REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 204 of 2005

PETER NJOGU NDEGE .... APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's

Court at Nanyuki in Criminal Case No. 176 of 2005 dated 15th July 2005 by Ms R. N. Muriuki – SRM)

J U D G M E N T

The appellant, Peter Njogu Ndege was convicted of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to the mandatory death sentence. He was aggrieved by the conviction and sentence. Hence he preferred this appeal. In his home drawn petition of appeal, the appellant faults Ms Muriuki, the learned Senior Resident Magistrate for convicting him on contradictory evidence, mode of arrest, upon arrest nothing was recovered in his possession, inconclusive investigations and rejection of his defence that was sufficient to secure his acquittal.

Briefly, the facts of the case were that on 23rd January 2005 PW2 Lepayan Lemaranya, although in the typed proceedings he is referred to as PW1, was at Doldol bus stage at about 1 p.m. He was suddenly confronted by three people. Whereas one of them held him by his hand, and leg, others held him by his neck and threw him on the ground. He identified the appellant as the person who held him by the neck. Once on the ground, the assailants removed his wallet which contained Kshs.5,300/= from his shirt pocket and took his Masai sword as well. The complainant screamed and two of the assailants started running. He ran after one of them being the appellant and with the assistance of members of the public managed to apprehend the appellant. Nothing was however recovered from the appellant as he threw the wallet to his accomplices who ran away. On apprehending the appellant, he was taken to Nanyuki police station and a report of the incident was received by P.C. Jackson Gichuki (PW1). The complainant was then issued with a P3 form having been injured in the course of the robbery. He was referred to Nanyuki District hospital for treatment. Richard Kalenya (PW3) a clinical officer at the said hospital examined the complainant on the same day of the robbery and assessed the degree of injury as harm. The appellant was then charged.

Put on his defence, the appellant in a sworn statement of defence stated that he resides in Meru and sells clothes. On 23rd January 2005 he was in Timau for that purpose when he received information that a colleague of his had been taken ill and was at Nanyuki hospital and went to check on him. As he was leaving the hospital he met two people. One of them pointed at him and he was arrested. The person who

had pointed at him and who was a Masai hit him with a rungu saying that one of the persons who had robbed him was wearing a jacket resembling the one he was wearing. He was then arrested and subsequently charged. He vehemently denied having been involved in the robbery.

The learned trial magistrate considered the prosecution case *vis-a-vis* the defence of alibi put forward by the appellant and came to the conclusion that there was sufficient evidence of identification on which to convict the appellant.

In his judgment the learned Senior Resident Magistrate stated inter alia:-

"Though the complainant was the only witness to the robbery there is no doubt from all the evidence on record that he was able to identify the accused as one of the persons who robbed him. Though none of the stolen items was recovered from the accused, there is evidence of the complainant that the accused threw the wallet to others who escaped. The complainant I found had no reasons to pick on the accused as he alleges. The robbery was during the day when it was easy for the complainant to identify his attackers without possibility of error or mistake."

When the appeal came up for hearing before us on 12th March 2008, Mr. Orinda, learned Principal State Counsel conceded to the appeal stating that the appellant should have been convicted for the offence of simple robbery or theft from a person. The evidence of PW1 regarding the mode of arrest of the appellant was not resolved by the magistrate. That it would appear that the robbery was committed before the report. That the evidence of robbery did not marry with that of the complainant. Counsel further submitted that none of the members of the public who purportedly arrested the appellant testified. Finally counsel submitted that the evidence was contradictory.

On his part, the appellant submitted that he did not commit the offence. That he was arrested by police officer with the complainant and not by members of the public. Finally he submitted that when the crime was committed he was on his way from hospital.

It is the duty of this court, as a first appellate court to remember that the parties to this appeal are entitled as well as on the question of fact as on question of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always be weary and bear in mind that it had neither seen nor heard the witnesses and to make due allowance in that respect. See Pandya v/s Republic (1957) E.A. 336, Ruwalla v/s Republic (1957) E.A. 570 and Okeno v/s Republic (1972) E.A. 32

We have anxiously considered this appeal. We find ourselves in an unfortunate position of not going along with Mr. Orinda's concession. We have no doubt at all in our mind that the offence charged was proved. We have on earlier occasions commented on the issue of a charge of robbery with violence contrary to section 296 (2) of the Penal Code and we think it may be useful to revisit the same. In the case of **J**ohana Ndungu v/s Republic, criminal appeal No. 116 of 1995, the court of appeal stated that there are three ingredients, any one of which if proved is sufficient to constitute the offence of robbery with violence under section 296 (2) of the Penal Code. If the offender is armed with any dangerous or offensive weapon or instrument that would be sufficient to constitute the offence. Secondly, if the offender is in company with one or more other persons or persons that would constitute the offence. And lastly if at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person that would be yet another set to constitute the offence.

