



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
CRIMINAL APPEAL 196 OF 2006

AMOS DOUGLAS NG'ANG'A 1ST APPELLANT

SAMUEL NJOROGE KIIRU 2ND APPELLANT

-AND-

REPUBLIC RESPONDENT

*(An appeal from the Judgment of Principal Magistrate Mrs. M.W. Murage dated 3rd May,
2006 in Criminal Case No. 26 of 2005 at Kikuyu Law Courts)*

JUDGMENT OF THE COURT

The appellants herein were charged with the offence of robbery with violence contrary to s. 296 (2) of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the two, on 13th August, 2005 at Mwimuto Village in Kiambu District, Central Province, jointly with others not before the Court and while armed with offensive weapons, namely pieces of timber, robbed **Peter Thairu Njoro** of cash in the sum of Kshs.1,500/= and, at, or immediately before, or immediately after the time of such robbery, used actual violence upon the said **Peter Thairu Njoro**.

PW1, **Peter Thairu Njoro** testified that the two appellants herein, who are well known to him even by name, on the material date at 9.30 pm, attacked him as he was coming from the shops, where he had gone to buy several items. The 1st appellant caught and held PW1, then 2nd appellant hit him on the face, and he fell. The attackers took his money, Kshs.1,700/=; the shoes PW1 was wearing; half a kilogramme of meat which PW1 had bought. The **locus in quo** was some 10 metres from the shopping centre; there were neighbouring flats, from which lights illuminated the **locus in quo**. PW1 screamed, attracting two people who came to the scene – **Kihara** and **Ngige**. The appellants herein had left the scene by then. PW1 was taken to hospital and given medical attention.

PW1 said the appellants herein were in the habit of hanging around at the bus stage, and he had known 1st appellant for two years, and 2nd appellant for one year. It was PW1 who later led members of the public to the place where the appellants herein were arrested. He said he had no grudge with the two.

On cross-examination PW1 confirmed that he had known the 2nd appellant herein for one year and a half. He confirmed also that the **locus in quo** was illuminated by security lights, at the time of the incident. PW1 said he knew 1st appellant who had been born in his (PW1's) village, and that he did see 1st appellant before first appellant hit him, on the material evening. PW1 said he had asked 2nd appellant just what was the cause for this attack; 2nd appellant responded by hitting him. At the time 1st appellant held PW1, 2nd appellant was still five metres away. After the incident, 2nd appellant ran away, as he was being chased. It was 2nd appellant who took from PW1 Kshs.1,700/=, shoes, and a piece of meat. PW1

had given the appellants' names to members of the public, who then arrested the appellants.

PW2, **John Kihara Kamau**, a casual worker living at Mwimuto, was at his home at 9.30 pm on the material date, when PW1 came bearing an injured face, and saying he knew his attackers. PW1 gave the names of the appellants herein, and said he had been robbed of his shoes, and Kshs.1,700/=. PW2 then, with others, took PW1 to hospital; and three days later they found the appellants herein, and arrested them. The 1st appellant was arrested at the trading centre, and 2nd appellant at his home.

PW3, Police Force No. 65309 **P.C. Njiru** of Kibiku Police Post testified that he was at his office on 16th August, 2005 when members of the public brought two suspects, and the complainant whose face was swathed in bandages. The report was made that the complainant had been attacked three days earlier, and his money and jacket stolen.

PW4, **Dr. G.K. Mwaura**, had examined PW1 on 17th August, 2005. He found that the complainant had been assaulted and had swollen and bruised face, eyelids and cheeks. The injuries were four days old, and the weapon used was blunt. The complainant had been treated at Caanan Medical Clinic, and there were treatment records. PW4 assessed the degree of injury as harm, and he filled in the P3 medical-reporting form.

PW5, **Samuel Ngige Njoroge**, testified that he was at his home at 10.00 pm on 13th August, 2005 when the complainant came along. He had injuries, and said he had been attacked by the appellants herein, and robbed of his shoes and Kshs.1,700/=. PW5 joined the group that searched for and arrested the appellants herein, three days later. Once the 1st appellant had been arrested, he took the arresting members of the public to 2nd appellant's home; but 2nd appellant then ran away, and was arrested only later.

Responding to cross-examination, PW5 said he knew 2nd appellant as a tout at the bus stage. PW5 said he and the members of the public who had gone to arrest 2nd appellant, found him in the company of others, and he ran away; but the crowd managed to arrest him. PW5 said the members of the public arrested 2nd appellant because of the report that he and 1st appellant had attacked PW1, but that there was no reason to frame-up the 2nd appellant by way of a false accusation. The 2nd appellant did not challenge PW5's testimony that he had decamped, when members of the public went to effect his arrest.

Both appellants herein chose to make sworn statements when they were put to their defence.

The 1st appellant said he was a metal-welding worker; he did not remember what happened on 13th August, 2005; on 15th August, 2005, as he was going home from his workplace, he was arrested; he met 2nd appellant at the Police Station. On cross-examination 1st appellant said he did not know the complainant, and he had only seen PW1 in Court. He said he had not robbed PW1 of anything on the material date. He said PW1 had fabricated the case.

