



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 573 & 574 of 2005

(Coram: Ojwang and Dulu, JJ)

CRIMINAL APPEALS NOS. 573 OF 2005 & 574 OF 2005

(CONSOLIDATED)

BETWEEN

SILAS GITAU NJUGUNA.....1ST APPELLANT

MICHAEL KIIRU NJUGUNA.....2ND APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of Chief Magistrate Mrs. U.P. Kidula dated 2nd December, 2005 in Criminal Case No.6442 of 2004 at the Thika Law Courts)

JUDGEMENT OF THE COURT

There had been four accused persons at the trial stage. Three appeals were filed, but during the pendency of the same, a signal was received at the High Court Registry that one of the appellants had died; and the Court, on that account, marked Criminal Appeal No. 572 of 2005 as abated on 19th July, 2007.

The appellants herein, *Silas Gitau Njuguna* and *Michael Kiiru Njuguna*, each brought written submissions before the Court, and asked that learned State Counsel do make submissions before they do the same.

Mrs. Kagiri for the respondent set out by conceding to the appeal, on the ground that the prosecution evidence had not proved the offence charged, but had established the commission of a different offence.

Counsel urged that what had taken place between the complainant and the appellants, who were persons known to him for over a decade, was a fight occasioned by a grudge. Counsel read the Chief Magistrate's judgment as indicating that the motive of the appellants at the time of the incident had not been to rob the complainant, but to settle scores with him. It was urged that the real offence committed

by the appellants had been, the causing of grievous harm.

Mrs. Kagiri urged this Court to proceed by virtue of s.179 of the Criminal Procedure Code (Cap.75, Laws of Kenya) and, after reviewing the evidence on record, consider convicting for a lesser offence. She urged that there was proof of the commission of grievous harm upon the complainant; and so conviction for the offence of robbery with violence be quashed.

The 1st appellant, in his response, said he had not committed robbery with violence; and 2nd appellant was in agreement that a charge of causing grievous harm would have more properly arisen, from the material incident.

In her summary of evidence, the learned Chief Magistrate notes that PW1 had been walking along the road, pushing his bicycle, in the company of PW3, between 7.00 pm and 7.30 p.m. on the material day. A lady, **Vivian Wambui Kung'u** (PW2), came from behind, and passed PW1 and PW3. She had a torch, which she flashed at a person whose name she called out, "**Kamana**". PW2 continued walking ahead, but when PW1 and PW3 got to the spot where PW2 had flashed her torch a short while back, somebody accosted PW1 and held his bicycle; a scuffle ensued, and the attacker then called out, "**Jeshi, tokeni**" ? Kiswahili command meaning "**My squad, come forward**". A "**squad**" comprising three persons came out and set upon PW1, beating him up until he fell unconscious. PW1 later recovered, and was taken to the Police station, and then to hospital. After he was treated and discharged, PW1 found that three persons had been arrested on the night of the incident, and he now identified them as the persons who had attacked and battered him. The three were PW1's neighbours, and he knew all of them.

PW2 testified that at the time she had flashed her torch, she had seen somebody crouching in the roadside thickets, and she believed this was the notorious village imbecile by the name **Kamana**. When she called out the name, the crouching man told her he was not **Kamana**, but he was waiting for **Baba Wambui**. Soon thereafter PW2 witnessed the attack on PW1; she raised alarm and, being herself a nurse, she later administered first aid to PW1.

PW3's testimony was consistent with that of PW1. The appellants herein, together with a co-accused who had been arrested by members of the public, had been brought before the lady Assistant Chief, **Monica Wangoi Kariuki** (PW4). PW5, **Peter Kariuki Kairo** went to the *locus in quo* and found the appellants herein and another person having been arrested, soon after the incident. PW6, Police Force No. 56397 **P.C. Samuel Mburu** was the Police officer before whom the appellants herein were brought, after being arrested by members of the public.

Each appellant, when put to his defence, had made an unsworn statement, and called no witnesses. Each denied robbing PW1, but said they had a land dispute with PW1 who had the sympathy of their elder brother.

