REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 151 of 2006

KASEE NGUKU …… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate Mr S.A. Okato

delivered on 31/10/2006 in Machakos Criminal Case No. 1171 of 2006)

JUDGMENT

1. The appellant herein, Kasee Nguku was the accused person in **Machakos CM'S Court Criminal Case Number 1171 of 2006** where he faced a single count of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of offence were that: "**on the 18th June 2006 at Kaviani area in Machakos District jointly with others not before court being armed with a dangerous weapon namely a knife robbed Joseph Mutinda of his one mobile phone make Nokia 7250 and cash Kshs.1,500/= all valued at Kshs. 15,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Joseph Mutinda."** On 31/10/2006, having been convicted of the offence, the Appellant was sentenced to death and his Appeal now is against both the conviction and sentence aforesaid.

2. In his Petition of Appeal filed on 13/11/2006 he listed the following as his grounds of appeal:

1. "That the trial magistrate erred in both law and fact while basing his conviction on the basis that the act was committed to the victims, during bread day light (sic) whilst there was no allegations by the victims of having either identified or recognized him during the execution of the crime to the victims PW1 and 2 as per their statement reveal clearly to this.(sic)

2. That the trial magistrate erred in both law and fact while being impressed with his mode of arrest without considering that there was no evidence that was adduced by those who arrested him nor neither was he ever found in possession of any in criminative item to link me with the crime alleged. (sic)

3. That the trial magistrate erred in both law and fact and while convicting him on charges that weren't proved as to how he was partly and parcel to them as was alleged and charged. (sic)

4. That the trial magistrate erred in law while rejecting his defence without a need to consider that the same wasn't displaced by the prosecution side as per law enjoins in section 212 of the Criminal Procedure Code. (sic)"

3. During the hearing of the Appeal, however, the Appellant raised one other issue; that his rights under Section 77 (2) of the Constitution had been violated in that he never understood the language used by PW3 and PW4 when they gave their evidence.

4. Before complying with the expectations set out by **Okeno vs Republic (1972) E.A. 32** that as the first appellate court we are obligated to evaluate the evidence tendered before the trial court and reach out our own independent decision, it would be prudent to set out the totality of that evidence. It was as follows:-

PW1, Joseph Mutinda stated that on 18/6/2006, he was walking from Kaviani market with his girlfriend, Christine Kanini at about 4 p.m. Three men approached them from behind and one of them asked for a matchbox. He recognized the Appellant as one of the three men and it was he who asked for the match-box. He said that he had known the Appellant before and knew his names as Kasee Nguku. After giving the Appellant the matchbox, he lit up a cigarette and then the three ran off into a forest. After a short distance, the three returned and accosted PW1, as well as his girlfriend. That the Appellant held his legs and with the help of his confederates, pulled him down and robbed him of Kshs.1,500/= in cash and his Nokia 7250 mobile phone valued at Kshs.14,000/=. During the robbery, he said that one of the robbers held him by the neck and others hit him on the face using fists and shoes. He was injured in his eyes and he was unable to see for a while. Later he walked home and the next day, he went to a private clinic at Kaviani and he was treated. He only reported the incident on 25/6/2006 although he went to the Appellant's home the day after the robbery and on failing to get him told, his mother to tell him that he would return the next day to collect his mobile phone. The initial report was made to the area Chief and it was the Chief who caused the arrest of the Appellant.

5. During his cross-examination, PW1 stated partly as follows:-

"**I have known you for a long time… I recorded my statement and I mentioned your name to the police but not in the statement. I have no reason as to why I did not mention your name in my statement."**

6. PW2, Kanini Kimeu, a house help in Nairobi recalled that on 18/6/2006 at 4 p.m, she was walking from Kaviani when three men emerged and one of them requested a matchbox from PW1. She said that it was the Appellant who did so and after lighting his cigarette they walked on but the Appellant and the other two men re-emerged, attacked PW1 and beat him up. That the Appellant took PW1's mobile phone while the others robbed him of Kshs. 1,500/=. PW2 was allegedly also beaten up and when she started screaming, the robbers ran away. She picked PW1's wallet and as he had problems seeing anything, she escorted him home and she then left. She made no report to anyone and only recorded her statement after the Appellant was arrested.

7. As to how she knew that the Appellant was one of the robbers, she merely said;

"**That was the first time I saw the accused. If I saw the others, I would recognize them,**" and In cross-examination;

"**I did not give the police your physical description… In my statement, I did not state that I had seen and recognized one of the robbers. I do not know your names."**

8. PW3, Ludwick Kithia Muinde, an anaethestician at Machakos General Hospital stated that he completed the P3 form for PW1 on 30/6/2006, close to 2 weeks after the alleged incident. He noted in any event, that PW1 had a swelling above the eye, inflammation of the eye and a tender neck leading to difficulty in swallowing. The injuries in his estimation were about 12 days old and the object that may have caused the injury was a blunt one. The degree of injury, he said was "**harm."**

9. PW4, P.C. Laban Wanyonyi was at Machakos Police Station on 25/6/2006 when APC Rotich attached to Kathiani Chief's Camp handed over the Appellant to him after the latter had been arrested on allegations that he had violently robbed PW1 on 18/6/2006 and PW4 was informed that the Appellant's

accomplices were armed with a piece of wood during the attack.