In the present appeal, the evidence adduced and accepted by the trial court was that the appellant was in company of more than two persons at the time of the robbery. They committed the act of wounding the complainant, if the evidence of the clinical officer is anything to go by. It is manifestly clear from the evidence on record that the ingredients of the offence of robbery with violence under section 296 (2) had been satisfied and the appellant had committed an offence under the section and was therefore properly convicted. There is nothing on record to persuade us to reduce the charge to one of robbery contrary to section 296 (1) of the Penal Code as suggested by the learned Principal State Counsel.

As for the contention that the robbery may have been committed on a different day the original which record we have perused does not support that contention. From the typed proceedings and according to the testimony of PW1, the offence would appear to have been committed on 31.1.05 yet according to the charge sheet and the testimony of the complainant, the same was committed on 23.1.05. This was a typographical error as the original record clearly shows that PW1 stated the complainant came and reported that, he had been robbed of his money on 23.1.05. Had Mr. Orinda cared to look at the original record, we doubt whether he would have conceded the appeal on that ground. Finally on the issue of members of the public who arrested the appellant failing to testify, we do not think that that failure was fatal to the prosecution. After all, the complainant testified that he ran after the appellant following the incident and was assisted by members of the public to arrest him. The evidence of the complainant as regards the chase and final arrest of the appellant was sufficient to convict the appellant.

There can be no dispute that the complainant was attacked by a gang of three people who proceeded to relieve him of his Kshs.5,300/= and Somali sword. In so doing, they injured the complainant who had to be treated immediately after the robbery. The main issue in this appeal turns on identification. The robbery took place on 23rd January 2005 in broad day light. It was at about 1 p.m. There is no suggestion that the complainant was in any way inhibited from seeing and observing his assailants. Immediately after the incident, the complainant chased one of the robbers whilst screaming and was assisted by members of the public to apprehend him. That robber was the appellant. There is no suggestion that during the chase, the complainant ever lost sight of the appellant. The arrest of the appellant was immediate and at the vicinity thereby minimizing the chances of the appellant being a victim of mistaken identity.

Yes it may have been desirable and indeed prudent that a member of the public who assisted the complainant in apprehending the appellant testify. However and as already stated, failure to call such witness or witnesses was not fatal to the prosecution case. Who knows as it happens with events of this nature, may be the members of the public dispersed from the scene the moment the appellant was apprehended and never left their contacts with the complainant. They could not therefore have been traced to testify. After all, the police were nowhere in the neighbourhood who may perhaps have insisted on getting the particulars of these people who effected a citizen arrest.

The identification of the appellant was by a single witness. However we do not think that it was in difficult circumstances as it was during broad day light. In the case Roria v/s Republic [1967] E.A. 583 at 584 the court of appeal observed:-

A conviction resting entirely on identity invariably causes a degree of uneasiness and as LORD GARDNER, L.C. said recently in the House of Lords in the course of a debate on section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:

"*There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity.*"

"That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

We fully adopt the foregoing as we consider this appeal. The appellant was arrested immediately after the incident. He was chased and arrested. The complainant did not at all loose sight of the appellant as he chased him. Though he was not arrested in possession of anything stolen during the robbery, the evidence on record however shows that he threw the wallet containing the complainant's money to his accomplices in crime who ran away and were lucky not to be apprehended. Finally, we refer to the celebrated English case of Republic v/s Turnbull [1976] 3 ALL E.R. 459 in which the Lord Chief Justice gave the following directions:

“First, whenever the case against an accused depends wholly on substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?”

We think we have sufficiently considered the issue of identification by a single witness in difficult circumstances although in our view the circumstances obtaining during this robbery were not as difficult. We have considered all what is on record.

On our own re-evaluation of evidence more particularly the evidence of identification, we have come to the conclusion that the identification of the appellant was free from all reasonable doubts. We are satisfied that the appellant was properly convicted. The appellant’s alibi was considered and properly rejected by the learned magistrate. The Complainant was categorical on how and where the appellant was arrested. There was no reason for the complainant to frame the appellant. He never knew him before. PW1 confirmed that he saw the appellant at the police station on the same day of the robbery. This evidence ties in well with the complainant’s evidence that upon apprehending the appellant, they took him to the police station. The alibi defence was a mere afterthought concocted to extricate the appellant from the consequences of his actions.

In the result we find no merit at all in this appeal. We dismiss the same and confirm both the conviction and sentence of the lower court.

Dated and delivered at Nyeri this 29th day of May 2008

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE