



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 138 & 139 of 2006

1. SAMUEL MURIITHI MBUI

2. NZAU MULIAPPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

[Being an Appeal from the original conviction and sentence in Kitui PM's Court

Criminal Case Number 1608/2005 by E.K Makori SRM on 23.10.06]

JUDGMENT

1. The Appellants herein, Samuel Mureithi Mbui and Nzau Muli were charged in Kitui PM's Court Criminal Case Number 1608/2005 with three counts of the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars thereof are that in :

“Count 1- On the 29th day of June 2000 at Kalundu market in Kitui District of the Eastern Province, jointly with others not before court while armed with dangerous or offensive weapons to wit an AK 47 rifle and a panga robbed Geoffrey Kasamba Mue of cash Kshs. 3,000/= and at or immediately before or immediately after the time of such robbery killed the said Geoffrey Kasamba Mue.

Count II; - On the 29th day of June 2000 at Kalundu market in Kitui District of the Eastern Province, jointly with others not before court while armed with dangerous or offensive weapons to wit an AK 47 rifle and a panga robbed Jane Esther Kasamba of cash Kshs. 5,000/= and at or immediately after or immediately before the time of such robbery wounded the said the Jane Esther Kasamba.

Count III- On the 29th day of June 2000 at Kalundu market in Kitui District of the Eastern Province, jointly with others not before court while armed with dangerous or offensive weapons to wit an AK 47 rifle and a panga robbed Jeremiah Kinyamasyo of cash Kshs. 4,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Jeremiah Kinyamasyo.”

2. They denied all the charges and at the hearing PW1, Jane Esther Kasamba stated that she was at her shop in the Kalundu area at 8 p.m on the material night together with her husband, Geoffrey Kasamba as well as one Elizabeth Kasau Mue, PW2. That according to her and PW2 the shop was well lit with electric light and so when two men entered and posed as customers, she was able to see them clearly.

That she noted that one was tall and wore a black jacket while the other was short and had a white jacket. She asked them what they wanted and that is when the tall one pulled out a gun and demanded money. The short person ransacked the money box and took Kshs. 3,000/= from it and took another Kshs. 5,000/= from PW2's purse. She was hit on the face but was unable to tell which of the two did so as she promptly lost consciousness. Before she was hit, the robbers had started pushing her husband to the back of the shop as they demanded more money. When she recovered, her husband was on the floor and he could not talk.

3. PW2 stated at this point that she was at the back of the shop washing clothes and when the robbers struck she too was forced to lie down as they ransacked the shop for money but she was able to see the robbers. She confirmed that the one with the gun was middle aged and had a dark jacket and dark trouser while the other one had a panga and a green paper bag. That she pleaded for mercy as they took her brother Geoffrey Kasamba Mue away and shortly she heard a gun shot and the shooter returned and announced;

“huyo nimemumaliza” – “I have finished that one.”

The robbers then fled and she noticed that her brother was bleeding and groaning on the floor.

4. Both PW1 and PW2 then stated that PW1 was taken to hospital as was her husband, who had died at the scene.

5. PW2 further stated that on 20.7.2002 she was called to attend an identification parade and she was able to pick the 1st Appellant as the person who had a gun and on 23.1.2001 she had attended another parade where she picked out the 2nd Appellant as the person who had a panga and who collected cigarettes and money during the incident.

6. PW2 had meanwhile been treated and a P3 form issued to her. She also gave evidence that the 2nd Appellant was not a complete stranger to her because he used to come to her shop as a customer although she did not know his name.

7. PW2 similarly attended the identification parades on 26.7.2002 and 23.1.2001 and was able to pick out both Appellants as the two robbers. She had not known or seen them prior to the incident in question.

8. PW3, Anastasia Mwikali, an employee of MAPS Lodging House recalled that on 28.6.2000 a young man came to the Lodging House with another man who was tall. The two took a room and stayed there for 3 days. She identified the tall man as the 1st Appellant. It was her evidence that the two persons would leave and return but on 1.7.2007 they left with a sack of goods and later she was informed of a robbery where someone had been killed. On 29.7.2000 she attended an identification parade and picked out the 1st Appellant as the tall man who had rented the room at the lodging house.

9. PW4, Samuel Mbui Mue attended the post-mortem on the body of the deceased husband of PW2, Geoffrey Kasamba Mue.

10. PW5, IP Ernest Malinga of the Provincial CID Office in Embu visited the scene on 30.6.2000, took photographs thereof and then visited the Kitui Mortuary and took photographs of the deceased's body and produced them before the trial court.

11. PW6, Jeremiah Kinyamasyo Kisovoke had a shop neighbouring PW2's shop and on the material night, he heard a loud bang at the door and someone entered while armed with a gun. The electric lights were on and he saw that as the man demanded money a ***“small boy”*** also entered and armed with a panga proceeded to open the cash box and took Kshs. 4,000/= in notes and an unclear sum in coins. The robbers then went away and as he was on the floor, PW6 heard gunshots and later when he went out, he found that PW2 was injured and when he went to her shop, her husband had been fatally shot. The deceased was taken to hospital and on 20.7.2000? PW6 attended an identification parade where he identified the 1st

Appellant as the man with the gun.

12. On 23.1.2001 he identified the 2nd Appellant at a parade and he also recognized him as a person who used to purchase food when PW6 was running a hotel in the area.

13. PW7, Jennifer Mwendu Munyasya recalled that on 29.6.2000 at 1pm she was at her shop within Kalundu centre when a tall man together with a short one came and asked her where her husband was. Since he was away, they promised to come back at 2 p.m. but they failed to return as they had promised. On 30.6.2000 she was informed that her neighbour, Kasamba, had been killed.

