



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang & Dulu, JJ.)

CRIMINAL APPEAL NO. 306 OF 2005

BETWEEN

DAVID KAMAU WANJIRU..... APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the judgement of Senior Resident Magistrate L.W. Gicheha dated 15th June, 2005 in Criminal Case No. 113 of 2004 at Thika Law Courts)

JUDGEMENT OF THE COURT

The appellant herein was the second accused before the trial Court. He faced a charge of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63) in two counts, as well as a third count in which the charge was attempted rape contrary to s.141 of the Penal Code (Cap. 63). There is no appeal in respect of the third count, as the trial Court had found that the complainant “was not able to identify the five persons who wanted to rape her due to the fact that they had taken her to a dark corner.” The learned Magistrate found no evidence to support the charge, and acquitted the accused persons of this charge under s.215 of the Criminal Procedure Code (Cap.75, Laws of Kenya).

The charge in the first count was particularized as follows. The accused persons, on 20th December, 2003 at 2.00 am, at Muchatha Village in Thika District, within Central Province, jointly with others not before the Court, robbed **Dorcias Wangari Kamau** of cash in the sum of Kshs.140/=, and, immediately before, or at, or immediately after the time of such robbery, used actual violence against the said **Dorcias Wangari Kamau** while armed with a knife.

The particulars of the second count of the charge were given as follows. The accused persons, on 20th December, 2003 at 2.00 a.m., at Muchatha Village in Thika District, jointly with others not before the Court, robbed **Alice Wanjugu Maina** of cash in the sum of Kshs.80/=, and, immediately before, or at, or immediately after the time of such robbery, used actual violence against the said **Alice Wanjugu Maina** while armed with a knife.

PW1, **Dorcias Wangari Kamau**, was in the company of her husband, **Anthony Maina**, and her friend, **Alice Wanjugu** (PW2), as they walked to their home at Juja, at 12.00 midnight. When they reached a certain junction on the road, popularly known as CNN, they met some seven men, who demanded that

they stop. While PW1's husband ran away and escaped, the gang of seven held PW1 after she was slapped and fell down. She was ordered to surrender all effects in her possession, and she handed over to the gang Kshs.140/= which she had on her. She was ordered to lie down and remain there, even as some members of the gang took away **Alice Wanjugu** (PW2). The members of the gang got preoccupied with PW2 and other passers-by; and this gave PW1 a chance to escape into a nearby residential plot, and to raise alarm. It so happened that there were policemen on patrol, in the neighbourhood; they swung into action, and arrested seven people.

PW1 gave testimony that there was difficulty in separating the thugs from innocent passers-by. In her words:

"I was able to separate the thugs from the ones who came to assist me...After the thieves were separated from the rescuers, the Police officers were left with only three people. The three who were left [were not known to me]....The accused was one of the people arrested...On the next day I went to Juja Police Station to report. The Police told me they had arrested one of the accused....My jacket was also found on the road. I don't know the accused who was arrested."

On cross-examination, PW1 said:

"I did not recognize even one person who attacked me."

PW2 gave evidence similar to that of PW1 in certain respects, and added that the seven people she and PW1 and PW1's husband met at the material time, had knives, machetes, long sticks, and torches. The members of the said gang demanded money, and extracted the same from their victims. A handful of the members of the gang got into an argument as they started stripping off her clothes, and she used the moment of confusion to escape, after suffering assaults.

Subsequently, Police officers caught up with PW2, and she identified some persons just arrested by the Police, on the material night. In PW2's words:

"I identified the 2nd accused [the appellant herein]. I [had seen them] in the electric light when they first attacked us...I was called to Juja Police Station where I was told I would be shown a group of people and I would say if I could identify any one of them. They were about 15 people. They were put on parade. I was able to identify the accused [appellant herein] and the [deceased] accused."

The appellant herein cross-examined PW2, and she responded that at the time she and her friend were robbed of money, on the material night, there were electric lights illuminating the place. PW2 said she had been able to identify the appellant herein, as one of the robbers of the material night. She said she could only identify persons she saw in the light – and the appellant was in this category. PW2 said she had not seen members of the identification parade being brought along by the Police. She identified two persons (including the appellant herein) because she had seen them on the night of attack.

