REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 326 of 2008

JANE WANJIKU MURIUKI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Kerugoya in Criminal Case No. 47 of 2008 dated 1st December 2008 by P. T. Nditika – S.R.M.)

J U D G M E N T

The appellant, **Jane Wanjiku Muriuki** was charged in the Senior Resident Magistrate's Court at Kerugoya with one count of Robbery with violence contrary to section 296(2) of the Penal Code. The particulars in support of the charge were that on the 16th day of December 2007 at Kerugoya Township in Kirinyaga District of Central Province jointly with others not before court while armed with offensive weapons to wit; a knife robbed **Francis Ndiga Gatimu,** mobile phone make Motorolla C200, wrist watch and cash Kshs.1200/= all valued at Kshs.3200/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Francis Ndiga Gatimu**. She pleaded not guilty to the charge and her trial ensued.

The prosecution case was that on 16th December 2007 PW1 was in Kerugoya town and entered swallow pub to buy cigarettes. He saw the appellant who was taking beer. The appellant asked for a cigarette from him but he retorted that it was bad for her to take beer yet not afford a cigarette. He thereafter went to the urinary to relieve himself. The appellant followed him thereat and forcefully removed a cigarette. An argument ensued and the appellant threatened him telling him that he would not leave with his Motorola cell phone. PW1 went back to the club leaving behind the appellant. She did not enter the club again thereafter. Soon thereafter the complainant left for home. He immediately saw two boys in the company of the appellant. The trio attacked him by hitting him on the chest and he fell. In the process the appellant removed his mobile phone. The appellant and the boys then left having taken from him a watch, keys to his house as well as Kshs.1,200/=. He woke up and followed them. They entered the club corridor. He got hold of the appellant and demanded the money and the other items they had stolen from him. The boys threatened to kill him unless he left the appellant alone. He took the appellant outside and the two disappeared into darkness. He had been able to identify the appellant because of the electricity light in the bar as well as the moonlight at the scene of robbery. The following day he reported the incident to Kerugoya police station. On 31st December 2007 in the company of PW2 they came across the appellant in a club drinking and caused her arrest for the earlier incident. She was thereafter taken to Kerugoya police station.

PW2 told the court that on 16th December 2007 he was at Swallow pub together with **Musembi** (PW4). As they left from the back door they saw a group of boys and the appellant struggling with another person. The boys then left. The appellant was not that lucky as PW1 held on her. There was security light. The appellant however later managed to escape. PW1 then told them that his mobile, Kshs.1200/= and watch had been stolen. He had been injured on the neck, chest and leg. They took him home. On 31st December 2007 PW2 whilst in the company of PW1 they found the appellant in a club drinking. They caused her to be arrested and taken to Kerugoya police station. PW3 testified that on 31st December 2007 whilst at Kerugoya police station **P.C. Toromoi** and PW1 brought the appellant to the station. They claimed that she had robbed PW1 on 16th December 2007 of his Motorola phone, Kshs.1200/= and wrist watch all valued at Kshs.3,200/=. He took statements and later charged the appellant with the offence.

PW5 a clinical officer testified that PW1 presented himself before him for examination. He had attended hospital 2 days earlier. He had bruises on the neck, swelling on the knee and soft tissue injuries on the chest. The approximate age of injury was 2 days. A blunt object had been used.

The appellant was put on her defence. She elected to make unsworn statement and called no witnesses. She stated that on 31st December 2007 she was arrested at about 7 p.m. There were other people who had been arrested as well. She thought that she would be charged with being drunk and disorderly. PW1 then alleged that she had robbed him. She denied the charges.

The learned magistrate having carefully analysed and evaluated the evidence tendered by both the prosecution and the defence came to the conclusion that the prosecution had proved its case against the appellant, convicted her and sentenced her to the mandatory death sentence.

The appellant was aggrieved by the conviction and sentence. She therefore preferred this appeal. The grounds of appeal advanced by the appellant in support of the appeal cannot really pass for serious grounds of appeal. In effect they are merely pleas in mitigation.

