REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 225 of 2007

CHRISTOPHER MWANGI MAGUA ……...… APPELLANT

versus

REPUBLIC…………………………………. RESPONDENT

(Being an appeal from the conviction and sentence of R. A. A. OTIENO, Senior Resident Magistrate

in the Chief Magistrate's Criminal Case No. 4624 of 2005 at NYERI)

CONSOLIDATED WITH

JOSEPH MEURI LONGISA. ……………....…… APPELLANT

versus

REPUBLIC…….………………..……………. RESPONDENT

(Being an appeal from the conviction and sentence of R. A. A. OTIENO, Senior Resident Magistrate

in the Chief Magistrate's Criminal Case No. 4624 of 2005 at NYERI)

JUDGMENT

The appellants were charged in the lower court with ***robbery with violence contrary to section 296(2) of the Penal Code.*** After both appeals were consolidated the appellant CHRISTOPHER MWANGI MAGUA was made the first appellant. JOSEPH MEURI LONGISA was made the second appellant. According to the charge sheet in the lower court Joseph Meuri Longisa was the second accused person. Christopher Mwangi Magua was the third accused person. The first accused was acquitted by the lower court. The order in which the appellant appear on the charge sheet was made an issue by the second appellant when he argued his appeal. We feel it is important to deal with that issue at the beginning of this judgment. The second appellant argued that the title of the proceedings indicated that he was the third accused in the lower court. This he said caused confusion and should lead to the success of his appeal. During the trial in the lower court it became clear that the appellants did not keep to the order of their appearance on the charge sheet. As a result they were instances that witnesses referred to first accused as Christopher Mwangi Magua because he was seated as the first person on the court's bench when infact he ought to have been seated as the third accused person. That also was the case with the

second appellant. This prompted the prosecutor on 31st October 2006 to bring to the attention of the court of what the appellants had been doing that is, changing places with each other whenever the case was adjourned. This was put to the appellants each one of them and they confirmed that they had been sitting in the wrong places. The first appellant stated:-

"***There was a time I was not sitting here."***

The second appellant in response said:-

"***What the prosecutor has said is true."***

That being the case the submissions by second appellant that there was confusion in the order of the accused person has no merit. It certainly did not affect the learned magistrate's decision in this case. The lower court convicted both appellants of simple robbery contrary to Section 296(1) of the Penal Code. She sentenced both the appellants to 14 years imprisonment. This appeal relates to both conviction and sentence. This court is duty bound to re-evaluate the evidence of the lower court. That duty is succinctly set out in the case of **OKENO vs REP (1972) EA 32.** In that case the court of appeal had the following to say:-

"***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya VS R., (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs R.(1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post (1958)E.A. 424."***

PW 1 stated on the night of 28th/29th September 2005 at about 11.45 p.m. he left his bar called Forest Inn Bar. He was on his way home. He met three men at a place where there was light. He knew them. He referred to the first appellant as Mwangi. Mwangi was his former employee. He identified the first appellant before the court. He also knew the 2nd appellant because he was a watchman at a bar called Senior Joint Bar. The third person was also a watchman but is not the subject of this appeal. PW 1 passed the three men and said:-

"***I did not greet them."***

As he passed them the second appellant together with the other accused person were on one side whilst the first appellant was on the other side. He had gone for about 20 -30 metres from his bar. As he passed them he was hit on the lower lip. On realizing that he was being attacked he began to struggle with them. He screamed but was warned by the assailants not to scream. During that struggle he injured his hands and legs. He managed to run back towards his bar but he fell down and it was at this time that he was pulled by the 2nd appellant. By then he was bleeding. The appellants managed to steal from him everything that he had in his pockets. He then struggled back to his bar, knocked at the door and an employee called Rodah opened the door. He was taken to hospital and was admitted until 12th October 2005. By the date he was giving his evidence in the lower court that was on 3rd March 2006 he was still attending hospital as an outpatient. He had undergone two operations. When he reported the matter to the police he described the people who attacked him. He informed the police that two of them were locally referred to as Turkanas. The third person he said was Mwangi. He identified the two Turkanas as the other accused person and the second appellant. After the incident he said that Mwangi the first appellant disappeared. He said that he lost a Nokia phone, 2 ATM cards and cash kshs. 5000. Those items were not recovered. On being cross examined by the 2nd appellant he said that he had known him to work at Senior Joint Bar for eight years. PW 2 was Rodah Wacuka. She confirmed that she was an employee of Forest Inn Bar in Ruringu. On the night of 28th September 2005 at about 11.45 pm she had

