REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 132 of 2005

DAVID NGURU KINYUA ……APPELLANT

VERSUS

REPUBLIC ……...RESPONDENT

(From original Conviction and Sentence of the Senior Resident Magistrate's Court at Nanyuki in Criminal Case No.1446 of 2004 by R.N. MURIUKI – SRM)

J U D G M E N T

David Nguru Kinyua, hereinafter referred to as "*The appellant*" was arraigned in the Senior Resident Magistrate's court at Nanyuki on one count of robbery with violence contrary to *section 296 (2)* of the Penal Code as well as one count of stealing farm produce contrary to *section 8 (1)* of the Farm Produce Act. The appellant returned a plea of not guilty to both charges and he was tried. At the end of it, the appellant was acquitted of the second count but convicted on the first count. Upon conviction he was sentenced to death which is the only lawful sentence for the offence. The appellant subsequently filed this appeal. The appellant raised five grounds of appeal in his amended memorandum of appeal drawn in person and filed with the written submissions. These are:

"**1. THAT the learned trial Magistrate erred in law and fact in holding that the offence charged was proved to the required standard.**

2. THAT the learned trial Magistrate erred in law and fact in relying on identification/recognition by complainant PW1, not considering the circumstances obtained (sic) at the time of attack, and or failed to consider that no names was (sic) given (sic) initial report.

3. THAT the learned trial Magistrate erred in law and fact in failing to find that enough doubt were (sic) created to secure an acquittal.

4. THAT the learned trial Magistrate erred in law and fact in putting reliance on insufficient and incredible evidence of prosecution witnesses.

5. THAT the learned trial Magistrate erred in law and fact in failing to give the appellant defence adequate consideration. In that he failed to give inter alia point for determination, the decision thereon, and reason for the decision made C/S 169 (1) of C.P.C."

We shall return to those issues presently. As this is a first appeal, the appellant is entitled to expect that

we shall re-evaluate the evidence on record afresh and arrive at our own conclusions in the matter but giving allowance for the fact that the trial court had the advantage of seeing and hearing witnesses – See **Okeno V. R.(1972) E.A.32**. We must therefore examine the evidence relating to the appellant in detail and how the trial court treated such evidence.

Peter Mwangi Kinyua (PW1) resides at Ngare Ngiro village in Laikpia District. On 24th September, 2004 at about 9p.m he was in his house when someone entered and found him sitted. The person suddenly attacked him by hitting him on the head with a rungu. He demanded money from PW1 on account of cabbages he had sold. When PW1 resisted, the person removed a knife from his pocket and cut him on the hand. PW1 screamed and people came to his aid. Before then the said person had taken his jacket and Ksh.2,230/= and left. PW1 identified the person as the appellant for he saw his face clearly courtesy of the hurricane lamp that was on. The appellant was a person he knew very well as he came from his village.

The following day he reported the incident at Ngare Ngiro police patrol base and was issued with a P3 form. Following treatment, the P3 form was duly completed by PW4 who assessed injuries sustained as harm. PW3 received PW1's complaint at the police patrol base at about 9am. PW1 told PW4 that he had identified the appellant as the person who had robbed him. Since PW4 knew the appellant's house, he went there and caused his arrest. He searched the appellant's house and recovered neither the money nor jacket. He only recovered seven maize combs and two cabbages which formed the particulars of the second count which the appellant as we have already stated was acquitted of. The appellant was then charged with the offence.

Put on his defence, the appellant elected to give a sworn statement of defence and called in aid his only witness, the brother (DW1). He stated in his defence that he was a farmer in Ngare Ngiro and that on 22nd September, 2004, he took his mother who was ailing to Tumutumu Hospital where she was admitted. He remained with his mother and was not near Ngare Ngiro on the material day. Essentially the appellant raised the defence of Alibi. He was therefore surprised when he was arrested on 27th September, 2004 on allegation that he had robbed PW1. His witness, **Ephraim Kinyua** supported the appellant's Alibi defence that on the material day, he was attending to the needs of their mother who was sick at Tumutumu.

When the appeal came up for hearing before us, the appellant elected to tender written submissions in support of his grounds of appeal. We have carefully read, analysed and considered them. **Mr. Orinda**, learned principal state counsel half heartedly opposed the appeal. He submitted that much as he supported the conviction of the appellant he was nonetheless of the view that perhaps the case should have been treated as one of simple robbery. He doubted whether a rungu was a dangerous and or offensive weapon.

We are however unable to accept the learned Principal State Counsel's proposition. There is ample evidence on record that a part from the rungu, the appellant is said to have been armed with a knife which he used to inflict injuries on PW1 when he resisted to part with the money as demanded by the appellant. The evidence shows that the appellant actually cut PW1 on the hand. The injuries sustained by PW1 in the attack were confirmed by PW4, **Stephen Gitahi,** the clinical officer who examined PW1 and observed that he had a cut on the 3rd finger. With this evidence two of the three ingredients of robbery with violence were met i.e. he was armed with a dangerous or offensive weapon or instrument (the knife) and immediately before or immediately after the time of the robbery, he wounded PW1 (he cut PW1's finger). **See Johana Ndungu V Republic, C.A.CR.APP. NO.116 OF 1995** (unreported). We would have gone along with **Mr. Orinda's** argument had the appellant been said to have only been armed with the rungu during the attack, for we know that in certain communities in this country, to be armed with a rungu is but part of their daily regalia.

