Kiambu District of Central Province, while armed with dangerous weapons, namely pistols, machetes and swords, robbed **David Kamau Wainaina** of one motor vehicle, Registration No. KAL 240H, a Datsun Pick-up, one television set, Great Wall by make, a video deck, Panasonic by make, two cameras, two cellphones, one being Motorola and the other Nokia, one gold trophy, two gas cylinders, one wallet, a Barclays Bank ATM card, and cash in the sum of Kshs.10,000/= ?? all valued at Kshs.497,000/= ?? and at, immediately before or immediately after the time of such robbery, threatened to use personal violence on the said **David Kamau Wainaina**.

The prosecution case was that, on 30th February, 2005 the complainant (PW1) and his wife (PW2) had left their home in the morning, and gone to work, leaving behind their children, house-girl and watchman. At 6.00 pm on the same day, PW2 on returning home, found two men near her gate. When PW2 passed the two men, they followed her; and coming behind these men was a third man, wearing what resembled the uniforms of officers of the Administration Police. This putative Policeman came up to PW2, drew a pistol, and ordered PW2 to get into her home compound, and while inside, she was commanded to sit near the flower-bed. The three men kept watch over PW2 until dusk set in; then they admitted into the home-compound a man who, though dressed in PW2's watchman's clothes, was not the watchman. The true watchman, **John Baraza** (PW4) had been making food for the dogs, when a number of the intruders took him by surprise, held him, and took away his watchman's uniform, his machete, his torch and his whip. According to PW2, a number approximating to 20 intruders, had entered her home-compound. These robbers got the doors to PW2's house to be opened; and they took PW2 into her bedroom as they assaulted her, and demanded from her money, with menaces. They pushed a pistol into PW2's mouth, and ordered her to produce Kshs.500,000/=; but she had only Kshs.10,000/= in her handbag, which she handed over to the robbers. The robbers, after conducting searches in the house, settled for several items which they stole: television sets, video players, clothes, and a variety of household goods.

In the meantime, PW1 came home, finding intruders in his compound; and when he tried to rush back, the robbers chased and caught him. They took him into his house, where he found other members of his family bound up with chains. The robbers grabbed PW1's cellphone and ATM cards, and then chained him, and drove off in his motor vehicle in which they conveyed the stolen goods

PW1 and his family raised alarm, and this brought out neighbours. The incident was reported to the Police; and three weeks later, the stolen motor vehicle, but without the stolen goods, was recovered.

PW1 was not able to identify any of the robbers; but Pw2 said she was able to identify those among the robbers who had stayed with her at the gate, on the material day, and those who had frog-marched her into her bedroom. On this indication, PW2 was called to an *identification parade*, and she identified 2nd appellant herein as the man who had broken the family briefcase as he ransacked things in the house, on the material day.

The house-girl, *E W*(PW3) had been in the kitchen with the baby when the robbers entered the home, and they had whisked her into the lounge where others were already tied up; and now she said she was able to identify the man who held her hand and took her to the lounge, as there had been *a lamp* illuminating the kitchen when that man came to her. PW3 later identified the said robber at an *identification parade*, as 1st appellant herein.

LW (PW7), the thirteen-year-old daughter of PW1 and PW2 identified 1st appellant herein who had attempted to defile her.

Police Constable John Muema (PW5) had received word that two men carrying a bag, and who evoked suspicion, had been sighted in the Kamirithu area; Police officers apprehended the two men, and found them concealing a crow-bar in the bag; one of these men was 2nd appellant herein.

Inspector Festus Machoki (PW8) conducted the identification parade where 1st appellant was identified by PW3. **Cpl. Timothy Kariuki** (PW9) had arrested 1st appellant before knowing of the offence herein, but later learned that 1st appellant had been involved in the robbery which is the subject of this case. **Inspector Joseph Muguna** (PW10) investigated the robbery incident, and charged the appellants herein.

The appellants gave unsworn defences, 1st appellant saying he had gone to check on a friend while he was drunk, and was then arrested by the Police for no reason. The 2nd appellant said he was on a visit to a neighbour, when Police officers entirely without cause, and arrested him.

In her analysis of the evidence, the learned Magistrate proceeded as follows:

“The robbery took place at night and therefore, the issue that comes to the fore is that of identification of the accused persons None was arrested immediately, nor was any of them found with the stolen items. Basically therefore, the prosecution case rests on the identification of the accused persons [Accused] No. 1 and accused No. 2 were both identified. Accused No. 1 was identified by PW3, *E W*, the house-girl. *W* narrated how Accused No. 1 found her in the kitchen; she said she was able to see with the help of a lamp, the person who went for him. She identified him as Accused No. 1. She then later identified him at an identification parade at the Police Station

“Accused No. 2 was identified by Pw2, *M MB*. [PW2] narrated how she found robbers waiting for her near her house. It was not yet dark. [Accused 2 and others] stayed with her until it got dark. She said she was able to identify Accused No. 2 among the robbers. Later ... it is Accused No. 2 who took her to her bedroom, slapped her and broke ... the briefcase, while looking for money. PW7 ... the young girl who was raped also said she saw Accused No. 1.....

“Having considered all the above evidence as set out, I am convinced that Accused No. 1 and Accused No. 2 were positively identified by the two witnesses. The circumstances surrounding the identification points were favourable for positive identification. There was light, as stated by the witnesses, and hence they could see the face of the assailant. The accused [persons] were close to them and, again, they took time with the witnesses. I would thus find the first count duly proved against Accused No. 1 and Accused No. 2.”

The learned Magistrate convicted the appellants herein on count 1 of the charge, and she sentenced them to death as provided by law.

Departing from their original grounds of appeal, the appellants appeared for this hearing with written submissions, to which were attached “amended memoranda of appeal”. The appellants contended that they had not been properly identified as suspects; that the prosecution had not adduced sufficient evidence to support conviction; that there had been contradictions in the prosecution evidence; that they had been convicted on the basis of defective charges; that the trial Court had disregarded their evidence.

In the oral submissions, 1st appellant contested the evidence that he had been identified as a suspect, contending that the source of the lighting in the room had not been described. The 2nd appellant disputed the consistency with the evidence, of the dates shown in the charge-sheet.

Learned counsel **Mr. Makura**, for the respondent, contested the appeals, and submitted that there was overwhelming evidence to support the charge under s. 296 (2) of the Penal code, in respect of both appellants. Counsel urged that the 11 witnesses called had proved the charges laid against the appellants beyond any reasonable doubt. Counsel urged that both PW2 and PW3 had positively identified the two appellants at an identification parade; although the offence took place at 8.00 pm, PW2 and PW3 testified that there was a lamp in the room; and that the robbers arrived during daylight ?? and at that stage, had been positively identified. Counsel urged that the learned Magistrate had duly considered the defences put forward by the appellants herein, and found them not to shake the prosecution case; and he submitted that the appeals lacked merit.

Upon carefully considering all the evidence, we find ourselves in agreement with the learned Magistrate, that both PW2 and PW3 had positively identified the appellants herein as having been part of the gang of robbers on the material evening. We have found the appellants' defences to have been merely evasive, but did not make a dent on the detailed and well-connected prosecution evidence, part of which provided focused identification of the appellants as culprits.

We dismiss the two appeals; uphold conviction in both cases; and affirm sentence as imposed by the trial Court, in respect of both appellants.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 11th day of February, 2009.

J. B. OJWANG G. A. DULU

JUDGE JUDGE

Coram: Ojwang & Dulu, JJ.

Court clerk: Huka & Erick

For the Respondent: Mr. Makura

Appellants in person