PW3, **Thomas Njathi Mbugua**, who lives at Juja, testified that he was walking home from his place of work, on 20th December, 2003 at 2.00 a.m. when he met two young men, one armed with a knife. The man with the knife stood on PW3's left side and pointed the weapon at PW3's shoulder, while the other started emptying PW3's pocket of money, taking the sum of Kshs.3000/=. They also seized PW3's bag of fruits and biscuits which were intended for his children.

On cross-examination, PW3 said the thug who had removed money from his pocket on the material night, was the appellant herein. Was PW3 able to see clearly, at the material time? In his words:

"I know it was you who attacked me. I have a second sight. It was dark, but when you [left] there was light...I did not identify you at the Police station because I did not see any purpose in doing so."

PW4, Police Force No. 40908 **Police Constable William Kipkari** of Juja Police Station, gave testimony

that in the early hours of 20th December, 2003 he was on duty at Muchatha, in the company of the OCS, of *P.C. Kyalo* and *P.C. Mwangi* (deceased). PW4 and his colleagues heard a scream, and rushed to the source of the alarm; and they saw seven men who when challenged to account for themselves, disappeared. PW4 chased and arrested one of these men; while another was arrested by *P.C. Mwangi* and *P.C. Kyalo*. When those arrested persons were taken to the Police station, it turned out that a report of the incident had already been made there. As those who made the report said they could identify the robbers, an identification parade was conducted by *Inspector Theuri* on 30th December, 2003 – and the two accused persons were positively identified; and charges were then laid against the appellant herein, and another.

On cross-examination, PW4 testified that the identification parade took place *ten days* after the material date.

PW5, Police Force No. 51000 *Inspector Faith Theuri* of Juja Police Station testified that there had been a case of robbery with violence, reported at the station on 30th December, 2003. She later conducted an identification parade for the appellant herein, and another. Asked if he consented to the parade, the appellant herein had no comments. He did not want to bring along any relative or advocate, to be present during the parade.

All the parade members had been in Police custody. Witnesses remained outside the Police compound, as the parade members were arranged. The parade was conducted within the corridors of the Police station. The witnesses had no opportunity to see the accused persons before the parade. There were eight parade members. Those doing the identification were informed that the suspects may or may not be on parade. The appellant herein chose to take No.9 position on the parade; and the witness was then summoned to view the parade members. PW2 made the identification by touching the appellant herein on the shoulder. The appellant did not comment after he was identified. He then told PW5 that he was not satisfied with the parade. He had no complaint about the manner of conducting the parade; but he believed the identification itself to be a lie. The appellant herein had duly signed the parade forms.

After the Court ruled that the prosecution had made a *prima facie* case against the appellant herein, he elected to make an unsworn defence. He said he was arrested on 19th December, 2003 as he was going home from his work-place. He said he had met Police officers who already had some other persons under arrest. He said he was not told why he had been arrested; and he was later charged together with a person unknown to him. He said a lady had come to say she recognized the appellant herein, even though no parade had been held. He said he knew nothing about the charge.

In arriving at its final decision, the trial Court proceeded as follows, in assessing the evidence:

“According to PW1, seven people were arrested. She then helped to distinguish the thieves from the ...Good Samaritans, and two people were placed in Police custody. According to her, the people placed in Police custody were persons known to the Police as robbers. On 20th December, the accused persons were arrested by the Police not because they were identified by PW1, but because they were known as robbers, and because they were at the scene of robbery, they were suspects. Therefore it is not really in dispute that the accused person was arrested at the place where the robbery took place, as the Police immediately rushed to the scene when PW1 screamed.

“Is there then a possibility that [the appellant herein] was on his way home, from work? If that was the position he would have at least acknowledged to the Court that he was arrested when the Police were handling thieves alleged to have robbed PW1 and PW2. He also must have heard PW1 screaming. Failure to give this information makes his presence at the scene of robbery very suspicious. This evidence put together with PW2’s ability to identify him, proves that the accused was involved in the said robbery.

“Further to strengthen his defence, he should have produced documents to show that he was

employed in the said bar, or called witnesses.

“The accused was in a group of persons who not only robbed PW1 and PW2 and PW3, but were also armed with knives. They in fact injured PW2 and threatened to use violence on PW1 and PW3.

“I therefore find that the prosecution have proved beyond reasonable doubt a charge of robbery with violence contrary to section 296(2) of the Penal Code, against the accused person.”

Upon conviction, the appellant was sentenced to death, as provided for in s.296(2) of the Penal Code.