The conviction of the appellant turned on the evidence of identification nay, recognition by PW1. He was a single identifying witness. The learned Magistrate appreciated the dangers of relying on the evidence of recognition of a single witness in difficult circumstances and duly warned himself. The learned Magistrate no doubt appreciated that such evidence must be treated with utmost care and caution.

Having so warned himself, he went on to convict the appellant on the basis that PW1's evidence was cogent and consistent. He also found as a fact that the conditions prevailing during the attack, were favourable to enable the complainant to identify the appellant. We have no quarrel at all with the conclusions reached by the learned Magistrate. Based on our thorough evaluation of the evidence on record, we have no doubt at all that the learned Magistrate was careful and diligent in the treatment he gave to the evidence on record and the law applicable in the matter.

Just as the learned Magistrate, we also find that PW1 was in a position to recognize the appellant. The offence was committed at about 9p.m. PW1 was not sleeping at the time. He was sitted in the house. The hurricane lamp was on. Had he been suddenly attacked whilst asleep, one may have had doubts as to his capacity to immediately recognize the assailant. Here the situation was different. The appellant was a person well known to PW1. When the appellant entered the house, the hurricane lamp was on which enabled PW1 to see the appellant sufficiently to recognize him. We note though that the learned Magistrate did not make any enquiries as to the intensity of the light emitted by the hurricane lamp and its position relative to the appellant as required – see **Maitanyi V Republic (1986) KLR 198**. However we do not think that the failure to make these enquires occasioned any prejudice to the appellant. PW1 was emphatic that he recognized the appellant. The appellant is a person he knew very well. He was from his village. They talked for the evidence on record suggests that the appellant demanded money from PW1. Apparently he knew that PW1 had received money from the sale of cabbages during the day. In our view, we are satisfied that the conditions obtaining were favourable for positive identification and or recognition of the appellant more so as the appellant was a person well known to PW1. It is instructive that PW1 told PW2 and PW3 that he had been robbed by none other than the appellant. This was so soon after the incident. Infact using the information PW3 who knew the appellant also went to his house and arrested him without the assistance of PW1. There is nothing on record that remotely suggest that this case was framed against the appellant. There is no evidence of a grudge between the appellant and either PW1, PW2 or PW3 as would have led them to falsely testify against the "*innocent*" appellant. There is also evidence that PW1 was injured in the process. We doubt very much that PW1 would have gone to the extent of injuring himself merely to frame the appellant.

As was stated in the case of **Anjononi V.R. (1980) KLR 5**

"…….**this was however, a case of recognition, not identification, of the assailant; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other….."**

We are aware that mistakes of recognition do occur even with close friends and or relatives. However we are satisfied that this was not the case here. The learned Magistrate found PW1 a credible witness. This is a finding on the demeanour of a witness. As an appellate court we cannot interfere with that finding unless no reasonable tribunal could make such finding or it was shown that there existed errors of law. See generally **Republic V Oyier (1985) KLR 353 & Ogol V Mureithi (1985) KLR 359**. We discern no such misgivings in the circumstances of this case. It is evident from the record that the prosecution merely called four witnesses to establish the case against the appellant. However the law does not require any specific number of witnesses, to establish a fact. See *section 143* of the *Evidence Act.*

The appellant has raised the issue of contradictions and inconsistencies in the prosecution case. The major one being hat whereas PW1 had testified that only appellant entered his house, attacked and robbed him he had however told PW3 that he had seen two people. The same issue is revisited in the charge sheet wherein it is stated in the particulars thereof that the appellant with another person not before court robbed PW1. We have carefully examined the record on the issues raised but we cannot, with respect, accept that the contradictions or inconsistencies, if they were, were material enough to affect the substance of the prosecution evidence which must be assessed in its totality. Nit-picking isolated contradictory statements by witnesses is not the right approach in assessment of evidence unless the contractions fundamentally affect the evidence. That is not the case here. PW1 was emphatic that he was attacked by the appellant alone. He repeated the same story to PW2. We do not wish to speculate why the PW3 claimed that PW1 had told him that he had been attacked by two people. May be it was a mere oversight. On the evidence we are satisfied that PW1 was attacked by one person, the appellant. In any

event we do not think that the fact that PW3 talked of two assailants instead of one prejudiced the appellant's case. The learned Magistrate found PW1's evidence cogent and consistent. We agree.

The appellant also faulted the learned Magistrate for not considering his defence appropriately. That complaint is not however borne out by the record. The appellant put up an alibi defence. He also called his brother as a witness. The brother's evidence did nothing to advance the appellant's case. He did not know what the appellant did on 24/9/04. No doubt the Alibi defence was extensively considered by the learned Magistrate. The defence was however rejected in view of the circumstances and the prosecution evidence on record. The learned Magistrate gave reasons why he felt that the alibi defence was not sustainable. Small wonder that the appellant was infact seen by PW2, a church pastor in Ngare Ngiro village on 24/9/04 at 4p.m, the day of the robbery! On our evaluation of the defence, we find nothing in it that would dislodge or cause reasonable doubts to the prosecution evidence. The trial court had in mind the appellant's defence and was satisfied that it was not true. In the circumstances its rejection was justified.

In the final analysis we are unable to agree with **Mr. Orinda**, that the offence disclosed by the evidence was one of simple robbery. The evidence on record fits the offence charged. The appellant's conviction on the evidence on record was inevitable. We therefore find no reason to interfere with the conviction, which we uphold, and we order that the appeal be and is hereby dismissed.

Dated and delivered at Nyeri this 22nd May, 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE