REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 150 of 2006

STEPHEN KINOTI M'IKIAO ……..……. 1ST APPELLANT

BENJAMIN MUTETHIA KIUNGA ……..…….... 2ND APPELLANT

ALEX MWONGERA KIUNGA ……...…..…….. 3RD APPELLANT

JAMES KIMATHI ……4TH APPELLANT

VERSUS

REPUBLIC ……....……. RESPONDENT

JUDGMENT

(An Appeal from a judgment of W.K. Korir, SRM in Isiolo delivered on 28th September 2006)

The four appellants in this appeal were jointly charged, in the first count with robbery with violence contrary to section 296(2) of the Penal Code. The 1st appellant was charged alone in count two with being in possession of a firearm without firearm certificate contrary to section 4(2) of the Firearm Act.

The 1st and 2nd appellants were further charged in count 3 with assault causing actual bodily harm contrary to section 251 of the Penal Code. In count 4 the 2nd appellant was charged with being in possession of imitation firearm contrary to section 34(1) of the Firearms Act. Finally, the 3rd appellant faced a charge of grievous harm contrary to section 234 of the Penal Code in count 5.

There were three alternative charges of handling suspected stolen property against the 1st, 2nd and 3rd appellants.

We shall briefly outline the evidence on record and re-evaluate the same in order to arrive at an independent conclusion. On 19th December 2005, PW1, Moses Kaunyanga (Moses) and his wife PW3 Agnes Kagwiria (Agnes) were in their house in the company of PW2, Peter Kinyua Kithinji (Kinyua) when a gang of robbers burst in and ordered Moses and Kinyua who were in one room to lie down. One of the gang members, identified as the first appellant was said to have had a gun. Moses refused to comply with the order to lie down and instead attacked the 1st appellant. The 4th appellant on seeing this attacked Moses on the head with a rungu. Moses ran out of the house and on coming out he encountered the 2nd appellant who stabbed him with a knife. Later that night, Moses returned to his house and found his television set, a DVD player and battery stolen.

He reported to the police before going for treatment at the Isiolo District Hospital. At the hospital, he met

Kinyua who was nursing an eye injury. Agnes too had head and chin injuries sustained during the robbery. The next day Moses returned to the police station and led the police under the command of P.C. Nixon Talaam to the homes of the suspects who were known to him. P.C. Talaam confirmed that Moses, Kinyua, Agnes and Limiri had supplied him with the names of the suspects. On the way, they met the 1st appellant who Moses pointed out to the police and was arrested. The 1st appellant was escorted to his house which was searched and no stolen items recovered. But behind his house a television set, which Moses identified as his was found covered with grass. This discovery was witnesses by PW5, Charles Limiri.

The 2nd appellant was found at a quarry where he worked. He took the police to his home where the stolen battery was found in his father's house. When the 2nd appellant was arrested at the quarry he was in the company of the 3rd appellant who was also arrested. Recovered during the search in 2nd appellant's house was an imitation of a gun made of wood hidden in the roof.

The 3rd appellant led the police to a spot outside his house where the DVD player was found buried. PW7 P.C. Clement Mwangi also recovered the rifle buried in the 4th appellant's shamba. P.C. Mwangi submitted the rifle together with an exhibit memo form to the ballistics expert for examination. According to the expert's report, the rifle was a firearm but not capable of being fired due to rust.

PW8 Elias Muhindi, a clinical officer at Isiolo District Hospital examined Moses, Agnes and Kinyua and assessed the injuries sustained by Moses and Agnes as "harm" while those suffered by Kinyua were assessed as "grievous".

The 1st appellant gave a sworn statement in his defence in which he told the court that on the fateful night he did not leave his house until the following morning when he went to fetch water. It is on that day, 20th December 2005, while at home that the police, in the company of the local ward councilor, the area chief and assistant chief arrested him for failing to honour a police bond issued earlier in a different case altogether. The police and those accompanying them searched the 1st appellant's house and took away a TV set and radio. He claimed that the T.V. set that was taken from his house and produced in court belonged to him.

In his sworn statement, the 2nd appellant stated that on 19th December 2005 he went to work at a quarry returning home at 6pm and never left his house until the following day, that is on 20th December 2005. While returning home from work on that day he met one Gitonga, a brother to Moses and six others who he later learnt were police officers. He directed them to his house. While some officers went to his house others went to his neighbour's house. At his neighbour's house the officers found a home made gun, a battery and panga. But he denied any of these exhibits were found in his house.

On his part, the 3rd appellant in his sworn statement also denied involvement in the robbery and stated that on the night in question he slept in his house. The next day as he went for lunch at 1pm he was arrested and taken to his house which was searched but nothing recovered. But the officers took away his personal DVD player claiming that it was stolen even after he availed to the officers the relevant receipt.