The learned Chief Magistrate noted, quite correctly in our view, that identification presented no problem in this case, as the appellants herein had been well *recognised* by witnesses. The complainant had known his assailants for some ten years; PW2, although she did not at first see the appellants herein, recognised them when she saw them after arrest, which took place right at the *locus in quo*, or nearby. PW3 knew the appellants, and saw them being arrested at the *locus in quo*.

After dealing with the foregoing evidentiary points, quite judicially in our view, and for which credit goes to the learned Chief Magistrate, she made an inferential leap which, we think, lacks explanation. In her words:

"[Setting out from this secure evidence of recognition].....the Court has to look at the cogency of the evidence, its consistency and the credibility of the witnesses."

"The time of the robbery was around7.30 p.m. It was not too dark.....The evidence of PW3 is that he was nearer the place from where the [attackers] emerged but the [attacker] passed him

and attacked PW1 [who was further away].”

Since it is already clear that the attackers had been well recognised, and their identity is not in issue, it would not, we think, have been necessary for the learned Magistrate to return to the question as to the state of lighting at the material time. The real issue at this stage is whether there had been a *robbery*. This must be addressed, in the first place, by considering whether the ingredients of robbery were present, and then by focusing on the evidence of the happenings at the material time. In any case of robbery, two elements are required: theft, and violence. In *Njuguna v. Republic* [1965] E.A.583 it had been held that “the essence of the offence of robbery is an openly committed theft from or in the presence of someone or a theft where the offender is caught more or less in the act or immediately after the act”.

Although the learned Chief Magistrate presupposed the existence of a robbery, and proceeded to record that there *was* a “time of the robbery”, she does not appear to have addressed her mind to the *theft* and *violence* elements which attach to every true act of robbery.

Indeed, the trial Court’s record showing that the attacker avoided PW3 and sought the complainant specifically, would in our view, suggest a targeted assault which was not aimed at seizing certain property. From the evidence, the person referred to as *Baba Wambui*, who the attackers sought, was the complainant. These circumstances, we think, disclose an offence other than robbery. This position is recognised by the trial Court in a paragraph of the Judgment which reads: “The motive appears not to have been robbery *per se* but an intention to cause grievous harm to PW1”. What the trial Court associated with robbery was a sum of Kshs.1,700/= which the complainant said he found to be missing much later. The facts pertaining to the loss of the said money are entirely unclear and, in these circumstances, it would in our view be improper to relate it to the attack which had taken place upon the complainant.

We do not think the prosecution had established a case beyond reasonable doubt, of robbery with violence, against the appellants. Consequently we will allow the appeal in that regard.

However, it is clear from the evidence that the appellants, together with their accomplices, did indeed cause grievous bodily harm to the complainant on the material evening. PW6, *P.C. Samuel Mburu* produced the medical report form by virtue of s.77 of the Evidence Act (Cap. 80, Laws of Kenya), and it showed that the complainant had suffered a sharp cut on the forehead.

In the circumstances of this case we consider it right to proceed under s.179 of the Criminal Procedure Code (Cap. 75), which thus provides:

“(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

“(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it”.

The spirit of the foregoing provisions is quite clear to us; it is a commitment to the goals of justice in criminal law which empowers this Court, where it has become convinced that a crime *has* been committed, to make exception to the requirement of the formal terms of charge, and to proceed by judicial discretion to pronounce a party guilty, where guilt has been proved beyond reasonable doubt.

From the evidence, the complainant suffered actual bodily harm at the hands of the appellants herein, and we find them guilty in this regard. Section 251 of the Penal Code (Cap.63) provides that:

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.”

We will make orders as follows:

- (1) *The appeal against conviction for the offence of robbery with violence is allowed.*
- (2) *The sentence imposed by the trial Court is hereby quashed.*
- (3) *We find the appellants guilty of the offence of causing actual bodily harm, and convict them accordingly.*
- (4) *We sentence each of the appellants to a prison term of three-and-a-half (3 ½) years beginning from the date of original sentence by the trial Court.*

It is so ordered.

DATED and DELIVERED at Nairobi this 12th day of February, 2008.

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang & Dulu JJ.

Court Clerks: Tabitha Wanjiku & Erick

For the Respondent: Mrs. Kagiri

Appellants in person.