



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

Criminal Appeal 237 of 2006

VICTOR MWAI KIHUROAPPELLANT

- AND -

REPUBLICRESPONDENT

(An appeal from the Judgment of Senior Resident Magistrate F. M. Nyakundi dated 5th May, 2006 in Criminal Case No. 1042 of 2004 at Nairobi Law Courts)

JUDGEMENT

The main charge brought against the appellant herein was robbery with violence contrary to section 296 (2) of the Penal Code (Cap.63, Laws of Kenya); and the particulars were that the appellant, on 22nd December, 2003 along Outer Ring Road in Nairobi, jointly with others not before the Court, and while armed with a dangerous weapon namely a pistol, robbed *David Kang'ethe Ng'ang'a* of his cellphone, Nokia 3310 by make, valued at Kshs.8,500/= and his national identity card, his driving licence and cash in the sum of Kshs.7,000/= – all valued at Kshs.15,500/= – and at or immediately before or immediately after the time of such robbery, used actual violence upon the said *David Kang'ethe Ng'ang'a*.

In a second count, the appellant was charged with escape from lawful custody contrary to s. 123 of the Penal Code. The particulars were that the appellant, on 22nd December, 2003 at about 6.25 p.m. at Kariobangi Police Post in Nairobi, being in the lawful custody of P.F. No. 49023 Police *Constable Festus Nyakeno* after having been arrested for the offence of robbery with violence, escaped from such lawful custody.

The case for the prosecution was that on the material date at 10.15 a.m., the complainant was walking to office at Kariobangi Light Industries, having just been to the Co-operative Bank branch at Kariobangi; and on the way he bought an air-time card for his cellphone, Nokia 3310, sim-card No. 0722-342410 and he stopped to feed the air-time on the cellphone; and at that point in time he saw a man walk ahead of him, turn around, whip out a pistol and order him to drop the cellphone, or be shot. When PW2 tried to turn and dash away, two young men grabbed him. When the complainant (PW2) tried to use one of the two young men as a shield against the gun, the gun-man threatened him and ordered him to let go the apparent accomplice of the gun-man. And in the meantime one of the young men rummaged in the complainant's pockets and grabbed a Nokia 3310 cellphone, cash in the sum of Kshs.7,000/= , a driving licence, and an identity card. This young man who helped himself to the several items, the complainant testified, was the appellant herein. After the complainant screamed in alarm, members of the public came in aid, and chased after the mid-morning attackers. At a distance of some 500 metres from the *locus in quo*, Police officers on patrol received word of the robbery attack; and they too gave chase after the

attackers. The Police officers, PW3, PW4 and PW5 heard alarm-shouts of “Thief! Thief!”, and they saw three young men on the run, with the crowd in hot-pursuit. The said officers also gave chase, and the three young men in flight went separate ways, but PW3 shot in the air and one of the suspects who got scared, drew something out of his pocket and cast it away. PW3 managed to catch the young man, who PW4 handcuffed and, with the help of PW5, the appellant was taken up to the Police post. The three officers identified the appellant herein as the suspect who they arrested as he was being chased by the mob.

The complainant identified the appellant herein, and reported that the appellant and the appellant’s escaped-companions, had robbed him of money and several items including his cellphone. When the appellant was searched, nothing was found on him. But he was held in Police custody.

When the complainant called his cellphone number it kept ringing – and he suspected it was abandoned at the scene of arrest of the appellant herein; and when he retraced his steps to the scene of the arrest, he called his cellphone number and it rang – and so it was recovered and taken to the Police station.

On the same date, 22nd December, 2003 Police Constable *Festus Nyakeno* (PW1), at Kariobangi Police Station, had escorted eight prisoners who asked to be allowed to use the toilets – and for this purpose he was assisted by *Police Constable Munene* and *Police Constable Kimano* (PW5). When it was the turn of the appellant herein to use the toilet, he did, but on coming out, hopped over the fence, next to the toilet. PW1 paid for this escape by being dismissed from the Police Force; but he decided on his own to investigate and pursue the matter, and, on 15th April, 2004 as he walked in Kariobangi, he got information that the appellant herein was at Huruma-Kiamaiko. PW1 then informed PW3, PW4 and PW5 who accompanied him, and the appellant herein was arrested and charged with the second count.

The appellant herein, in his unsworn evidence, said that he had been arrested as one of the robbers, entirely on the basis of mistaken identity.