The 4th appellant also gave a sworn testimony and stated that on 19th December 2005 he was working at a farm belonging to one Kirimi. At 6pm, he went to see Kirimi in town and was given the wages for the workers. The 4th appellant went to his home but did not find his wife. He went to his wife's parent's home and confirmed that she had been taken away by her brother, Moses who was demanding dowry from the 4th appellant. That evening at 10pm he was allowed to take his wife with him. The following day at Isiolo town he (the 4th appellant) was arrested. His house was searched but none of the stolen items recovered.

The trial magistrate, W.K. Korir SRM found all the four appellants guilty in the first count and sentenced them to death after conviction. 1st appellant was found guilty and convicted in count 2, while 1st and 2nd

appellants were convicted in count 3. 2nd appellant was convicted in count 4 and 3rd appellant convicted in count 5.

The trial magistrate applying the correct procedure ordered that the sentences be held in abeyance clearly because the appellants had been sentenced in count one to death.

Being aggrieved by both the conviction and the sentence the appellants preferred separate appeals, which were consolidated before the commencement of the hearing of the appeal. The appellants have raised similar grounds in their respective petitions. These grounds may be summarized as follows:-

(i) That they were not properly identified

(ii) That the television set produced in court belonged to the 1st appellant while the rifle and panga were planted on him.

(iii) That the rifle was irregularly produced.

(iv) That there was failure to call evidence of vital witnesses

(v) That their respective defences were not considered.

(vi) That the case against them was not proved beyond any reasonable doubt.

The appellants relied wholly on their written submissions which we have most carefully considered. The 1st appellant, 3rd and 4th appellants have raised an additional ground, namely that the trial magistrate failed to indicate the coram on 17th July 2006 at 2.30pm and on 18th July 2006.

The 2nd appellant had two additional grounds in his written submissions to the effect that the evidence of the prosecution witnesses were contradictory and that the judgment did not comply with the provisions of section 169(1) of the Criminal Procedure Code. The learned counsel for the respondent supported both the conviction and sentence of the four appellants. He submitted that the appellants were recognized. That the victims of the robbery were able to see the appellants with the help of a lantern lamp. Counsel submitted further that the stolen items were recovered from the appellants the following day.

We have duly considered the appellants' written submissions and oral submissions of the learned counsel for the respondent. There is no doubt that Moses, Agnes and Kinyua were attacked on the night of 19th December 2005 by a group of people who were armed with assorted weapons. In the course of that attack the three sustained injuries of various degrees. It is alleged that Moses lost to the robbers a television set, a VCD player and a battery.

The broad question for determination is whether the appellants were identified as the gang which attacked and robbed Moses injuring him, Agnes and Kinyua. The attack is said to have taken place at 8.30pm. The incident was inside a house. There is evidence that there was a lantern lamp in the house.

Moses was emphatic that he was able to see the 1st, 2nd and 4th appellants, who were known to him as his neighbours with the aid of the lantern lamp. He, however, stated that he did not see the 3rd appellant during the robbery. It was his evidence that the 1st appellant ordered them to lie down. Instead he charged at the 1st appellant knocking him down before he (Moses) escaped.

It was further his evidence that as he knocked down the 1st appellant, the 4th appellant hit him (Moses) with a rungu. While escaping he was also stabbed by the 2nd appellant. The 1st, 2nd and 4th appellants are village neighbours of Moses and are therefore well known to him. That is why he was able to give their names to the first person he encountered after the incident, PW5, Charles Limiri. He similarly gave the same names to P.C. Talaam a short while later.

Kinyua on the other hand estimated that the encounter took some five minutes. He confirmed that it was the 1st appellant who pulled him from under the bed where he had hidden on being ordered by the 1st appellant to lie down. Agnes on her part was in the kitchen, a separate room from where Moses and Kinyua were. She heard commotion in the next room but before she could go to confirm what was happening three men came into the kitchen. With the help of a lantern lamp she was able to identify the 1st, 2nd and 4th appellants. They ordered her to lie down but she could not as he was carrying a baby. They demanded money from her before they descended upon her with their weapons. She was moved to the next room. She estimated that she was with the three appellants for about 12 minutes.

Coupled with the foregoing, the 1st appellant was found with a television set which we are satisfied was stolen from Moses during the robbery. Moses produced original receipt to prove its ownership. He had bought it two days prior to the robbery. The manner in which the televisions set was found hidden behind the 1st appellant's house and covered with grass is a clear manifestation that he knew it was stolen. His explanation that the television set was his is not convincing in the light of the overwhelming prosection evidence. In our view this was a case of possession of recently stolen property.

Regarding the 2nd appellant, according to Moses, the 2nd appellant was standing by the door when they were attacked. As Moses ran out of the house the 2nd appellant stabbed him on the left rib with a knife. Moses was able to recognize him with the aid of a lantern lamp.

Agnes identified the 2nd appellant as among the three people who came to the kitchen. She identified them with the help of a lantern lamp. She was specific that the 2nd appellant smashed the lamp. This was after she had been with them for some eight (8) minutes. When the 2nd appellant was arrested he led the police to his father's house where a battery identified by Moses as his was recovered. The 2nd appellant explained that the battery was recovered from a neighbour's house, one Mwiti. That explanation is not persuasive as we find no reason why he would be made to suffer for a crime committed by his neighbour.

