

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 214 of 2007 & 215 of 2007 (Consolidated)

JAMES MUHIA MUIRURI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction and sentence of

S.M. Mokuia Senior Resident Magistrate in Senior Resident Magistrate's

Criminal Case No. 1474 of 2006 at Kigumo)

JUDGMENT

The appellants were charged in the lower court with robbery with violence contrary to section 296(2) of the Penal Code on the first count. On the second count they were charged with handling stolen goods contrary to section 322(2) of the Penal Code. On count 3 they were charged of causing actual bodily harm contrary to section 254 of the Penal Code. After trial before the lower court they were convicted on count one and two. They filed their separate appeals before this court and at the hearing these two appeals were consolidated. They both have appealed against conviction and sentence. This is the first appeal. In deciding this appeal we are guided by the principles enunciated by the Court of Appeal Case of *Gabriel Njoroge vs Republic (1982 – 88) 1 KAR 1134 at page 1136* where it was stated:

*“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see *Pandya v R (1957) EA 336, Ruwala vs R (1957) EA 570*).”*

PW 1 stated that on 3rd July 2006 at 11p.m. in the company of PW 2 they were walking home. This witness saw and recognized the 2nd appellant. He said that he was able to see him because his companion PW 2 had a torch and because there was moonlight. The 1st appellant emerged from the right hand side and hit this witness. PW 1 retaliated by hitting him with a bag full of belts. The first appellant was over powered by PW 1. PW 1 was able to recognize the first appellant from his voice. The first appellant did manage to pin him down and stole from him in total Kshs.340/-. He also took the bag containing 48 belts. These were valued at Kshs.2400/-. The first appellant also stole a video cassette from PW 2. PW 1 noticed that the second appellant had pinned down PW 2. The next morning he learnt that PW 2 had been stabbed. On being cross examined by the first appellant this witness stated that he had known the first appellant from the time he was young. He reiterated that he recognized him from his voice and because there was moonlight. On reporting the incident to the police he confirmed that he gave the first appellant's name to the police. On being cross examined by the second appellant he also confirmed that he had known him since childhood. That his parents were also known to him. During the incident he said that the second appellant was 3 metres away and he was able to recognize him from the spot light.

PW 2 confirmed that he was in the company of PW 1 on 3rd July 2006. As they headed home they were attacked. Using the spotlight in his possession he managed to recognize the 2nd appellant. He received injuries to his face. At the time he was carrying a coat containing Kshs.3000/-. His four video cassettes valued at Kshs.1000/- were in his possession. The belts that PW 2 was carrying for him were stolen. He was taken to hospital the following day. He identified the belts before court which had been recovered by the police. He said that his injuries were inflicted by a sharp object. The second appellant on cross examining him this witness said that he indeed recognized him at the scene.

PW 3 a police officer investigating this case said that on 4th July 2006 the two appellants were arrested by members of the public. They were later taken to the police station. The first appellant agreed to produce the items that had been stolen from the complainant. This police officer went with the first appellant to his home. They recovered from that home a piece of timber which was used to assault the complainant. The first appellant then led the officer to a newly dug

pit latrine where he removed a bag containing 48 pieces of belts. These were exhibited before court. They are the belts that were identified by PW 2.

PW 4 was the Clinical Officer. He was the one that examined PW 2. He found that he had a cut on his forehead and swelling on the right elbow. He also had tenderness on his elbow. PW 5 a police officer was the one who rearrested the appellants when they were produced at the police station. The first appellant chose to give an unsworn statement when he was put on his defence. Without saying where he carried out his business the first appellant said that he was a hawker. He said that he and PW 1 had a grudge. He did not elaborate on the grudge. He stated that the belts produced before court belonged to him and produced receipts for various items which included belts. He did not however deny that those belts were recovered from a newly dug pit latrine at his home. The second appellant in his unsworn statement simply denied the offence. The evidence of PW 1 and 2 was very clear on the recognition of both the appellants. Although it was under difficult circumstances we are satisfied that there was moonlight and the appellants were also identified by the aid of a torch. The proximity of the appellants and the complainants was near enough to allow for correct identification and recognition. PW 1 had known both appellants from their childhood. Additionally the evidence of PW 3 which was not controverted in defence was the first appellant had hidden the recovered belts in a pit latrine. The number of belts recovered was the same number of the belts stolen from the complainant. The second appellant was identified and recognized by both PW 1 and 2 at the scene. Both appellants were seen by the aid of the torch and the moonlight. Having re-evaluated the lower court's evidence we find that we are in agreement with the finding of the learned trial magistrate. In his judgment the learned magistrate stated, "*The evidence is quite consistent on the identification and recognition of the first and third accused (1st and 2nd appellants respectively)*". We can find no reason why we should interfere with the finding of guilty of the lower court. Accordingly we do hereby dismiss the appellants' appeals.

Dated and delivered at Nyeri this 21st day of October 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE