



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang & Dulu, JJ.)

CRIMINAL APPEAL NO. 334 OF 2005

BETWEEN

DAVID KAMAU NDUNG’U.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Principal Magistrate Mrs. M.W. Murage dated 29th June, 2005 in Criminal Case No. 19 of 2004 at Kikuyu Law Courts)

JUDGEMENT OF THE COURT

David Kamau Ndung’u, the appellant herein, was charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). This charge was particularized as follows. On 30th July, 2004 at Nderi, in Kiambu District, within Central Province, the appellant jointly with another not before the Court, robbed **Moses Mukere Wairagu** of a cellphone, Nokia 3310 by make, a Seiko 5 wrist-watch, and cash in the sum of Kshs.4000/= ? all valued at Kshs.16,000/= ? and at the time of such robbery, wounded the said **Moses Mukere Wairagu**.

PW1, **Moses Mukere Wairagu**, a driver for the Kenya Agricultural Research Institute (KARI) living at Nderi, had gone out to buy some meat, on the evening of 30th July, 2004. As he was returning home, at 9.00 p.m., he saw two men walking along behind him; it was a well-lit night; he could see that one of the two men was someone known to him, this man was the appellant herein. As he approached his house, PW1 came into a dark stretch; and precisely at this point, the two men who were following, now launched an attack; they held PW1, and hit him with stones. They grabbed cash, being Kshs.4000/= which he had on him; they took his Nokia 3310 cellphone; and they helped themselves to his Seiko watch. In his suffering, PW1 was rescued by villagers who happened to be close-by. An unsuccessful search was made for the appellant herein. PW1 reported the incident at Kikuyu Police Station, where he was issued with a P3 medical-reporting form. PW3 was attended to at a hospital.

The appellant was by no means unfamiliar to PW1; he used to sell maize close to the complainant’s dwelling. Several days after the robbery incident, on a Sunday, the appellant herein was arrested by members of the public. It was the complainant’s testimony that his attackers had followed him over a distance of some 20 metres, on the material night; and that they had been armed with a knife, which was found at the scene of crime on the following day.

On cross-examination, PW1 said he did not know the appellant's companion on the material night.

PW2, **Dr. George K. Mwaura**, testified that on 1st August, 2004 he had examined the complainant, who presented with a history of having been assaulted. PW2 found the complainant to have: a swollen and bruised back-hand; broken upper front tooth; pain and tenderness on both eyes; a left hand that was swollen and bruised. These injuries were two-days-old, and PW2 was of the opinion that a blunt weapon had been used to assault the complainant. PW2 put the complainant on treatment; and he classified the injuries sustained by the complainant as "harm". He submitted the P3 form duly filled in and signed.

PW3, Police Force No. 59513 **Police Constable Fred Mugambi**, of Kikuyu Police Station, testified that he was at his station on 4th August, 2004 when he received the statement recorded by the complainant. PW3 laid a charge against the appellant herein. On cross-examination, PW3 said he had carried out investigations into the matter.

PW4, **Samuel Kinyanjui**, a driver living at Nderi, testified that he was coming from his place of work on 30th July, 2004 at 9.30 pm when he saw two young men ahead of him. These young men were holding the complainant, but when they saw him coming, they took off. PW4 came upto the complainant, who said his two tormentors had assaulted and robbed him. PW4 reacted by informing the complainant that he (PW4) had identified the appellant herein as one of the attackers. PW4 identified the appellant herein after the appellant had been arrested on the following day. PW4 had known the appellant, who comes from the same locality as the witness. At the time of the incident, there was moonlight; but PW4 did not identify the second attacker, as the man was unknown to him.

On the foregoing evidence, the learned Magistrate ruled that the appellant herein had a case to answer, whereupon the appellant made a statement as follows. On 2nd February, 2004 [which we note, is some six months *before* the material date] at 7.30 p.m., as he was going out of his home, he met PW4. There was a conversation between the two; in the words of the appellant: "He asked me where I was going. I told him he was not the watchman...I was arrested. I deny the charge."

The learned Magistrate assessed the evidence in the following manner:

"From the foregoing, it is clear that [the] accused was identified by both PW1 and PW4 as being among the robbers who attacked him. Indeed [the] accused was arrested by [the] complainant himself. I find that [the] accused was well known to PW1 and PW4 and he was positively identified. His defence is a mere denial and does not challenge [the] prosecution evidence. I find that [the] prosecution has proved [their] case beyond reasonable doubt. I find [the] accused guilty as charged and convict him under s.215 CPC."

In his grounds of appeal, the appellant questioned the holding that he had been positively identified by PW1 and PW4, in view of the fact that the offence took place at night. The appellant stated that the trial Court had shifted to him the burden of proof, and that there had been no proof beyond reasonable doubt.

The appellant presented his grounds of appeal in written submissions. Learned State Counsel **Ms. Gateru** contested the appeal, and supported both conviction and sentence. She submitted that the prosecution had duly discharged the burden of proof resting upon them: the robbery in question was shown to have taken place on the material date, PW1 being attacked and robbed of his personal effects, by several persons. PW2 confirmed that the attack had resulted in personal injuries to the complainant. PW1 had testified that there was lighting at the material time, and he did see the appellant herein, a person previously known to him, as one of the attackers. Counsel urged that the appellant's defence statement had been duly considered, but found to have no merits. Consequently, counsel submitted, the appeal had no merits.

We see no reason to doubt the evidence that PW1, in proper lighting, had already perceived the appellant and a companion following him, as he (PW1) walked towards his house in the night. The attack now took place at a place with less lighting, and the complainant was clear in his testimony that one of his attackers was the appellant herein. This testimony is corroborated by the evidence of PW4, who came along and witnessed the robbery attack take place. The appellant's defence is mainly evasive, and clearly carries no

merits, in the light of the focused evidence tendered by the prosecution witnesses.

Consequently, we dismiss the appellant's appeal, uphold his conviction, and confirm sentence as imposed by the trial Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 22nd day of April, 2008.

J.B. OJWANG G.A. DULU

JUDGE JUDGE

Coram: Ojwang & Dulu, JJ.

Court Clerk: Huka & Erick

For the Appellant: Ms. Gateru

Appellant in person