The 3rd appellant was not identified by either Moses or Agnes during the robbery. However, Kinyua gave an account of how the 3rd appellant stabbed him in the eye with a knife. That the 3rd appellant told him that he (Kinyua) would be one-eyed like himself. The trial court observed that indeed the 3rd appellant was one-eyed. We too confirm this condition.

The identification of the 3rd appellant was therefore by a single witness. In the circumstance we have warned ourselves of the danger of basing our finding on the evidence of Kinyua alone without seeking other evidence to enable us conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error. See **Abdalla bin Wendo & Another V. R.** (1953) 20 EACA 166.

We are satisfied that, with the aid of a lantern lamp and taking into consideration that the 3rd appellant talked to Kinyua and given the fact that Kinyua knew him before this date, the 3rd appellant was duly recognized as part of the gang that attacked Kinyua and his colleagues. This finding is corroborated by the evidence of recent possession of stolen property. A DVD player stolen from Moses the previous night was retrieved from where it had been buried outside the 3rd appellant's house. Moses satisfied the trial court and we are convinced that indeed the DVD player belonged to him. It was brand new and still wrapped. We are satisfied that the DVD was found buried outside the 3rd appellants house. This confirms that it did not belong him as he claimed in his defence. His name was also supplied to the police at the time the report was made.

It is the 4th appellant's own testimony that Moses is infact his brother in-law. They are therefore well-known to each other. During the time of the robbery all the three eye witnesses identified/recognized the 4th appellant, who is also known as Kamenchu.

We are satisfied from the foregoing that he was positively identified. Having come to the conclusion that

all the four appellants were involved in the robbery, we then consider if provisions of section 296(2) of the Penal Code were satisfied by the evidence adduced. The offence of robbery with violence under S. 296(2) is committed in any one of the following circumstances:-

(i) If the offender is armed with any dangerous or offensive weapon or instrument; or

(ii) If the offender is in the company with one or more person or persons; or

(iii) If at or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses any other personal violence to any person.

The officer drafting the charge sheet seemed to have relied on all the three limbs. The proper approach is to choose, in the circumstances of each case, which of the above three modes is applicable. Combining all the three modes in one charge may well be duplex. But as would be apparent from the facts of this appeal as in many other robbery cases, the suspects normally tend to be in groups, armed and in most cases use or threatened to use violence on their victims, all in one transaction. There is no doubt from the evidence on record that the four appellants were together; that they were armed with imitation of a gun, a rifle, rungu and panga; and that the three victims were beaten and wounded. A rungu and a panga are generally speaking not dangerous or offensive weapons unless evidence is led to show the use to which they were put. Section 89(4) of the Penal code defines an offensive weapon to mean:

"……***any article made or adapted for use for causing injury to the person, or intended by the person having it in his possession or under his control for such use."***

The appellants sharing in common intent were armed with a panga and rungu which they intended to use on their victims and which they indeed used, inflicting serious injuries on the in victims.

We are convinced that the offence under section 296(2) of the Penal Code was proved beyond any reasonable doubt. The learned trial magistrate considered at length the defence of each appellant and dismissed them. We too have considered the same and are of the view that the overwhelming prosecution evidence displaced the appellants' defence.

The final ground raised by the 1st and 3rd appellants relates to the coram of 17th July 2006 and 18th July 2006. The need for an accurate coram cannot be gainsaid. It helps in ascertaining the level of the trial magistrate, the rank of the prosecutor, the presence of an interpreter, et cetera.

In the appeal before us, the record is clear that on 17th July 2006 the evidence of Moses and that of Kinyua was taken before the court adjourned directing that cross-examination of the latter to proceed at 2pm. At 2.40 pm, the same day, the coram is not written in full but simply expressed as "Coram as before". The proceedings of that afternoon are signed by W.K. Korir, SRM who heard the matter in the morning and we have no reason to assume that the magistrate and prosecutor were sudden changed. In our view, nothing turns on this ground.

Regarding the ground concerning contradictions by prosecution witnesses, we find none. The fact that one witness saw and identified one appellant while another did not see the same appellant cannot amount to contradictions. The witnesses saw the appellants at different stages of the robbery, while Agnes in particular was in a different room.

Finally, we find that the charge of being in possession of a firearm against the 1st appellant, assault causing actual bodily harm against 1st and 2nd appellant, being in possession of imitation firearm against the 2nd appellant, the charge of grievous harm against the 2nd appellant and the charge of grievous harm against the 3rd appellant were all proved beyond any reasonable doubt.

We come to the final conclusion that the appeal fails and is hereby dismissed in its entirety.

Dated and delivered at Meru this 8th. day of February… 2008.

I. LENAOLA

JUDGE

W. OUKO

JUDGE