10. PW4 said that PW1 had earlier made a report of the robbery and received treatment after being issued with a P3 form.

11. When the Appellant was asked to defend himself, he said nothing of the events of 18/6/2006 but stated that on 25/6/2006, at 9.00 a.m. two Administration police officers and another person arrested him and took him to Kaviani Administration Police Camp. Later he was escorted to Machakos Police Station where PW1 made the allegation that he had robbed him. That he did not know PW1 and on 18/6/2006 he was not at Kaviani but at Machakos where he was loading vehicles the whole day and remained at his place of work upto 8.30 p.m.

12. The learned trial magistrate in his judgment after reproducing the evidence before me, concluded that the evidence of PW1 was "**sufficiently corroborated by Kanini Kimeu (PW2) who was an eye witness and whose evidence was direct and highly reliable."** That the Appellant was therefore guilty of the offence and he proceeded to sentence him to death.

13. From the grounds of appeal, the written submissions by the Appellant and submissions by Mr Wang'ondu, Learned State Counsel who conceded the Appeal, our analysis and evaluation of the case is as follows:-

Firstly, we have to note that whereas the charge sheet specifically states that the Appellant was armed with a knife during the alleged robbery, not one of the four witnesses ever mentioned such a weapon. Infact PW1 and PW2 said that the robbers attacked them with their fists and no weapon was mentioned. PW4, the police officer who purportedly re-arrested the Appellant and also investigated the case said that the Appellant's "**accomplices was armed with a piece of wood."** Whether he received this information from PW1 or he made it up is beyond us but suffice it to say that where the particulars of offence in the charge sheet do not match the eventual evidence tendered before the trial court, a miscarriage of justice would be occasioned if the accused person is convicted **(see Ochieng vs Republic (1985) KLR 252)**. This finding properly applies to this case.

14. Secondly, the conduct of PW1 and PW2 after the incident is puzzling. PW1 said that after the robbers left, he "heard (his) girlfriend scream and leave," and that he went home alone. PW2, the girlfriend on the other hand said that after the robbers left, she went with PW1 "upto near his home and left him," who should we believe? Even if this is not a serious contradiction and inconsistent conduct, what of their separate conducts thereafter? PW 2 did not report the incident at all although she said that she was also attacked and assaulted by the robbers. PW1 on the other hand although half-blinded and out of Kshs.1,500/= and a Kshs.14,000/= mobile phone only went to the Appellant's house the next day and when he failed to get him, did nothing until 25/6/2006 when he complained to an unnamed chief who then caused the arrest of the Appellant. The chief was not called to testify neither was APC Rotich who arrested him. Their evidence would have been crucial to fill in the gap as to the exact report made by the complainant at the earliest instance, in this case one week after the alleged incident. We agree with the decision in **Kenga vs R Cr. App.1126/87 (C.A.)** unreported where it was held that the evidence of arrest of a suspect is sometimes important to explain the exact circumstances of arrest and to connect it with the alleged incident.

The other issue we would like to raise as a corollary of the question of arrest is the medical evidence given by PW3. Whereas PW1 said that he was treated as an unnamed private medical clinic at Kaviani, a day after the incident, PW3 said nothing of any such treatment and whether he had treatment notes from that clinic to guide his decision on the age of injuries that PW1 had. This is a common practice amongst medical practitioners. Further, PW1 picked his P3 form a week after the incident but only went for check-up another 5 days thereafter i.e. on 30/6/2006. No explanation for this delay is given at all. PW3 on the other hand while filling the P3 form signed and stamped it as the Medical Superintendent of Machakos General Hospital but in evidence he called himself an "anaesthesistant (sic) Machakos Hospital." We are not certain with all the inconsistencies in this case that the evidence as contained in the P3 is wholly believable for these reasons.

15. Having so said, there is still the evidence of recognition of the Appellant at the scene. PW1 said that he had known the Appellant previously and that the robbery took place in broad daylight. PW2 had not known the Appellant before and her identification of him at the dock is of no value (see Kiarie vs Republic (1984) KLR 739). With that finding, the evidence of PW1 is reduced to that of a single identifying witness and the law as we know it is that the evidence of recognition is more reliable and more assuring than the identification of a stranger. That was the holding in **Anjononi & Others vs R (1980) KLR 59**. In this case however, we have already expressed dissatisfaction with much of the evidence tendered in this case and an recognition. PW1 merely stated that he had known the Appellant for a "long time" yet in his statement to the police he failed to mention him although he also stated in evidence that he knew the Appellant's name. "Long time" is not qualified and it is incomprehensible why if he knew the Appellant so well and even knew his name, why not tell the police so? In any event as we said, earlier, had the chief and arresting officer been called to testify, this issue would have been easily cleared. It has not and the benefit of doubt must favour the Appellant.

16. On the whole therefore, our considered view is that this is a case in which we have difficulty in sustaining the conviction and sentence in view of all the important matters of law and procedure that we have highlighted above. There are far too many doubts that can only lead us to conclude that the offence as framed in the charge sheet was not proved beyond reasonable doubt. The Appeal is also properly conceded. The Appeal herein has merit and is hereby allowed as prayed. The Appellant's conviction is hereby quashed and sentence is now set aside. He will be released unless he is otherwise lawfully held.

17. Orders accordingly.

Dated and delivered at Machakos this 17th day of April 2008.

J.B OJWANG' **ISAAC LENAOLA**

JUDGE **JUDGE**