



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL 81 OF 2007

JOEL NDUNGU KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Joel Ndung'u Kamau alias ZY the appellant herein was charged with the offence of **robbery with violence contrary to section 296(2) of the Penal Code**. The particulars of the offence state that on the 4th day of August, 2003 at 5.00 a.m. at Kwa-Amos trading centre Bahati in Nakuru District of the Rift Valley Province jointly with others not before court, being armed with dangerous weapons namely rungu and simis robbed Anne Wanjiru Macharia of cash money Kshs 10,000/=, a mobile phone make siemens C-35, one sack of rice, a key holder and a school bag all valued at Kshs 20,800/= and at or immediately before or immediately after the time of such robbery used personal violence to the said Anne Wanjiru Macharia.

The appellant pleaded not guilty to the charge, he was tried by the Senior Resident Magistrate Nakuru. He was acquitted of the first charge but found guilty and convicted of the second count and sentenced to the mandatory death sentence.

The appellant being dissatisfied with the conviction and sentence appealed and in his petition of appeal he has challenged the trial magistrate's decision which is based on the evidence of identification by recognition despite the fact that circumstances for positive identification can be said to have been difficult. The trial court was also faulted for relying on evidence of identification parade which could not stand the test of law. The trial court failed to consider that the parade was conducted fourteen (14) months after the offence. Finally the trial court relied on evidence which was not credible and failed to take into account the defence by the appellant which was plausible and should have earned the appellant an acquittal.

On the part of the State the learned State Counsel **Mr. Njogu** opposed this appeal on the grounds that there was overwhelming evidence by PW1 the victim of the robbery who recognised the appellant. It was corroborated by the evidence of PW2 who also recognised the appellant as somebody who used to work at Amos Hotel at Engashura. When word went round that the appellant had been arrested PW1 was able to identify him at an identification parade.

This being a first appeal this court is mandated to reconsider the evidence, re-evaluate it itself and arrive at its own independent judgment on whether or not to allow the appeal. See the case of **Okeno vs. Republic** [1972] E.A. 32. We now set out briefly the evidence that led to the conviction and sentence of

the appellant.

On 4th August 2002 **Ann Wanjiru Macharia (PW1)** who is also the complainant in this case testified that she was inside her house when the dog started barking. **Joseph Ndungu Wambugu (PW2)** who was her employee had gone out to milk cows. That is when a gun of four men entered PW1's house. PW1 testified that she was able to identify the appellant as the one who identified her as the owner of the house. She was threatened with a pistol and ordered to go under the bed. They ordered her to give them money where upon she produced Kshs 10,000/= from her purse. The robbers also took her telephone valued at Kshs 12,000/- and her daughter's school bag. The assailants also dragged PW2 into the house and ordered him to lie down. The robbery took about 30 minutes. Both PW1 and PW2 testified that they were able to see the appellant. After the robbery the assailants disappeared in motor vehicle registration number KAQ 385Q. The owner of the motor vehicle was inside the boot and was later identified as Mr. Dominic Kimatta Advocate. PW2 testified that he was able to recognise the appellant who used to work at Amos Hotel. The matter was reported at Bahati Police Station and PW1 stated that she would be able to identify some of the robbers if she saw them. On 1st November 2004 PW1 was called by the Police. She attended an identification parade where she identified the appellant. PW1 was treated for the injuries she sustained during this ordeal by **David Mbugua (PW6)**. According to PW6 the complainant sustained soft tissue injuries, a fracture of the forearm. These injuries were first treated at the Provincial General Hospital Nakuru. He classified the injuries as grievous harm and in his opinion the weapon used to inflict the injuries was a blunt object. He filled the P3 form which was produced in evidence.

This matter was investigated by **PC Daniel Monari (PW7)** who recorded statements from the witnesses. He was instructed by the O.C.S. when the appellant was already in the Police cells on 19th October 2004. He therefore organised an identification parade which was conducted by **Chief Inspector Patrick Oduma (PW4)** on the same day. PW4 testified that he had received a report of robbery on 4th of August 2003. He later received a report from an informer that the appellant was at the report office on 19th October 2004 that is when he rushed to the Bahati Police Station and arrested the appellant. All over a sudden word went round that the appellant who was known as *ZY alias* Ndungu had been arrested. Immediately PW1 came to the station and alleged that she had been robbed on the night of 4th August 2003, thereupon PW4 arranged an identification parade and PW1 was able to positively identify the appellant.

Put on his defence the appellant gave a sworn statement of defence. He denied having committed the offence. He testified that he used to run a hotel with his wife known as Amos Hotel where he used to every day between 6.00 a.m. – 9.00 p.m. On 19th October 2004 he had gone to buy provisions. When he returned he was informed that his wife had been arrested and taken to Bahati Police Station. He followed the wife and while there he was arrested and put in a parade and was surprised to learn that he had been implicated with a robbery. His evidence was also supported by his wife. Upon evaluation of the above evidence the trial court was satisfied that the prosecution proved to the required standard the charge spelt out under count II. The trial court also considered the defence offered by the appellant and his witness which was dismissed as lacking in merit. The appellant was therefore convicted and sentenced to the mandatory death sentence.

This appeal turns on the issue of whether the appellant was convicted on sound evidence of identification and whether the prosecution proved their case to the required standard and whether the defence by the appellant was plausible. This offence took place on 4th August 2003. According to the complainant and PW2 the matter was reported at Bahati Police Station. There is no evidence of what happened between the time the offence occurred up to 19th October 2004 when the appellant was arrested. This is a period of about 14 months delay which has not been explained at all by the prosecution's witnesses. According to PW2 he was able to identify his attacker as the appellant and during cross examination he said that he used to see the appellant at an Hotel at Kwa-Amos centre which is not far from PW1's home. If the appellant comes from within the neighbourhood and was indeed running a hotel the question that lingers in our minds is why it took the Police 14 months to apprehend the appellant. Had the appellant escaped or ran away from being arrested? Those questions are not answered. How the complainant appeared at the Police Station on 19th October 2004 is also not clear

from the evidence. In this case PW1 testified that she recognised the appellant during the robbery. It is trite that once a witness has been able to identify by way of recognition the assailant and identification parade is not necessary. This was the holding in the case of **Ajode Vs Republic [2004] 2 KLR 81**

“Once a witness has been able to see the suspect before the parade is held, then he will be doing no more than demonstrating his recognition of the suspect and not identifying the suspect. That indeed is the reason why no identification parade is required in cases of recognition.”

Due to a long passage of time between the time when this offence occurred and when the identification parade was conducted we are not satisfied that the evidence that there was positive identification which to sustain a conviction. The upshot of the above reasons is that the appeal by the appellant has merit and is hereby allowed. The appellant is acquitted of the charge of robbery with violence. His conviction is quashed and the death sentence is set aside. The appellant is to be released forthwith unless otherwise lawfully held.

Judgment read and signed on 14th day of May 2009

M. KOOME

JUDGE

M. MUGO

JUDGE