finished her work at that bar. Her employer PW 1 requested her to open for him to go. He left and after a very short while she had a single scream. There was electricity security light and she looked outside through a window she saw people struggling. She saw the 2nd appellant struggling with PW 1. The second appellant was trying to push PW 1 towards the back of the building. This witness identified to the court the second appellant. She stated that she knew him before since he used to work at the Senior Joint Bar. After a short while PW 1 knocked at the door and told her that he had been attacked. She noted that his tooth was broken and that he was bleeding. He also did not have his phone. She summoned a taxi which took PW 1 to hospital. On cross examination she confirmed that the attack took place about 20 – 25 metres away from Forest Inn Bar. She further stated there were three security lights outside where she saw three people assaulting PW 1. She clearly saw the attack. The evidence of PW 3 who was a police officer was affected by the accused person's failure to sit according to the order appearing in the charge sheet. However in going through his evidence we were able to ascertain that he arrested the 2nd appellant together with other persons. PW 1 was recalled for further cross examination. Second appellant cross examined him and he responded by saying that he had seen him about a month before the incident. He further confirmed that the Senior Joint Bar was adjacent to his bar Forest Inn. The first appellant also further cross examined him and he responded by stating that he knew the first appellant. He was sure that he was amongst the people who attacked him. Again the evidence of PW 1 during this further cross examination was affected by the appellant switching their order of sitting. PW 5 was a police officer. He stated that PW 1 identified the persons who attacked him and stated that one of them was a watchman in a premises next to his bar. He also confirmed to the police that there was security light during the attack. The lower court found that the appellants had a case to answer. In their defence the first appellant stated that he had initially been arrested for allegedly stealing a computer. He however denied robbing PW 1. The second appellant gave evidence relating to his movement on the day of arrest. He however admitted that he was known by PW 1. However he denied the offence. Having considered the evidence adduced before the lower court it becomes very clear that PW 1 recognized the appellant. The first appellant was his former employee. The second appellant was a watchman employed in the bar next to his. He knew them so well that as he walked toward them he contemplated greeting them. He had the advantage of security light which enabled him to see the appellant. In his evidence he walked toward the appellant. He therefore had an opportunity to observe them. It was clear that he recognized them as people he knew. Recognition is more satisfactory more than identification. This indeed was the holding in the case of **ANJONONI & OTHERS VS REPUBLIC (1980) KLR 59** where the court of appeal stated:-

"***........ The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in cases like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other ....***"

The fact that there was security light was confirmed by PW 2. The evidence of his attack by the appellants was corroborated by PW 2. She by the aid of security light saw clearly the 2nd appellant attacking PW 1. The appellants however denied the offence. We are however of the view that the evidence of PW 1 and 2 overwhelmingly showed that the appellant committed the offence. On conviction we are satisfied that the prosecution proved the case against the appellants beyond the reasonable doubt. Whereas as we are of the view that the learned magistrate correctly assessed the prosecution evidence and indeed concluded that that evidence satisfied the burden of proof we however part way with her in her conclusion in her considered judgment that the offence of robbery with violence was not proved because there was no evidence of use of violence. The learned magistrate stated in her judgment thus:-

"***The complainant himself stated that a P3 form was filled. However, none was produced before court. No medical evidence tendered. The court was therefore not able to ascertain that infact the complainant was injured during that incident and what injuries he sustained. That being so, I find that the use of violence either immediately before, during or immediately after the robbery had not been proved. In the circumstances the charge of robbery with violence contrary to Section 296(2) has not been proved.***"

The learned magistrate proceeded to invoke the provisions of Section 179 Criminal Procedure Code and reduced the appellants charge from robbery with violence contrary to Section 296(1) of the Penal Code. In our view the learned magistrate erred. The ingredients of robbery with violence were well set out in the case of **JOHANA NDUNGU vs REPUBLIC Criminal Appeal No. 116 of 1995 (unreported)** the Court of Appeal had this to stay:-

"***In order to appreciation properly as to what acts constitute an offence under Section 296(2) one must consider the sub-section in conjunction with Section 295 of the Penal Code. The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in Section 296(2) which we give below and anyone of which if proved will constitute the offence under the sub-section;***

1. If the offender is armed with any dangerous or offensive weapon or instrument, or

2. If he is in company with one or more other person or persons, or

3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.

The court continued after explaining the essential ingredients under the first two sets of circumstances:-

"***With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under subsection (2) proved and convict accordingly".***

As can be seen from the above case the evidence adduced in the lower court at least one of the ingredients of robbery with violence was proved. There was evidence that the appellants were more than one, indeed there were three persons who robbed PW 1. The learned magistrate therefore should not have reduced the charge against the appellants to simple robbery. When the appellants appeal was heard by us, we failed to warn them that we could if we found the evidence satisfied the charge of robbery with violence set aside the learned magistrate's reduction of the charge and reinstate the original charge of robbery with violence. Having not given that warning to the appellants however we cannot interfere with the lower court's decision. The Court of Appeal in the case of **AJODE V REP (2004) 2 KLR** had this to say where the trial court reduced the sentence the charge:-

"***It is clear that injury of the victim itself is not the only ingredient of the offence of robbery under Section 296(2) and to reduce the charge to that of simple robbery under Section 296(1) because none of the witnesses was injured is not correct in law."***

In conclusion we find that the appellant's appeal has no merit and we do hereby dismiss both appeals.

Dated and delivered this 11th day of May 2009

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE