



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Criminal Appeal 32 of 2006

JOHN KATHIA M'ITOB I APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal against the judgment of J.N. Nyaga P.M. in Criminal Case No. delivered on 8th March 2006)

JUDGMENT

The appellant was charged in the lower court with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. On being tried by the lower court, he was convicted and sentenced to death. He has preferred this appeal against both the conviction and sentence. We, as the first appellate court, are guided by the case of Gabriel Njoroge vrs. Republic (1982 – 88) 1 KAR 1134 where it was held as follows:-

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own interferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Panday Vrs. Republic [1957] EA 336, Ruwala Vrs. R. [1957] EA 570).”

The evidence adduced in the lower court was as follows:-

PWI a butcher, on 16th May 2000 at 7am was on his way to Mutuati market. He was with other people on that road. When he was near the market, he saw people coming from the side of the road. They were 4 in number. Each of them had a C-line panga. One of them held his shirt and he noted that the appellant hit him with a panga on the head. He was cut on his fingers during that incident. They searched his pockets and robbed him of Kshs. 7,600/=. He screamed and people came to his rescue which caused the robbers to run away. He recognized the appellants and some other robbers. On 19th May 2000 PWI came across the appellant sleeping at Mutuati market. He identified him as one of the robbers and called the Police who arrested him. After his arrest, the appellant escaped. He was very sure that during the robbery he clearly saw the appellant's face. He identified the appellant as the one who cut him and who removed money from his pocket. He however did not know the appellant by name.

PWII was also on the road at the same time when the robbery took place. When he was about 100m from Mutuati market he heard shouts behind him, about 50m away. He saw 4 men attacking PWI. They were armed with C line pangas. People run towards PWI to rescue him and the robbers run away. This witness identified the appellant as one of the robbers and the one who cut PWI. He did not know the appellant before then. An identification parade was mounted and he did pick out the appellant as one of the robbers.

PWIII was a Police Officer who investigated this matter. He denied having framed the appellant with this case. PWIV was on the road when the robbery took place. PWI had shown him the money he was carrying prior to the robbery. He saw the money being stolen from him and he identified the appellant as one of the robbers. The appellant was known to him before then because he used to see him in Kabachi in Mutuati. When the robbery took place, this witness was 3 steps away. On cross examination, he said he identified the appellant even noted the clothing he was wearing. He said that he used to see the appellant going to PWI's butchery to eat meat. Further, he stated that he knew the appellant and even knew his home.

The appellant was put to his defence. In his defence, he gave evidence of a date other than the date of the robbery. He said that he was arrested on 15th January 2004 at his place of work. He was told that he was arrested because of a complaint by Catherine Kinya. That Catherine he said, was the wife of the investigating officer. He concluded by saying that that was the reason the case was fabricated against him. The prosecution did not adduce evidence of the identification parade even though PWII said that he participated in such a parade. It is however clear that in the case of PWIV it was a case of recognition rather than a case of identification. He even knew the name of the appellant. He had seen him eating meat at PWI's butchery. In the case of **R. Vrs. Turnbull (1976) 3 ALL ER 549** at page 552 where he said:-

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

We are satisfied that the appellant was recognized by PWIV and that PWIV witnessed him cut PWI and rob him of Kshs. 7,600/=. He was 3 steps away from where the robbery took place. This was during the day. He saw the appellant face and even described his clothing. We have considered the appellant's written submissions. On the issue of the charge being defective, our perusal of the lower court's proceedings shows that that charge was amended to include the words, “*dangerous weapons*”. The fact that the P3 which was in relation to PWI's injury was not produced was not fatal to the prosecution's case. The definition of robbery as propounded in the case of **Johana Ndungu Vrs. Republic** Criminal appeal no. 116 of 1995 (unreported) was well met in the prosecution's evidence. The appellant was stated to be in the company of more than 1 person. They all had dangerous weapons and they robbed PWI.

The defence offered by the appellant was an afterthought in our view. We say so because, if there was a conflict between the appellant and the investigating officer, then one would ask how could it be that PWI, II and III would be involved in that conflict. It certainly was not explained. That defence is rejected. We

find that we are in agreement with the finding of guilt by the lower court and our judgment is that this appeal has no merit and is dismissed.

Dated and delivered at Meru this 20th day of November 2009.

MARY KASANGO

JUDGE

M.J.A. EMUKULE

JUDGE