

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 747 of 2007

SIMON KINGORI KABIRU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No.1181 of 2006 of the Chief Magistrate's Court at Kiambu by

G. W. Macharia – S.R.M.)

JUDGEMENT

The appellant was jointly charged with others with robbery with violence contrary to section 296(2) of the Penal Code. That on 31st day of May 2007 at Muchatha village in Kiambu District within Central Province while armed with dangerous weapons namely knives robbed **Janet Mwihaki Njoroge** of her handbag, one purse, one mobile phone Nokia 1600, a bunch of keys, two SIM cards and cash of Kshs.5,000/= all valued at Kshs.11,000/= and at or immediately before or immediately after the time of the such robbery threatened to use actual violence to the said **Janet Mwihaki Njoroge**. He was also charged with an alternative charge of handling stolen goods contrary to section 322 of the Penal Code that on the 1st day of June, 2007 at Muchatha village in Kiambu District within Central Province otherwise in the cause of stealing dishonestly handled one mobile phone make Nokia 1600 knowing or having reason to believe it to be stolen goods. After full trial the appellant was convicted on the main count while his co-accused persons were convicted on the alternative charge of handling stolen property. He was sentenced to suffer death as provided in law. He is now dissatisfied with that decision and has filed the present appeal under our determination.

The case that was made out against the appellant before the lower court is that on 31st day of May 2007 at about 8 p.m. the complainant (PW1) was accosted by somebody who hit her on the neck and in the process she fell on the ground. It is alleged that the attacker was holding a knife and after hitting the complainant on the neck, he snatched the items stated in the charge sheet. PW1 contended that she was able to recognize one of the attackers. PW1 claims to have seen the appellant in the light of the electric bulb on the gate of her house. She stated that she knew the attacker as **Kingori** who was her immediate neighbour but she could not call out his name for fear of reprisal. It is also the evidence of PW1, that there were two other people standing by who did not attack her and whom she could not identify. PW1 went to a neighbour's house who escorted her to her home where she told her husband about her encounter with the attackers. She informed her husband that she was attacked and robbed by Kingori who is their neighbour. The husband to PW1 reported the incident to Karuri Police Station and police officers from Karuri Police Station arrived at the scene at about 5 a.m., the following morning. The officers were shown the house where **Kingori** lives. The appellant was arrested and a mobile phone belonging to PW1 was recovered from him. It is also alleged that the appellant directed police officers to the houses of his accomplices where all the stolen items were recovered.

PW2 **PC Cyrus Omondi** from Karuri Police Station stated that after answering a call of distress from PW1, they rushed to the house where the alleged attacker was sleeping. On reaching the gate, police

officers met with the appellant coming out of the said house. A search was conducted and a Nokia mobile phone belonging to PW1 was recovered from the right trouser pocket of the appellant. It is alleged that police officers took the appellant back to his house where thorough search was conducted. It was then that a sum of Kshs.2,000/= was recovered from the appellant's house, hidden under the mattress of his bed.

Upon further interrogation the appellant volunteered to show PW2 and other police officers the persons who were in possession of the remainder of the items that were stolen from PW1. He led police to the house of his co-accused persons in the lower court where the remaining items were recovered.

The evidence of PW3 is that on the 31st day of May 2007 at about 9 p.m. he was informed by his wife that she was robbed by one **Simon Kingori** of the items and money listed in the charge sheet. He then telephoned Karuri Police Station and reported the incident. He said police officers came to scene at about 5 a.m. and directed them to the house of the appellant. The appellant was arrested and later he was informed that the stolen items have been recovered from the appellant and persons who were connected with him.

The evidence of PW4 is a replica of that of PW2 being that after receiving a report from PW3, they went to the scene of the robbery where the appellant was arrested and after a search, a mobile phone belonging to PW1 was recovered from him.

After the close of the prosecution case, the appellant gave his defence and denied having committed the offences that were alleged against him. The appellant stated that he was arrested on 1st day of June as he was going to work on allegation that he was a member of outlawed group known as *Mungiki* and that he had nothing to do with the robbery that is alleged against him.

