



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 29 OF 2006

OLIVER KAGIA.....1ST APPELLANT

GURIF MWATHI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellants herein Oliver Kagia and Gurif Mwathi (*1st and 2nd appellant respectively*) were charged with another 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 10th day of January 2004 at site phase 11 Nyahururu 2004 in Laikipia District within Rift Valley Province jointly being armed with a dangerous toy pistol and metal bar robbed Gabriel Muriithi Mugo of Kshs 200/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence against Gabriel Muriithi Mugo.

The SPM Nyahururu tried the appellants, they were found guilty and upon conviction, they were sentenced to the mandatory death sentence. The appellants appealed against the conviction and sentence. During the hearing of the appeals, the two appeals were consolidated and heard together. The appellants also added in written submissions, which they relied on in support of their appeals.

The appellants challenged the evidence adduced by the prosecution witnesses which they contended was contradictory and full of inconsistencies. If the trial magistrate properly evaluated the evidence it would have earned them an acquittal. The appellants also challenged the conviction, which was based on the evidence of identification when the circumstances for a correct identification can be said to have been difficult due to the prevailing circumstances at the time when the alleged offence occurred. Lastly the judgment of the trial court was also faulted for failure to take into account the defence by the appellants, which defence was plausible and if taken into consideration would have earned them an acquittal.

On the part of the State **Mr. Njogu** did not offer any arguments in this case on the grounds that he had not been able to prepare for the appeal. As required of this court by law we set out albeit briefly the evidence as presented before the trial court. On 10th January 2004 **Gabriel Muriithi Mugo** had gone to the toilets outside his house. As he was returning to his house he saw two men who ordered him to sit down. Later on they ordered him to enter the house and sit on the floor. When they entered the house they switched the lights off. One of the assailants stepped on his back, while the other one went to the bedroom. They later on ordered him to follow them to the bedroom. While in the bedroom, PW1

realised that the assailants were armed with a fake gun. He started screaming, and fighting the thugs, one of the assailants hit him with a metal rod while the other two started asking PW1 not to make noise.

PW1 armed himself with a sufuria and started chasing the robbers out of the house. While the robbers were leaving a third assailant joined them. All this time PW1's wife **Ann Nyatorio Muriithi (PW2)** was also in the bedroom. She testified that the robbers switched off the lights. One of the assailants went to the corridor and brought PW1. PW1 started screaming and struggling with the assailants. By that time the lights had been switched on. PW2 just sat by the bed and watched what was happening. The whole episode took about 12 minutes. PW2 said that she was able to identify the assailants. They were chased out by PW1. On the way out, the robbers stole Kshs 200/= belonging to PW1 from the table. They also forgot their torch in the complainant's house.

PW1 was injured on the back and PW2 started applying first aid when the police vehicle arrived with police officers. Two days later on 13th January 2004 while PW2 was at her place of work she saw some people sitting near a shoe shiner and she was able to identify them as the robbers who had attacked them. Soon PW1 joined her and confirmed that they were the same people who had attacked them. He rushed to the Police Station but when he returned with the Police officers the suspected robbers had moved from the spot where he had seen them. PW1 with the help of the Police went round the bus stop and spotted the suspects who were sitting near the shed. He identified them to the Police and the three of them were arrested.

PC Eustace Machage [PW4] received a report that there was a robbery on 10th January 2004 at about 10.25 p.m. At site Phase II estate. When he visited the scene he found robbers had attacked PW1 and PW2 while armed with a metal bar and a toy pistol. They escorted PW1 to the hospital and Dr. John Were of Nyahururu District Hospital who completed the P3 form examined him. He found that there was a cut wound on the right upper eye, which in his opinion was inflicted with a blunt object. He classified the degree of injury as harm and signed the P3 form on 13th February 2004.

PW4 testified that the complainant reported to the Police that he would be able to identify the people who attacked him if he saw them again. On 13th January 2004 the complainant reported that he had spotted the robbers. He pointed them out to PW4 who arrested the three appellants. The three appellants were charged with the offence of robbery with violence.

After considering the above evidence the learned trial magistrate was satisfied that both PW1 and PW2 were able to identify the appellants with the electricity light that illuminated the scene of the robbery. The robbery took 12 minutes, which was ample time for the complainant and his wife to identify the attackers. It is PW2 who spotted the appellants and alerted the Police who effected the arrest. The trial court was satisfied that the evidence by the complainant and his wife was cogent and the defence by the appellants did not dent the otherwise strong case put up by the prosecution.

It is clear from the judgment by the trial magistrate that the appellants were convicted on the basis of the evidence of identification by the complainant and his wife. The complainant testified that immediately the robbers they put off the rights confronted him. They then ordered him to sit on the corridor. One of the robbers guarded him while the other one went to the bedroom. Later on he was also ordered to go to the bedroom. That is when the lights were put on and there was a scuffle because the complainant realised the assailants were after all armed with a toy pistol. The complainant testified that one of the assailants hit him with metal bar on the back. That is when he became furious and started screaming and chased away the assailants with a sufuria.

The police arrived immediately and escorted the complainant to the hospital. However the complainant and his wife did not give the full description of the assailants to the Police. This was necessary to rule out a possibility of a mistaken identity. From their evidence the whole episode of the robbery took about 12 minutes. Within this time there is sometime when the lights were off. What is clear is that the lights were on when the complainant, PW1 and the two assailants were in the bedroom and the third assailant joined the two when they were disappearing. From the evidence before the court it is not clear at what time the third assailant was identified because he was not in the bedroom. While in

the bedroom there was struggle and a scuffle. The complainant was screaming. He had been hit with a metal rod when he armed himself with a sufuria and started fighting the assailants.

What is discernable from the evidence is that the lights were switched on for a short while. From our own evaluation of this evidence we are not satisfied that the circumstances prevailing within those few and very tense moments the complainant and his wife were able to identify the assailants. The three appellants were arrested two days later on because PW2 spotted them outside her business premises and identified them as the robbers. They were arrested and the Police especially for PW2 to identify the assailants conducted no identification parade. Apart from lack of identification there was no other circumstantial evidence that linked the appellants with the offence of robbery with violence.

After carefully evaluating the evidence before the trial court we do not find it safe to sustain the conviction and sentence, which we accordingly quash and set aside. Unless the appellants are otherwise lawfully held they are to be set at liberty forthwith.

Judgment read signed on 14th day of May 2009

M. KOOME

JUDGE

M. MUGO

JUDGE