However, **Okeno v/s Republic (1972) E.A. 32** directs this court on a first appeal as follows:-

"**..... The first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions, in deciding whether the judgment of the trial court should be upheld, as well the court has to deal with any questions of law on the appeal ....."**

It matters not therefore that the appellant may not have advanced any serious grounds of appeal. Our task is clearly set out in law and we have scruplously undertaken the exercise in the circumstances of this case.

From the evidence on record it is apparent that the offence if at all was committed at night. According to PW1 it was about 9.30 p.m. That being the case, the issue of identification of the appellant comes to the fore. A conviction resting on identification invariably causes a degree of uneasiness as stated by **Sir Clement de Lestang VP in Roria v/s Republic (1967) E.A. 58** hence the need to approach such evidence with abundant caution. Such evidence must be tested with greatest care. See also **Abdalla Bin Wendo v/s Republci (1986) KLR 198**. The testing of such evidence require a careful inquiry into the "**..... nature of the light available. What sort of light, its size, and it (sic) position relative to the subject, are all important matters helping to test the evidence with the greatest care.....” Maitanyi v/s Republic (1986) KLR 198**. The learned magistrate in his judgment was convinced that there was sufficient light both electric as well as moonlight that would have enabled PW1, PW2 and PW3 to positively identify the appellant. Much as the learned magistrate did not make inquiries in terms aforesaid, we have no doubt at all that he had the issue at the back of his mind. On our part and having anxiously considered the evidence on record on this aspect of the matter, we are satisfied, that the appellant could not have been identified in error. First PW1 met her in the bar. According to PW1 she was the only lady in the bar. The bar was lit. There was electricity light in the bar corridor as well as security lights. Besides there was also moonlight. So that from the club through to the corridor upto the scene of crime there was light.

The appellant talked to PW1 in the bar when she asked for a cigarette. She must have been in close proximity with PW1. A nasty exchange thereafter ensued. Moments later PW1 proceeded to the urinary. He was followed there again by the appellant. The appellant forcefully took his cigarette. This was in the urinary. It is again safe to assume that the appellant was in close proximity with PW1. She told him that he would not leave with his mobile phone. PW1 then went back to the club and shortly thereafter left let for home. Although the appellant did not follow him back into the bar, PW1 on leaving the club saw the appellant. Considering the fact that the appellant had spent with PW1 some considerable time since their first encounter in the club upto the time they parted company from the urinary, and exchanges that had ensued between them, PW1 could not have failed to identify her immediately he saw her again. None of the witnesses discounted the availability of light from the bar upto the scene of crime. Indeed the scene of crime seem to have been 4 – 5 metres from the club. The club had security lights on. Those being the circumstances, how could PW1 had failed to identify the appellant if he saw her? The offence was after all committed shortly after PW1 had left the appellant in the urinary, went back to the club and shortly thereafter left for home.

It is also important to note that the appellant had talked to PW1 in the bar when she demanded a cigarette, in the urinary when she told him to stop bragging and that he would not leave with the mobile phone he had. Thereafter at the scene of crime, PW1 heard the appellant say "*Remove that mobile.....*" Other than hearing her voice he also saw her remove the mobile so that apart from seeing the appellant at the scene of crime, PW1 also recognised her voice. The appellant having talked to the PW1 severally as aforesaid, could not have failed to recognise her voice so soon after the encounter aforesaid.

Having stolen the items, the appellant and her cohorts left and entered the club corridor. PW1 pursued and got hold of the appellant and demanded his items. He was threatened by the boys and let go the appellant. This fact of the appellant holding on the appellant is corroborated PW2 who found PW1 holding on the appellant as they came out of the club in the company of PW4.

Both PW2 and PW4 identified the appellant at he scene of crime. This was therefore not a case of identification by a single witness in difficult circumstances. The appellant was identified by two other independent witnesses – PW2 and PW3. Indeed following that identification, it was not difficult for PW1 and PW2 to easily identify her on 31st December 2007 as the person who had robbed PW1 earlier when they came across her in a club drinking. This was about fourteen days after the event. We do not think that this was such long time that the memory of PW1 & PW2 with regard to he identification of the appellant would have faded.