This is a first appeal and we have the mandate to analyze and re-evaluate the whole evidence afresh in order to satisfy ourselves whether the conviction of the appellant is save or not. It is clear from the evidence of PW1 that she was able to recognize the appellant with the help of security light at the gate of her house. In her evidence she stated that the appellant was her neighbour and that she gave the names of the appellant to her husband PW3 who subsequently reported the incident to the police officers PW2 and PW4. With the information given by PW1 and PW3, police officers from Karuri police station were able to arrest the appellant and recover some of the stolen items from him the following morning of the incident.

The learned trial magistrate correctly analyzed all the evidence in detail and came to the firm conclusion that the recognition of the appellant by PW1 and the recovery of the stolen items was compelling, leaving the trial court in no doubt of the involvement of the appellant in the robbery. In considering that evidence, the trial court held;

“In my mind I have no doubt that PW1 knew accused No.1 prior to the incident. She shared her ordeal with her husband PW3, who directed police officers straight to the home of accused No.1. If indeed PW1 was not known to the accused No.1 she will not have been able to lead to the arrest of the accused. She said the scene was well lit with security light which enabled her recognize accused No.1 and certainly this led to the quick arrest of the 1st accused”.

The question that falls for our determination is whether the decision and determination by the trial court is wrong or otherwise. In determining that question the central issue is whether the appellant was properly and sufficiently recognized by PW1. The law is that recognition of an attacker is more satisfactory, more assuring and more reliable than identification of a stranger. In the instant case we think the trial court analyzed the evidence of each of the prosecution witnesses. She was certainly alive to the fact that the prosecution case was dependent on the recognition of the appellant by PW1 and the fact that few hours after the robbery a mobile phone stolen from her was recovered from him. We think the trial court considered the circumstances obtaining on the night of the robbery and analyzed all the facts properly to dispel or discount the possibility of mistaken identity. On our part we find that there can never be any other explanation on how the appellant came to have items stolen from PW1 in his possession, taking into

account the short span of time between the time of the incident and the time when the appellant was arrested with the mobile phone belonging to PW1, other than that he was the thief and/or he had knowledge that it was unlawfully obtained.

It is clear that the appellant was convicted because he was properly recognized by PW1 as one of the attackers. PW1 immediately shared the information on the identity of her attacker with her husband (PW3). PW3 then relayed that information to PW2 and PW4 who arrested the appellant. Upon arrest, a quick search was conducted and a mobile phone earlier stolen from PW1 was found on the appellant. We also think that the findings of recognition and subsequent arrest of the appellant was reinforced by the recovery of all the stolen items from the persons and location that was shown to police by the appellant. There is clear evidence a Nokia phone 1600 was recovered from the appellant. It is also clear that he directed police officers to the houses of his other co-accused persons, where all the other items were recovered from. We make a finding that the evidence of the prosecution as to recognition and recovery of the incriminating exhibits found on the appellant is quite credible.

Having considered the issue of recognition of the appellant by PW1 and in view of what we have said on evidence of recovery of the stolen items, we are of the view that the conviction of the appellant is safe and proper. We think he was properly convicted on the strength of the evidence of PW1, PW2 and PW4 who narrated the circumstances that led to the arrest of the appellant and subsequently the recovery of all the items and monies stolen from the complainant. The complainant was firm and categorical that she had been attacked and robbed by her neighbour whose name she gave out to her husband PW3 who in turn shared that information with PW2 and PW4. As a result the appellant was arrested and all the items stolen from PW1 recovered. We think the evidence against the appellant is overwhelming and cannot be a basis to fault the decision of the trial court. The totality of the evidence of PW1, PW2, PW3 and PW4 gives one conclusion that the appellant was involved in the robbery that took place on 31st May 2007 against PW1. He was properly recognized, his names were given to police officers PW2 and PW4, and he was arrested after PW3 pointed out his house to the police officers. Upon arrest a search was conducted by PW2 and PW4 and a mobile phone stolen a few hours from PW1 was recovered from his right hand pocket trouser. He gave no explanation of how he came into possession of that mobile phone and the inference we make is that he was the thief and/or robber who attacked PW1. It is also clear that the appellant led police officers PW2 and PW4 to the house of his co-accused persons where the other stolen items were recovered from.

In the premises we think the appellant was convicted on sound evidence. We therefore, come to the conclusion that his appeal has no merit and it is hereby dismissed.

Dated, signed and delivered at Nairobi this 24th day of September, 2008.

J. B. OJWANG M. WARSAME

JUDGE JUDGE