



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 451 of 2005 & 449 of 2005 (Consolidated)

DANIEL GICHIMU GITHINJI1ST APPELLANT

SYLVESTER ODERO ONDIEK2ND APPELLANT

- AND -

REPUBLICRESPONDENT

(An appeal from the Judgment of Senior Resident Magistrate Ms. *Muchira* dated 31st

August, 2005 in Criminal Case No. 7174 of 2004 at Kibera Law Courts)

JUDGEMENT

The appellants herein were charged with robbery with violence contrary to s. 296 (2) of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the two, on 4th September, 2004 while armed with a dangerous weapon, namely a machete, robbed *Dorothy Awuor Bonyo* of her handbag valued at Kshs.600/=, and at or immediately before or immediately after the time of such robbery, threatened to use actual violence upon the said *Dorothy Awuor Bonyo*.

Dorothy Awuor Bonyo (PW1), the complainant, testified that on 4th September, 2004 at 1.30 pm she was walking along a short-cut path from Ngong Road into Langata. She then noticed that two men were coming towards her from behind, walking slowly. After some time, one of the two men passed her and went in front. As PW1 walked on, she felt somebody touch her from behind; and she turned and saw it was 2nd appellant herein. The 2nd appellant grabbed PW1's handbag, in a tussle which caused her to fall, and 2nd appellant took off with the handbag. When she screamed for help, 1st appellant turned on her, fished out a machete from his clothes, and cut PW1 on the hand as he ordered her to keep silent. As the two robbers took off, the complainant followed, screaming loudly. Members of the public answered the distress-call by chasing the two appellants herein. The 1st appellant who had hidden in the bush some 300 metres away, still clutching his machete was arrested by members of the public who overpowered him and battered him. The 2nd appellant who had gone ahead and hidden in a garage, was also arrested by the members of the public; and PW1's handbag was found in the bush where 2nd appellant had dropped it. Police officers came and re-arrested the appellants herein. PW1 identified in Court her handbag which had been grabbed, as well as the machete which the 1st appellant had been armed with. PW1 said in cross-examination that the robbery had taken place in broad daylight, and that her struggle with the thieves had taken some ten minutes.

PW2, **Patrick Mulwa**, who worked at Redbrick Hotel in Langata, heard PW1's screams at the robbers; and he came out to find that PW1 was giving chase after the fleeing men – one of them holding a machete and the other a handbag. As the two men entered the bush, members of the public came out and gave chase. The 1st appellant jumped out of his bush hide-out and came threatening PW2 with a machete; but PW2 ducked the attempted cut, and hit 1st appellant with a stone; 1st appellant fell and was thereupon arrested. The 2nd appellant ran out of the bushes and entered through a garage, into the hotel where PW2 worked. The 2nd appellant locked himself up in the hotel's reception room until the Police came and rescued him from irate members of the public. PW2 identified the machete and the handbag associated with the robbers, as exhibits.

Joseph Nguta (PW3), the receptionist at Redbrick Hotel, went outside when he heard alarm-screams; and then one man in flight from the mob entered the reception and locked himself in; the Police came and arrested the man at his hide-out.

PW4, **Police Constable Musyimi**, was called by PW2; and he came to the scene with fellow officers, and re-arrested the two appellants herein, taking also a machete and a handbag as exhibits. PW4 charged the appellants with the offence of robbery with violence.

In his sworn defence, 1st appellant said he had passed PW1 on the way, and only turned back when he heard PW1 scream that she had been robbed; but when he did so, members of the crowd threw stones at him and he fell; he was then arrested; he knew nothing of the offence. The 2nd appellant in his sworn defence, said he had entered Redbrick Hotel for the purpose of having his lunch, and that he knew nothing of the offence charged; and he claimed the waiter had framed him up by detaining him in the hotel and then calling the Police to come and arrest him.

From the evidence, the learned Magistrate determined the issues before the Court as: *whether it is 1st and 2nd appellant herein who, while armed with a machete, robbed the complainant; whether the prosecution has proved its case beyond reasonable doubt; whether the defence evidence had shaken the prosecution case.*

The learned Magistrate thus analysed the evidence:

“Accused 2 in defence said he had entered the hotel to eat food But as it is, the prosecution's evidence on how he was arrested is overwhelming, consistent and corroborated. I don't buy his defence. Accused 1 [avows innocence] in defence. I wonder how in broad daylight people mistook him and beat him [up] for having robbed PW1. I find ... the prosecution's evidence credible and overwhelming. ... I find ... [it] easier to believe the prosecution witnesses who have shown ... [that] accused 1 and accused 2 did not leave the eye-path of PW1, and she properly identified the [two] as her [assailants] who [had] cut her... with a [machete] on the hand. I saw the exhibits with which accused 1 and accused 2 were caught red-handed... I find the prosecution's case proved beyond reasonable doubt. I find the two accused persons guilty as charged, and convict them accordingly”.

The learned Magistrate went on to sentence the applicants herein to death, as required by law.

The grounds of appeal raised by the applicants are, in the case of 2nd appellant, as follows: that he had not been properly identified at the *locus in quo*; that the analysis of the evidence, in relation to him, was misdirected; that the trial Court had taken into account unreliable circumstantial evidence; that the trial Court had erroneously rejected his defence. These same grounds were raised by 1st appellant, who also contended that the case had been ineffectively investigated.