The 2nd appellant said he worked as a tout, and on 16th August, 2005 he had gone to work; then at 5.00 pm he was hurrying to his home, and some people came seeking to know why he was running; they arrested him and took him to the Police post. He said he had, on an earlier occasion, had a quarrel with the complainant, over mini-bus fare, so he believed there was a grudge.

On cross-examination, the 2nd appellant said he knew the complainant as a customer.

In arriving at the Court's decision, the learned Principal Magistrate thus noted:

“In their defence the accused [persons] merely denied the offence. They did not account for themselves on the night the offence was committed. PW1 knew the accused [persons] well. Even as they attacked him he called them by name. They have not challenged the complainant's evidence. PW4, Dr. Mwaura examined PW1 and found that he had sustained injuries which he classified as

harm.

“Arising from the above, I find that the prosecution have proved their case against the accused persons. I find them guilty and convict them accordingly.”

The appellants herein were sentenced to death, as ordained by s. 296 (2) of the Penal Code (Cap. 63).

The appellants then appealed, contending, in summary, as follows: (i) that the trial Court erred in holding them to have been properly identified as the suspects; (ii) that proof beyond reasonable doubt was not achieved; (iii) that the trial Court erred in rejecting their evidence (iv) that there were doubts in the evidence which should have been resolved in favour of the accused.

The appellants pursued the foregoing grounds of appeal in submissions both written and oral. The 2nd appellant contested the accuracy of identification which showed him to have been a suspect; he urged that the colour and strength of lighting at the ***locus in quo*** had not been described in the evidence. He urged that PW1 was a single identifying witness whose testimony was in departure from the truth. He also contended that there had been contradictions in the prosecution testimonies. He contended too that the trial Magistrate had failed to comply with s. 211 of the Criminal Procedure Code (Cap. 75) which relates to Court’s direction on possible lines of defence.

The foregoing contention was contested by learned State Counsel, ***Mrs. Obuo*** who noted that the appellants had given sworn evidence only after the options required to be given under s. 211 of the Criminal Procedure Code, had indeed been set out by the Court.

Mrs. Obuo submitted that it was clear from PW1’s evidence that the appellants herein had attacked and robbed him, on the material evening. Illumination, at the time, was issuing from neighbouring flats and security lights, and the appellants were persons well-known to the complainant. It was submitted that the appellants had been properly identified by the complainant, thanks to prior knowledge, thanks to his physical proximity to the attackers at the material time, and thanks to the illumination from near-by buildings. The complainant had at an early stage, told both PW2 and PW5 of the attack and of the identity of the suspects. There was no doubt the evening attack had taken place, as the medical doctor (PW4) did testify. The robbers were two persons, the appellants herein, counsel urged, and they injured the complainant. Counsel submitted that the learned trial Magistrate had rightly held that the defence offered was bare denial which had made no dent on the prosecution case which, consequently, had been proved beyond reasonable doubt. Counsel urged that the appeal had no merits, and should be dismissed.

We have carefully considered the evidence herein as we are required by law to do, a duty clearly stated in ***James Otengo Nyarombe & 2 Others v. Republic***, Criminal Appeal No. 184 of 2002:

“It is trite that a trial Court has the duty to carefully examine and analyse the evidence adduced in a case before it and to draw [conclusions] only based on the evidence before it. In the same way a court hearing a first appeal (i.e., a first appellate court) also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantages of seeing the witnesses and observing their demeanour and so, the first appellate court would give allowance for the same.”

From the record, the learned Magistrate had no difficulty with the complainant, in relation to credibility. It is an established fact the complainant, at about 9.30 pm on the material date, was attacked by two robbers who battered his face, and took off with his money and his shoes. We do not doubt the trial Court’s finding that the ***locus in quo*** was well illuminated from neighbouring buildings, and that the complainant did see his attackers. By the complainant’s evidence, these attackers were village-mates, persons well known to him and he could address them by their names.

By the testimony of PW1, who we think there is no reason to disbelieve, the two appellants herein were the ones who attacked and robbed him of his belongings. We think this evidence by itself is credible; but besides, we see an element of corroboration taking the form of circumstantial evidence, at

least with respect to the 2nd appellant. This appellant gave little by way of cross-examination, when PW5 said assuredly that on the occasion 2nd appellant was arrested, he had taken to his heels, on seeing members of the public go to his home. Why would he do so, from his very castle, where, if he were an ordinary reasonable man he would stand his ground to the hilt? Only because he feared arrest, which he apprehended because he had only so recently done wrong.

We find that the appellants herein were rightly found guilty as charged, convicted and sentenced according to law. We dismiss the two appeals, uphold conviction, and affirm sentence in both cases.

Orders accordingly.

DATED and DELIVERED at Nairobi this 4th day of March, 2008.

J.B. OJWANG G.A. DULU

JUDGE JUDGE

Coram: Ojwang & Dulu, JJ.

Court clerks: Huka & Erick

For the Respondent: Mrs. Obuo

Appellants in person