REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 507 of 2005

SAMUEL MWANGI KAGUNDA .....……..…..... APPELLANT

- AND -

REPUBLIC …….....……..……RESPONDENT

(An appeal from the judgment of Senior Resident Magistrate Ms. Lucy Mutai dated 28th

October, 2005 in Criminal Case No. 1592 of 2004 at Githunguri Law Courts)

JUDGMENT

The appellant herein was charged, in a first count, with robbery with violence contrary to s. 296 (2) of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the appellant together with a co-accused (who was, however, acquitted) and jointly with others not before the Court, and while armed with dangerous weapons namely axes, machetes, iron bars, stones and hammers, on 31st October, 2004 – 1st November, 2004 at Ikinu Trading Centre in Kiambu District of Central Province, robbed ***Ann Wangari Muthoni*** of a cellphone, Motorola, and cash in the sum of Kshs.250/= ? all coming to a total value of Kshs.3250/= ? and at or immediately before or immediately after the time of such robbery, wounded the said ***Ann Wangari Muthoni***.

The appellant with the co-accused faced a second count of robbery with violence which involved like particulars, but in relation to another complainant, ***Simon Gitau Kimani.*** In a third count, the appellant and the co-accused were charged with attempted robbery contrary to section 297 (1) of the Penal Code, and its particulars related closely to the ones aforementioned, but in regard to a different complainant.

Ann Wangari (PW1) was asleep in her room with her husband, after midnight on 1st November, 2004 when the door was forced open by a bang thereon. She was ordered to be silent when she screamed, and commanded to show the electrical switch for the room's lighting. The lights were then switched on, and she saw two men whose faces were half-covered with masks; and thereupon, she was hit with a hammer for not covering her face. The intruders grabbed Kshs.250/= from PW1's jacket-pockets; they also took her Motorola 2190 cellphone with its charger, and left.

PW1 testified that she had known the appellant herein before the material date ? as a tout in Ikinu Township ? and she identified him as one of the robbers.

Faith Muigai (PW5), a clinical officer at Githunguri Health Centre examined PW1 when PW1 presented with a history of assault which had taken place eight hours earlier. PW5 testified that PW1's bruise-to-the-right-eye was probably caused by a blunt object; and she classified the injury suffered as "harm".

After PW1 identified the appellant to the ***Police, Cpl Odiba*** (PW6) of Ikinu Police Post arrested the appellant.

On the manner in which PW1 said she identified the appellant herein, the learned Magistrate thus stated:

"The evidence of PW1 on the said robbery was also confirmed by that of PW4. I was convinced that [the

appellant herein] was at the scene and that he robbed the complainant of the aforesaid items with others not identified. He was particularly identified by PW1 at the scene. The issue of identification was not in dispute by [appellant herein] and I believe what PW1 said.... The scene of crime was well lit."

Identification of the appellant herein featured again, in respect of the second count. ***Simon Gitau Kimani*** (PW2) testified that he was sitting on a chair in his house on the material night, at 1.00 a.m. when his door was forced open, with the room's electric lights fully working. Four men entered, and PW2 recognised the appellant herein ? though not the other three. PW2 had known the appellant herein who was a tout in Ikinu Market. When he screamed in alarm, the intruders ordered PW2 to be quiet, or be killed; and then it was the appellant herein who opened PW2's drawer, and grabbed Kshs.8,000/=. PW2 testified that the robbers were armed with hammers, machetes and iron bars. The thugs left, locking PW2's door on the outside; and PW2 screamed, attracting a neighbour who came and opened the door. PW2 testified that the robbers at the time they entered his house, did not have masked faces, and he was able to see the appellant herein.

Of PW2's evidence, the learned Magistrate thus remarked:

"**His evidence was credible and I found that he positively identified [appellant herein] at the scene ... [The] [appellant herein] was well known to PW2. He was not just identified at the scene of crime by PW2, but rather, recognized.... The evidence of PW2 was well corroborated by that of PW3 [*Samuel Gichohi Wanderi*] who neighbours PW2 and who stated how, on the material night, he was inside his house when he heard movements from outside. He thought that his workmates had come calling him, [but] when he peeped through his glass window [he saw] somebody removing [the light bulb] which [had been emitting light] ... He saw the person who he identified as [the appellant herein]. He testified on how he had previously known [the appellant herein]. He testified on how he shortly [afterwards] heard the door of PW2 being hit ...."**

The learned Magistrate found the appellant herein guilty as charged, on both the first and second counts ? but reduced the charge in the second count to a non-capital robbery (s. 296 (1) of the Penal Code). On the first count, the trial Court imposed the death penalty as required by law; but on the second count an eight-year term of imprisonment was imposed.

In his grounds of appeal, the appellant contended that he had not been positively identified at the *locus in quo*; that nothing incriminating was found in his possession; that sheer suspicion was the reason for his arrest; that the prosecution case had not been proved beyond reasonable doubt; that his defence was rejected without justification.

At the time of hearing the appeal, the appellant came into Court with a document entitled "Amended Grounds of Appeal", in which he contended that PW1 could not have identified the robber whose face was concealed in a mask; that a first report had not been made by the complainants, describing the suspects; that the trial Magistrate was biased during the hearings; that the trial Court violated his constitutional rights regarding proper interpretation of the proceedings for his benefit; that conviction was entered without any evidence.

Learned counsel ***Mrs. Kagiri*** contested the appeal, and supported both the conviction and sentence. It was urged that the prosecution had proved that the appellant and others not before the Count, robbed both PW1 and PW2 on the material night; the robbers were more than one, and they robbed both PW1 and PW2 of personal items.

Counsel urged that since the robbers had ordered that the lights be switched on, the condition had been created in which witnesses saw the appellant and recognized him; PW1 did see and recognize the appellant; PW2, too, did; and PW3 also saw and recognized the appellant at and about the material time. It was not disputed that there were electric lights illuminating the *locus in quo*. The learned Magistrate found that PW1's evidence was "consistent, clear and credible"; and PW2 also clearly saw and recognized the appellant. Although the robbers had partly covered their faces when they confronted PW1, they had left their faces open when they launched their depredations on *PW2;* and PW2 was engaged in conversation with the robbers even during the robbery. Although PW3 was not a victim of the robbery attack, through his window he did observe the execution of the robbery, at the material time.

Learned counsel urged that the trial Court had improperly reduced sentence on 2nd count ? on the basis that this was simple robbery; but it was not, for there were several robbers; and this fact by itself brought this case into the category of *robbery with violence:* it was enough that there were several robbers, and whether they at the time bore arms or not, was immaterial.

We have carefully considered all the evidence, and the manner in which the learned Magistrate reviewed it.

The foregoing contention by learned counsel is, in our view, justified; and we hereby reverse the trial Court's findings in respect of count 2, and impose therefor the death penalty as provided by law, in place of a lesser sentence.

We hold that the appellant was well identified by PW1, PW2 and PW3 as one of the robbers of the material night; and so we find that the charges in both the first and the second counts are satisfactorily proved.

We dismiss the appellant's appeal. We uphold conviction in both counts 1 and 2; but we enhance the sentence in respect of the 2nd count ? to death as provided by s. 296 (2) of the Penal code.

We order that the sentence in respect of the 2nd count shall remain in abeyance, pending the execution of the sentence in respect of the 1st count.

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 clerks: Huka & Erick

For the Respondent: Mrs. Kagiri

Appellants in person