REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 239 of 2006

PARTRICK NJENGA MWAURA ……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From original conviction and sentence in Criminal Case No. 537 of 2005 of the Principal Magistrate's Court at Kikuyu – Mrs. M.W. Murage PM)

JUDGMENT

PATRICK NJENGA MWAURA, the appellant, was charged before the subordinate court with robbery with violence contrary to section 296(2) of the Penal Code. The particulars of offence were that on 20th October 2005 at Ngurinditu Village in Kiambu District within Central Province, with others not before court being armed with offensive weapons namely knives robbed FRANCIS WAMUI MUIGAI his jacket, one mobile phone SAMSUNG A800, plus cash Kshs.15,000/= all valued at Kshs.28,000/= and at or immediately before or immediately after the time of such robbery wounded the said FRANCIS WAMUI MUIGAI.

After a full trial, the appellant was convicted. He was sentenced to death as provided for by law. Being aggrieved by the decision of the subordinate court, the appellant filed this appeal challenging both the conviction and sentence. The appellant also filed written submissions, which he relied upon at the hearing of the appeal. The summary of the grounds of appeal were that –

1. The circumstances of identification at the scene by PW1 and PW2 were not favourable for positive identification.

2. PW1 and PW2 were not credible witnesses, and therefore the magistrate erred in relying on their evidence.

3. The evidence of prosecution witnesses was in consisted, therefore the magistrate erred in convicting the appellant on the same.

4. The evidence of prosecution witnesses was not sufficient.

5. The mode of arrest of the appellant was doubtful.

6. The magistrate erred in failing to adequately consider his defence of alibi as was required under section 169(1) of the Criminal Procedure Code.

The learned State Counsel, Ms. Gateru, opposed the

appeal and supported both the conviction and sentence. Counsel submitted that the evidence on record was sufficient to sustain the conviction. Counsel emphasized that it was the appellant who was armed with a knife and iron bar, and robbed the complainant of the items listed in the charge sheet. Counsel submitted that there was adequate light at the scene, and PW1, knew the appellant before. In addition, PW2 corroborated the evidence of PW1, and also saw PW1 come back into the bar without his jacket. Counsel contended that any apparent contradictions in the prosecution evidence were minor, and did not affect the prosecution case. Lastly, counsel submitted, the defence of the appellant was considered and found to be a lie. The P3 form which was produced by PW3, confirmed the injuries suffered by PW1.

In response to the State Counsel's submissions, the appellant submitted that there should have been evidence from somebody such as the barman who was in that bar at the time of the incident. He contended that PW2 did not see him and that PW1 was drunk and could have been injured because of drunkenness. He submitted that the prosecutor did not attend court on the date of ruling. He also contended that the prosecution witnesses, PW1 and PW2, must have sat down and decided to implicate him. He further submitted that the members of the public, who came to the scene, did not testify as well as the Administration Police officers who arrested him.

This being a first appeal, we are duty bound to re-evaluate the evidence on record and come to our own conclusions and inferences – see OKENO –vs- REPUBLIC [1972] EA 32.

The facts are as follows -

PW1 FRANCIS MUIGAI and PW2 SIMON NJENGA MBOCHE were in JACK'S PUB bar at Nderi Kiambu on 20/10/2005 at about 10 p.m. According to these two witnesses, the appellant, whom they knew before, walked into the bar and told PW1 that a man was calling him outside. When PW1 told the appellant to ask that person to come into the bar, the appellant informed PW1 that the man was saved and could not get into a bar. According to PW1, when he walked out, he found that the appellant was with a brother and other men. The brother of the appellant was armed with a knife and another man had a metal bar. The men then kicked PW1 and robbed him mobile of his phone, jacket and cash Kshs.1000/= which he had earned from sale of wood logs. PW1 screamed and members of the public came, but the appellant at this time had ran away. PW1 was later examined by a doctor, PW3, who filled in a form on the injuries suffered.

PW1 reported the incident to the police and the appellant was later arrested and charged with the offence.

In his defence, the appellant gave an unsworn statement. It was his defence that he was a casual worker. On 14/12/2005 he went to look for a motor vehicle to transport firewood. In the evening, when he went to eat in a hotel, he was called by someone who took him to the chief's office where he met PW1 and PW2. PW1 and PW2 alleged that he had stolen and asked for Kshs.5000/= which he did not have. He contended that, on the date of the alleged offence he was sick at home, therefore did not commit the offence.

It is clear from the above that the conviction of the appellant was predicated on the evidence of visual identification/recognition of the appellant, by PW1 and PW2, both of whom stated that they knew the appellant prior to the date of the incident. The scene was a bar. It was at night after 10 p.m. Though both PW1 and PW2 stated that they knew the appellant previously and recognized him there was need to scrutinize the circumstances of visual identification or recognition closely in order to ensure that there was no possibility of error or mistake – see GIKONYO KIRUME – VS – REPUBLIC [1980] KLR 23.

In our view, the circumstances of the incident in this case could not remove the possibility of mistaken identity. This is so because none of PW1 and PW2 stated that there was light in the bar, what type of light it was how close the appellant came to PW 1 and PW2, and how they actually came to be certain that it was, infact, the appellant and no one else who came to the bar to call the complainant (PW1). The burden was on the prosecution to adduce the necessary evidence on the scene and lighting in order to remove any reasonable doubt regarding the identification. They failed to do so. The benefit of the doubt

will go to the appellant. We give that benefit to the appellant.

Secondly, PW1 stated in his evidence that he screamed and even neighbours came to the scene. PW2, on the other hand, does not appear to have heard any screams, while the incident occurred just near that bar. This is rather incredible, and the benefit of doubt again goes to the appellant. It is instructive also to note that none of those members of the public, who were alleged to have even chased the robbers, was called to court to testify. However, the most important fact is that PW2 did not appear to have heard the screams, and merely saw the appellant come back to the bar a short while after, without his jacket.

Thirdly, the appellant was arrested in the absence of PW1 and PW2. No identification parade was conducted. In addition, the arresting officer (Administration Police Officers) were not called to court to testify as to the circumstances and reasons for which they arrested the appellant. These were crucial witness. We draw an adverse inferences against the prosecution for the failure to call these crucial witnesses – see BUKENYA –vs- UGANDA [1972] EA 547. We consider that if the said crucial witnesses were called to testify, their evidence might have been adverse to the prosecution one.

In conclusion, we are of the view that the prosecution failed to prove the case against the appellant beyond any reasonable doubt. We think that the investigations and the prosecution mishandled this case by creating some gaps. We will therefore allow the appeal.

For the above reasons, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 29th April 2008.

……. **…….**

J.B. OJWANG **G.A. DULU**

JUDGE **JUDGE**

In the presence of –

Appellant in person

Ms. Gateru for State

Huka/Mwangi - court clerk