The appellant, in his grounds of appeal, contends as follows: (i) proof of guilt to the required standard had not been achieved; (ii) in the prevailing conditions at night, the appellant had not been positively identified as a suspect; (iii) the identification parade had not been properly conducted, in accordance with the standing orders; (iv) the trial Magistrate had erred in law by shifting the burden of proof to the appellant herein.

The appellant developed the foregoing grounds in written submission which he brought before the Court at the time of hearing, but opted not to make any oral submissions.

Learned State Counsel **Mrs. Kagiri** contested the appeal, and urged the Court to uphold conviction.

Mrs. Kagiri submitted that the record of appeal shows the prosecution to have proved the ingredients of the offence of robbery with violence. She urged that both PW1 and PW2 had given a detailed account of how they had been attacked on the material night by seven men, armed with knives, machetes and sticks. The two complainants were robbed of personal effects.

Learned counsel submitted that PW2, unlike PW1 who had been forced to lie face downwards, was in a position to see the attackers, and thus, was able to identify the appellant herein as one of the robbers. Counsel urged that the appellant herein had been connected to the offence through visual identification.

Counsel submitted that the appellant had been arrested at the scene of crime, and there had been no challenge to the evidence of arrest. Counsel also placed much significance on the identification of the appellant by PW2, at the identification parade which was conducted by PW5. In the light of PW5's testimony, the trial Magistrate had concluded that the identification parade was properly conducted.

Learned counsel urged that, from the evidence on record, it was entirely safe for the trial Court to convict.

Counsel submitted that the defence offered by the appellant had no merits: its preoccupation was to demonstrate that all the prosecution witnesses had been lying; but both PW1 and PW2 were not known to the appellant before, and they had no reason to tell lies in Court.

We have carefully considered all the evidence in this case, as it is our duty to do on first appeal. Our review of the testimony of PW1 entertains no doubts at all, that this witness had no opportunity to identify anyone among the robbers of the material night. This is the position taken, too, by the trial Court; save that that Court attaches corroborative force to the allegation that the appellant was arrested by Police officers who were arresting suspected thieves. We are not in agreement with such an inference, because it was not proved that all the persons arrested by the Police on the material night, were thieves.

There is no doubt that the basis of the appellant's conviction was the evidence of PW2, **Dorcas Wangari Kamau**. This witness testified that there was electrical lighting from neighbouring buildings, illuminating the *locus in quo* at the time of attack, even though, shortly after, PW2 was ushered out into the dark by those intent on raping her. PW2 said she was still able to recall the facial features of the appellant herein, from the brief moment of lighting at the time of the robbery. We are conscious of the difficulties attendant on evidence of visual identification, especially at night; thus, such evidence is generally

required to be corroborated. Can this Court rely on the visual-identification evidence of PW2, even though it stood all by itself? We have anxiously considered this question, and come to the conclusion that PW2's evidence was reliable in every respect; and this in particular, because PW2 attended the identification parade organized by PW5, and easily identified the appellant herein. So, the appellant, we hold ? as did the trial Magistrate ? was in the group of attackers who had robbed PW1 and PW2 at the material time.

We do not, however, agree with a statement in the trial Court's judgement, that – "Further to strengthen his defence, [the appellant herein] should have produced documents to show that he was employed in the said bar, or called witnesses." By virtue of the established procedure (s.211, Criminal Procedure Code), it would have been perfectly right for the appellant to elect total silence, with no witnesses to support his case. Of the appellant, the trial Court had further said: "Failure to give this information makes his presence at the scene of robbery very suspicious." Suspicion cannot, by itself, be evidence, or a corroborative scenario of fact that will justify a conviction.

For the reasons already stated, however, we hold that the appellant herein was safely identified as one of the robbers on the material night.

Accordingly, we dismiss the appeal in respect of counts 1 and 2, uphold conviction, and affirm sentence as meted out by the trial Court. We order, however, that the sentence for the second count shall remain in abeyance, pending execution of the sentence in respect of the first count.

It is so ordered.

DATED and DELIVERED at Nairobi this 14th day of April, 2008.

J.B. OJWANG

G.A. DULU

JUDGE

JUDGE

Coram: Ojwang & Dulu, JJ.

Court Clerks: Huka and Erick

For the Respondent: Mrs. Kagiri

Appellant in person