PW1, PW2 and PW4 never knew the appellant before. One would therefore have been interested in the first report made to the police. However such evidence is not available on record. Similarly one might have thought that perhaps an identification parade should have been organised. However, in the light of subsequent events, such parade would have been worthless since, it is PW1 and PW2 who came across the appellant after the event and caused her arrest. In those circumstances if the appellant had been paraded in a police identification parade, she would have been mince meat for PW1, PW2 and PW4. They would have easily picked her from such parade.

Could the whole episode have been exaggerated and or blown out of proportion by PW1 so as to bring it with capital robbery when it was a simple bar brawl? We have no reason to think so. First and foremost PW1 and the appellant were strangers to each other. There is no evidence that there was prevailing grudge between them as would have propelled PW1 to frame her with the offence. The appellant in her own defence has not raised the issue. Indeed even in her entire cross-examination of all the prosecution witnesses, she did not as much as allude to whether she was familiar with PW1 and or whether there was a grudge between them. It is also noteworthy that though PW1 entered the bar, there is no evidence that he partook of alcohol. He only bought cigarettes. So that the possibility of PW1 mistakenly identifying the appellant because of influence of alcohol does not arise.

Appellant's cross-examination of prosecution witnesses was scanty and did not at all poke holes in the prosecution case. Essentially therefore the prosecution case remained unchallenged. The defence advanced by the appellant as well did not cast any doubts in the prosecution case. Indeed she only dwelt

on the events of 31st December 2007 when she was arrested. It is only during the hearing of this appeal that the appellant purported to advance the defence of alibi. That on the day of the alleged offence, she was away in Nyahururu. However that defence comes too late in the day and is not worthy of consideration.

On the whole we are satisfied just as the learned magistrate was that the circumstances obtaining were favourable for positive identification of the appellant by PW1, PW2 and PW4. The conviction of the appellant cannot thus be faulted. The ingredients of robbery with violence were met. When the robbery was committed, the appellant was in the company of two or more people and visited violence on PW1 if the unchallenged evidence of the clinical officer (PW5) is anything to go by.

Of course there were minor contradictions her and there in the prosecution evidence. For instance the clinical officer testified that he saw PW1 for purposes of medical examination on 15th December 2007. That cannot be possibly be correct considering that the offence was committed on 16th December 2007 according to the charge sheet. Indeed even the P3 form which himself filled is dated 16th December 2007 and was signed on 4th January 2008. There was also the issue of the number of robbers involved. Were they in total five or three? To us these contradictions are minor and do not go to the root of the prosecution case.

The record shows that the appellant on 9th June 2008 applied to have PW1 recalled for further cross-examination. The application was granted. However the record does not show that the said witness was ever recalled. Did the appellant abandon the issue along the way? Perhaps as she never raised it before the trial court nor has she raised it with us.

Finally, on 13th November 2008, the learned magistrate observed that "**..... The accused looks pregnant. Accused to be examined and report be availed on 18th November 2008 when the accused will be produced.....**" However the record does not show that this order was complied with. It is trite law that a sentence of death cannot be imposed on a pregnant person. Thus it was absolutely necessary for the learned magistrate to follow up his order of 13th November 2008 and determine the status of the appellant; whether pregnant or not before imposing the death sentence. The record does not show that he pursued that inquiry. However on our part, we have looked at the original record and have come across a note from the ministry of health, office of the medical superintendent, Provincial General Hospital, Embu dated 17th November, 2008 and signed by a clinical officer. It shows that the results of the pregnancy test were negative. That being the case, there is no need to interfere with the sentence of death imposed on the appellant.

In view of the foregoing and what we have already said we are satisfied that the appellant was convicted on very sound evidence. We decipher no error in the way the trial court dealt with the evidence tendered. For all those reasons we find no merit in this appeal and we order the same be and is hereby dismissed in its entirety.

Dated and delivered at Nyeri this 4th day of December 2009

J. K. SERGON

JUDGE

M. S. A. MAKHANDIA

JUDGE