Representing both appellants in this Court, learned counsel **Mrs. Ngari** submitted that proper identification of suspects had not taken place, since the offence is “said to have taken place on a public road”, and “public roads are used by members of the public”, and “when a commotion arises, there is a likelihood of mistaken identity”.

Mrs. Ngari submitted that the complainant could not have properly identified her attackers on the material day: for “she did not describe even the physical appearance of her attackers, or even how they were dressed, notwithstanding her evidence that she struggled with them for over ten minutes”. Counsel urged that it would have been “very important for the prosecution to hold an identification parade, for the complainant to confirm that the people she saw behind her, are the same people who attacked her”.

Counsel urged that PW2 who was the first to arrive at the *locus in quo* could not have seen the attack on the complainant, and so had only relied on the information from the complainant; and so, in effect, there was only one witness on identification, and an identification parade should have been held. Counsel urged that the learned Magistrate should have administered to herself a caution, at the time she relied on the complainant’s evidence of identification.

Learned counsel also submitted that there were contradictions in the prosecution evidence, with one witness saying that the 1st appellant had been found with machete and handbag, but another witness said it was 1st appellant who had the machete, while 2nd appellant had run away with the handbag.

Learned counsel submitted that the appellants had given serious defences which should have been taken into account by the trial Court.

Learned counsel **Ms. Gateru**, for the respondent, contested the appeals, and urged that the prosecution had proved their case to the required standard. On the evidence, counsel noted that the offence took place in broad day-light, at 1.30 p.m., and that the complainant positively identified both appellants; she saw the role played by each of the appellants: 2nd appellant held her by the shoulders, and reached for her handbag, overpowering her and felling her; and 1st appellant came with the machete to intimidate the complainant when she began to raise alarm. The complainant followed behind, and sent out screams, attracting PW2 to the scene as the two appellants were running away; and 1st appellant even accosted PW2 with his machete, but was overpowered and arrested. This was a clear-enough identification of 1st appellant as the aggressor wielding a machete; and as for 2nd appellant, he escaped into the hotel’s reception, apprehending crowd-rage; and he was arrested therein.

Ms. Gateru submitted that any contradiction in the evidence, as to whether 2nd appellant hid in the garage or at the reception, was an immaterial contradiction; for PW1 may not have known the exact description of the building into which 2nd appellant had sought refuge.

Ms. Gateru submitted that those who attacked PW1 were more than one; they grabbed and took PW1’s handbag; one of these attackers was armed with a machete – a dangerous weapon – and made threats at the complainant. This, counsel urged, supports a charge of robbery with violence.

Of the defences, counsel urged that they had been duly considered by the learned magistrate, who rightly dismissed them as making no dent on the prosecution case. Moreover, counsel urged, the defences merely confirmed the prosecution evidence, as to the *locus in quo*.

We have carefully considered the evidence on record, and the manner in which the trial Magistrate analysed the same, in coming to her verdict. All the evidence shows agreement that the complainant, the 1st and the 2nd appellants were in the same area, the *locus in quo*, at the material time. The complainant then gives clear testimony that 2nd appellant violently wrenched her handbag from her, and took off with it; she also testifies that 2nd appellant was acting in cahoots with the 1st appellant who had a machete, and who threatened her if she persisted in screaming out in alarm. The complainant testifies that both appellants took off, and she followed them screaming for aid. Then at that very moment, 1st appellant with his said machete accosted PW2; but PW2 dealt upon him a blow which immobilized him, and enabled members of the public to arrest him. In the meantime, 2nd appellant who apprehended crowd ire, escaped into a hotel room; and he was securely apprehended therefrom.

It is clear to us that the complainant’s evidence of identification for 1st appellant is abundantly

corroborated by the factor of the machete; by the complainant's perception; and by the testimony of PW2. This is overwhelming proof that 1st appellant was one of the robbers of the material day.

No less poignantly is 2nd appellant identified. Firstly the complainant's reliable testimony shows 2nd appellant to be the man who seized her handbag, struggled with her and felled her, in broad daylight, and then took off on foot. The recovery of the said handbag close to the *locus in quo* is a circumstance which corroborates the complainant's testimony. Then, not only did the complainant perceive 2nd appellant run away and coming towards members of the public brought out by the complainant's alarm, but PW2 and PW3 of Redbrick Hotel saw him mount a ruse, by seeking refuge in the hotel where he was by no means a legitimate client. The complainant too, saw 2nd appellant avoid trouble with Good Samaritans, by nipping into the hotel. All this is overwhelming evidence supporting the charge that 2nd appellant, along with an armed gangster, 1st appellant, were involved in a robbery attack on the complainant on the material day.

It is our finding that the learned Magistrate judiciously assessed the evidence, and came to the right conclusion. We dismiss the appeal by both appellants; uphold the conviction in each case; and affirm the sentence meted out in respect of each appellant.

Orders accordingly.

DATED and DELIVERED at Nairobi this 4th day of February 2009.

J. B. OJWANG H. A. OMONDI

JUDGE JUDGE

Coram: Ojwang & Omondi, JJ.

Court clerk: Huka & Erick

For the Appellants: Mrs. Ngari

For the Respondent: Ms. Gateru