



(Appeal from original conviction and sentence in Criminal Case No. 1229 of 2007 of the Principal Magistrate's Court at Nyahururu –{S. M. Mungai –Principal Magistrate})

JAMES GITONGA NJOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, **James Gitonga Njoki**, was convicted of a charge of **robbery contrary to section 296(1) of the Penal Code** and sentenced to serve three years imprisonment. He had been charged with having robbed Margaret Wanjiku Muhoro of Kshs 6,800/= in cash, a Sendo mobile phone, 2kgs of sugar, 2kgs of rice, 2kgs of maize meal and some cooking fat all valued at Shs 11,699/=.

The charge sheet stated that the offence was committed on 7th March 2007 at Nyahururu Township and that the appellant was in the company of another person who was not charged. The two are said to have threatened to use actual violence to the said Margaret at or immediately before or immediately after the time of the robbery.

At the trial, the prosecution called only the complainant, the duty officer to whom the incident was reported and the arresting officer to testify. The learned trial magistrate relied solely on their testimonies to convict the appellant and dismissed the appellant's unsworn defence as pure lies.

Aggrieved by both the conviction and sentence the appellant filed this petition of appeal citing four main grounds as follows:

- 1. THAT the learned trial magistrate erred in law and fact in failing to consider that the complainant never described the appellant when she made her first report of the robbery to the Police.***
- 2. THAT the learned trial magistrate misdirected herself when arriving at a conviction yet there was no evidence as to whether the complainants' attackers were armed or not.***
- 3. THAT his defence was erroneously rejected.***
- 4. THAT the learned trial magistrate failed to analyze and evaluate the entire evidence tendered at the trial.***

The State has conceded the appeal solely on the ground that no description of the assailants was given when the offence was first reported to the Police. Submitting for the State, learned State Counsel **Mr. Mugambi** told this court that, although the complainant testified that she identified the appellant as her attacker on the basis of a mark he had on the face and the clothes he wore, the said information was not given to the Police when she made her first report.

This being a first appeal, I have examined the trial court's record analyzed and re-evaluated the evidence tendered thereat before making my own conclusions. The complainant (PW1) testified that she was accosted by the appellant as she emerged from a shop where she had purchased the groceries mentioned in the charge sheet. He enquired from her of the whereabouts of some doctor whom she said she did not know. Another man joined the couple and the appellant posed the same question to the stranger who said he knew the whereabouts of the doctor. The complainant then told them to "*proceed on their way*" as she herself went home. She started walking home as the darkness was setting in. She saw the two men following her but suspected no ill-motive. Suddenly the two pounced on her, grabbing her and stealing from her the stuff she had bought as well as her mobile phone. She testified that she was too shocked to scream. Soon thereafter she found a policeman whose assistance she enlisted to try and trace the thugs to no avail. The following day she reported the matter to the Police.

On 25th April 2007 the complainant saw the appellant near the gate of the Nyeri Prison where the complainant worked. She alerted a prison warder (PW2) who arrested the appellant and escorted him to the police station. It was the complainant's testimony that the appellant wore the same clothes he had on when he and his accomplice robbed her. She had noted also that he had a mark on his face. The complainant described the clothes to PW2 leading to the arrest of the appellant as he approached the prison's gate. PW3's testimony confirmed the complainant's narrative of the events of 7th March 2007. He testified to having received the appellant at the Nyahururu Police Station when he was brought there by prison warders on 25th April 2007, in the company of the complainant.

The importance of a clear description of an assailant by a complainant while making a first report of a crime cannot be downplayed. The purpose of such a requirement is to ensure that no doubt exists at all as to the identity of the person charged with a criminal offence in order to avoid a conviction being metted out against a person who may have been arrested as a consequence of some mistaken identity.

In the case involving the appellant, the complainant testified that she had had occasion to converse with him for about 20 minutes while it was still daylight and that she saw the appellant and his companion follow her as she proceeded home, soon after their encounter. They pounced on her and attacked her without a break in the sequence of events. Immediately after the attack she met a policeman who assisted her in trying to trace the thugs. Not succeeding, she went home. The following day she reported the incident to PW3. The complainant testified that she had seen the appellant and his accomplice yet another time prior to his arrest on 25th April 2007 but there being no policeman around she could not prompt an arrest.

The learned trial magistrate took into consideration the fact that she was dealing with the evidence of a single identifying witness. She did not, however warn herself of the danger of basing reliance solely on such evidence when arriving at a conviction. In the celebrated decision of **ABDALLAH BIN WENDO & SHEH BIN MWAMBERE (1953) 20 E.A.C.A. 166**, which has been restated time and again by our courts, the Court of Appeal held, inter-alia, that:

“Although, subject to certain exceptions a fact may be proved by the evidence of a single witness, this does not lessen the need for testing, with the greatest care, the evidence of such witness respecting the identification, especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances, other evidence, circumstantial or direct, pointing to the guilt is needed.”

The evidence as to the arrest of the appellant on 25th April 2007 is more of recognition rather than identification. When the appellant and a police officer set out to trace her attackers immediately after the incident, she was quite certain of the persons she was looking for. She testified that she did see the two again, prior to the date on which she instigated the appellant's arrest. He wore the same clothes and had a distinctive mark on his face. Much as the trial court's record does not disclose any description of the appellant by the complainant when she first reported the incident, I am of the view that this not being a case of dock identification by a single witness the identification of the appellant by the complainant as having been one of the two persons who attacked and robbed her, given the circumstances was free from any error. Such was the case in **WAMAI –VS- R [2003] KLR 279** where the Court of Appeal found the evidence of a witness to a robbery incident reliable and free of error, despite unfavourable conditions, owing to the fact that apart from the appellant in that case having been seen by the witness, he had talked a lot to him in the course of the robbery. This court is alive to the fact that even in cases of recognition mistakes in identification of culprits do occur. However I am of the considered view that such is not the case regarding the appellant herein and the appeal on the first ground therefore fails.

Regarding the second ground I find that the charge was proved by the fact that the appellant was in the company of another person thereby fulfilling the requirements of **section 296(2)** of the **Penal Code**. The appellant's unsworn defence was a mere denial which, according to the learned trial magistrate did not impress the court. Although the defence was dismissed in a single sentence, the judgment of the trial court demonstrates, quite clearly that the evidence tendered both by the prosecution and the defence was considered, contrary to what the appellant states in grounds 3 and 4 of the petition.

Subsequent upon my own re-evaluation of the evidence tendered at the trial, I am not inclined to allow the appeal despite the State's concession. I find that the appellant was properly convicted for the offence and that in the evidence tendered against him actually proved an offence under **section 296(2)** of the **Penal Code** which statutorily carries a death sentence. The State having not moved for an enhancement I shall leave matters as they are. The appellant should count himself quite lucky to have been convicted under **section 296(1)** of the **Penal Code** and sentenced to three years only, despite the fact that the said section imposes a sentence of upto 14 years imprisonment.

Appeal dismissed.

Dated signed and delivered at Nakuru this 23rd day of October, 2009

M. G. MUGO

JUDGE