The learned Magistrate stated the issue for determination as: whether the prosecution has proved the charges facing the appellant herein, beyond any reasonable doubt.

Although the appellant had sought to rely on the fact that nothing had been recovered from him when he was arrested on the day the robbery took place, the trial Court noted that there was reliable evidence that the appellant had thrown something away just before being arrested by PW3, on the material day; and thereafter it turned out that the complainant’s stolen cellphone was at the place where the arrest had taken place. Three witnesses, PW2, PW3 and PW4 had later identified the appellant herein after his second arrest, in an identification parade conducted at Kasarani Police Station on 20th April, 2004.

The learned Magistrate held that the appellant herein had been clearly identified as one of the robbers of the material day; in the words of the trial Court:

“It is evident that the accused person was clearly seen and identified by the complainant in circumstances that cannot be disputed. Although the accused has stated that he has no knowledge of the offences and was arrested as he ran for safety after hearing gun-shots, his testimony is contradicted by the three officers who met....him and his two accomplices.”

The learned Magistrate thus found:

“I am satisfied from the evidence on record that the accused person was one of the three people who at gun-point, violently robbed PW2 of his cash, Ksh.1000/=, mobile phone, Nokia 3310 and other valuables on the material day. He has positively and properly been identified by PW 2, 3, 4 and 5 and I am in no doubt at all that he was one of them. A subsequent identification parade carried out confirmed he was one of the three, as these witnesses have confirmed”.

The learned Magistrate found both counts facing the appellant duly proved beyond any reasonable doubts, and he rejected the defence case, and found the appellant guilty on both counts. The trial Court sentenced

the appellant to death on the first count; and to six months' imprisonment on the second count.

In his grounds of appeal, the appellant contended that the circumstances accompanying his arrest following the robbery were not conducive to accurate identification; that the identification parades at which he was identified following his second arrest were not properly conducted; that he was not arrested while in possession of any item to link him to the robbery offences; that the prosecution evidence was "marred with inconsistencies and contradictions"; that his evidence had been improperly rejected by the trial Court.

It fell to learned counsel **Mr. Kangahi** to canvass the appellant's grounds of appeal, and he contended that there had been no proper identification of the appellant herein at the *locus in quo* – because PW3 (**Police Constable Rotich**) had said the complainant came along after he had arrested the appellant; it was being contended that the complainant had not continuously had the appellant in sight, following the robbery incident. **Mr. Kangahi** urged that it was unsafe for the Court to find the appellant guilty.

The State, however, supported both conviction and sentence. Learned counsel **Mr. Makura** submitted that the prosecution had adduced overwhelming evidence showing that the appellant was one of the robbers on the material occasion. PW1 who had charge of the appellant at the time he escaped, in clear daylight at 6.25p.m., had been able to identify him and to have him re-arrested several months later; and PW1's evidence had been supported by the complainant who had been robbed in broad daylight, at 10.15 a.m. on the material day; and the appellant had then been immediately arrested and identified by PW2. Counsel urged that following the robbery incident, there had been no break in the chain of events leading to the arrest of the appellant – and thus, there was no possibility of mistaken identification. Counsel submitted that, in a properly-conducted identification parade by PW6, the complainant positively identified the appellant following his second arrest. **Mr. Makura** urged that both mode of arrest, and of identification of the appellant, showed beyond reasonable doubt that he was the one who had robbed the complainant. Counsel urged that the appeal be dismissed.

We have considered all the evidence, and paid special attention to whether it showed the appellant beyond doubt as one of the robbers of the material date.

We have taken note that the robbery took place in broad daylight, and we believe the complainant's testimony that he very well saw and identified the appellant as one of the robbers; and this act of identification was repeated on a second occasion following the appellant's escape from Police custody, when, at an identification parade, the complainant again identified him. We are in agreement with the findings of the trial Magistrate, that the appellant was repeatedly identified by a good number of witnesses – PW2, PW3, PW4 and PW5. We do not, like the learned Magistrate, believe the appellant's testimony that he had been mistakenly arrested in connection with the offence in question. Like the learned Magistrate, we find the appellant's defence to be lacking in veracity, and we reject it.

Accordingly, we hereby dismiss the appeal; uphold the conviction; and affirm sentence as meted out by the trial Court. We also uphold the appellant's conviction on the second count, and affirm sentence in that regard. But we order that the sentence imposed in respect of the second count shall abide the execution of the sentence on the first count.

Order 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 and Erick

For the Appellant: Mr. Kangahi

For the Respondent: Mr. Makura