14. On 20.7.2000, PW7 attended an identification parade and she identified the 1st Appellant as one of the robbers. She was never called to identify the 2nd Appellant but she pointed him out in court as the other robber.

15. PW8, Nyerere Mwalule recalled that on 29.6.2000, a friend called Wambua came to see him accompanied by the 1st Appellant. They wanted to hire a taxi belonging to PW7's brother and use it as their transport during a robbery they planned to commit. PW7 refused to be involved. That others who were to be involved were a woman and another person who was not named. When PW8 learnt that the 2nd Appellant had disappeared he went into hiding but on 20.7.2000 he proceeded to the local Police Station and identified the 1st Appellant as the man who had come with Wambua.

16. PW9, Cpl Stanley Manore investigated the case and later had the 1st Appellant re-arrested on 19.7.2000 at Meru where he had been apprehended in connection with the offences outlined elsewhere above.

17. On 17.1.2001, he arrested the 2nd Appellant at Kongowea Primary School in Mombasa, and arranged for the identification parade in respect of the two of them.

18. PW10, Dr. John Omondi Amollo, performed a post-mortem on the body of Geoffrey Kasamba Mue and he concluded that he had died of cardio- pulmonary arrest due to internal organs' failure.

19. In his Statement in his defence, the 1st appellant denied being anywhere near Kalundu market on the material night. Instead he raised an alibi defence that on 29.6.2000 he was at home and that on 11.7.2000 he was arrested in Meru while selling his vegetables and after being beaten up, was placed in the cells at Meru Police Station and after a period of interrogation, he was transferred to Kitui and on 20.7.2000 he was beaten again and asked to produce a gun but he had none. He was then returned to Meru and charged with another offence of robbery with violence. He denied knowledge of one Wambua or the 2nd Appellant and denied the offences that he was charged with.

20. The 2nd Appellant on his part stated that he was a student at Upendo Primary School and he stated that on 29.6.2000 when the robberies were allegedly committed, he was at his parent's home in Mombasa and the next day went to school as he always did. That on 17.1.2007 he was arrested and on 20.1.2001 he was taken to Kitui Police Station and on 24.1.2001 he was charged with the offences of robbery with violence which he denied committing. He admitted that the complainants knew him by name quite well but failed to mention him in their first report.

21. In his judgment, the learned trial magistrate found that the charges had been proved beyond reasonable doubt and he proceeded to convict the accused persons and sentenced each one of them to death hence this Appeal.

22. From the facts as set out above, the theory advanced by the Republic was as follows;

That the 1st Appellant armed with a gun took lodging at MAPS Lodging House and begun looking for partners to join him in committing violent robberies within Kalundu area. One of the persons interviewed

was PW8 who was requested to provide his brother's taxi as a get-away vehicle but he developed cold feet and declined to take up the offer made. In any event, that the robberies as planned went on and the victims included PW2 and PW6 and in PW2's case, her husband, was killed during the robbery in their shop. PW7 was not robbed but the robbers visited her shop and promised to return later but did not.

23. We have no doubt from that evidence that in respect of all the 3 counts of the offence of robbery with violence, the facts justify an inference that the offence were committed and section 296 (2) of the Penal Code was properly invoked. The question that we must answer is whether the Appellants were the alleged robbers. In that regard, we have only the evidence of alleged identification to guide us because both Appellants were arrested far from the scene and no recovery of any gun or stolen item was made. Regarding identification, the evidence on the identification parade is worthless because the officer who conducted the parade never testified and the requisite forms were not produced. In Francis Nyagah Benson vs Republic, Cr. Appeal No. 21/2000, the Court of Appeal stated as follows:-

***“It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade. It is also trite law that before such a parade is conducted and for it to be properly conducted a witness should be asked to give the description of the suspect and the police would then arrange a fair identification parade (see Gabriel Kamau Njoroge vs Republic [1982-88]1 KAR 1134).*”**

24. In this case, save for evidence that an identification parade may have been conducted, how it was conducted and by whom is a matter of speculation only.

25. That leaves the visual identification by PW1, PW2 and PW6 as the only evidence tying the Appellants to the offence. PW2 and PW6 did not previously know the 1st Appellant but knew the 2nd Appellant who had previously bought goods at their shops. Were the circumstances prevailing on the material night sufficient to make the identification fool proof? PW2, PW3 and PW6 said that their shops were lit with electric light and each described how the robbers looked like. They repeated the same description to the Police and that is what led to the arrest of the Appellants miles away from the scene. In Oscar Waweru Mwangi vs Republic Cr. Appeal No. 2/1999, it was stated as follows:-

“ It is trite law where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from any possibility of error before it can safely make of basis for conviction.”

26. We should note here that other witnesses like PW3 and PW8 had seen the Appellants in broad daylight as they planned their robberies and so identification in that case cannot be faulted. We can only find that it was the Appellants who committed the robberies and their identification is not in doubt.

27. Their defences that they were not at the scene cannot dislodge the powerful evidence against them. They were indeed arrested in Meru and Mombasa respectively but that is clear so PW3 confirmed that soon after the robberies they checked out of MAPS Lodging House and she never saw them again until they were arrested. Their defences were an afterthought and their alibis cannot be upheld.

28. In the end, we see no merit in the Appeals as consolidated, and the same are dismissed in their entirety.

29. Orders accordingly.

Dated and delivered at **Machakos** this **19th** day of **August 2009**.

ISAAC LENAOLA

JUDGE

M. WARSAME

JUDGE