REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU
Criminal Appeal 265 & 274 of 2007

SAMUEL NJUGUNA GITONGA……...…..1ST APPELLANT

GABRIEL NJOROGE KIMANI ……..2ND Appellant

VERSUS

REPUBLIC……...RESPONDENT

JUDGMENT

SAMUEL NJUGUNA GITONGA and **GABRIEL NJOROGE KIMANI** the Appellants in the above appeals were charged with the offence robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The charge against them alleged that in the night of 8th October 2006 at Thayu Farm Bahati in Nakuru District of Rift Valley Province jointly with others not before court while armed with dangerous weapons namely rungus and iron bars they robbed Johnstone Muchuri of cash of Kshs.3,000/- and at or immediately before or immediately after the time of such robbery they injured the said Johnsntone Muchiri. They denied the charge but after trial before the Senior Resident Magistrate at Nakuru they were convicted and sentenced to death. They have appealed against both that conviction and sentence.

At the hearing of the appeal before us the first Appellant relied on the written submissions that he had filed. In those submissions he argued that the complainant's first report to the police officer, PW6, never mentioned any robbery while the Police OB report was one of attempted robbery. The charge of robbery was therefore a fabrication by the complainant after he failed to recover compensation of about Kshs.45,000/- which he had demanded from the Appellants' families. He contended that this was a case of a fight between PW1 and PW2 on one part and the 2nd Appellant on the other and that he was sucked into it when he went to separate them. In the circumstances he argued that they should have been charged with affray or assault and not robbery with violence.

Mr. Githui for the 2nd Appellant faulted the trial magistrate for not realizing that the intensity of the moonlight having not been stated. the identification of the Appellants and in particular the 2nd Appellant was in doubt. He also argued that the learned trial magistrate erred in not realizing that this was a case of a fight by drunkards.

On his part Mr. Gumo for the state urged me to dismiss these appeals as the Appellants were convicted on overwhelming evidence. He submitted that the identity of the Appellants who were well known to PW1 and PW2 is not in doubt as there was full moonlight on the material date and time. While disputing the allegation that the appellants were drunk he said that even if they were that would not afford them any defence at all.

We have considered these arguments and carefully read the record of appeal. In their defences the Appellants put themselves at the scene and contended that this was a case of a fight between two groups of drunkards. Mr. Githui's contention therefore that the Appellants' identification is in doubt is totally misplaced.

The robbery claim is only from the complainant, PW1. PW2 said that he did not witness PW1 being robbed. In their testimonies both PW4 and PW6 said that the robbery claim was made much later. PW4 is one of the members of the public who rushed to the scene in response to PW1 and PW2's distress call. He said that PW1 told him of his injury by the 2nd Appellant but never mentioned any robbery from him. PW6 is the police officer to whom PW1 made the first report. That witness was categorical that PW1 told him of his assault and never mentioned that he had been robbed. In the circumstances we are in doubt as to whether PW1 was indeed robbed as he claimed.

As we have already stated, the Appellants put themselves at the scene. The 2nd Appellant claimed that he had earlier on in the day disagreed with the complainant over some items the complainant was demanding from him that he had allegedly left in 2nd Appellant's brother's butchery. The 2nd Appellant wondered why PW1 did not demand those items from the person he had left them with. On their way home that evening 2nd Appellant claimed that the complainant assaulted him over the remarks he had made and in the course of the struggle the complainant fell on some piece of stone and injured his hand. The 1st Appellant's version of the story is that as the complainant and the 2nd Appellant struggled he separated them and when the 2nd Appellant run away, the complainant turned on him.

We do not quite believe the Appellants' contentions that this was a fight between the complainant and the 2nd Appellant and that the 1st Appellant's role was separating them. Instead we find from the record that the two Appellants assaulted PW1 and caused him grievous harm as is clear from the evidence of Dr. Omboga, PW5.

In the circumstances, and considering the fact that we are in doubt if PW1 was indeed robbed, we find that the appellants' conviction on the charge of robbery with violence cannot stand. We accordingly quash it and set aside the death sentence imposed upon the Appellants on that conviction. We substitute therefor a conviction on the offence of grievous harm contrary to **Section 234** of the **Penal Code.**

Though the 1st Appellant has been incarcerated since 8th October 2006 and the 2nd Appellant since February 2007, we alive to the fact that the complainant suffered a broken left humerus at the mid shaft level. In the circumstances we sentence the Appellants to six years imprisonment from the date of their conviction.

DATED and delivered at Nakuru this 9th December, 2009.

D. K. MARAGA

JUDGE.

M. G. MUGO

JUDGE.