



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG & OMONDI, JJ.)

CRIMINAL APPEAL NO. 429 OF 2005

-BETWEEN-

SAMUEL NJOGU WAINAINA.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

***(An appeal from the Judgement of Senior Resident Magistrate L. W. Gicheha dated 10th August, 2005
in Criminal Case No. 7482***

of 2003 at Thika Law Courts)

JUDGEMENT OF THE COURT

The appellant was charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap. 63 Laws of Kenya). The particulars were that the appellant, while in the company of others not before the Court and armed with a pistol, on 29th August, 2003 at Githurai Kimbo Village in Thika District, within Central Province, robbed **Martin Kimani** of cash, in the sum of Kshs.400/=, and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence against the said **Martin Kimani**.

It was the complainant's evidence that he was returning home from work, and as he walked along a short-cut route, he saw several people approaching from the front side. When PW1 reached the said group of persons, two of them grabbed him, one pointing a pistol at him, another demanding money with menaces. The two persons dragged PW1 into the bush and took his money, being Kshs.400/=. They ordered PW1 to lie down and not look behind, as they departed.

PW1 testified that the *locus in quo* was illuminated by the security lights on a shop known as Retail General Shop. It was his testimony that the man who had demanded money from him was the appellant herein, and that he had been able to identify this robber. On the following day, PW1 reported the matter to Police officers, and gave a description of the appellant herein. Then later at 11.00 p.m., as he was going to a supermarket, he heard some people talking, and one of the voices sounded familiar, in relation to the robbery incident aforesaid. When PW1 got to the supermarket he looked at those whom he had heard talking, and saw among them the appellant herein, who was in the company of two young men. PW1 straightaway went and reported the matter at the Police station, and he was given two Police officers; but

when they attempted to arrest the suspect, the suspect, being supported by an associate and by those gathered at the scene, managed to escape. The suspect was arrested later in the evening; and PW1 went and identified him, before recording a statement.

The Police officers carried out a search at the appellant's house, and found several items of significance: Jeans trousers, a shirt, and a blue jacket which the suspect wore on the material night.

PW2, Police Force No.69026 Police Constable **Humphrey Nyagah**, testified that he was at the Police station when the complainant came, on 29th August, 2003 to report to him that he had been attacked and robbed of his money. PW2 was one of the officers who arrested the appellant herein, searched his house, and recovered several exhibits.

PW3, Police Force No. 66387, Police **Constable Ngugi Wamwere**, the Investigating Officer, had been at Githurai Kimbo on 30th August, 2003 when PW1 made a report that he had been attacked by a four-man gang, as he was returning home from work. The complainant had reported that one member of the said gang had a pistol; and the attackers robbed him of his money before running away. On the following day the complainant had seen one of his attackers at Githurai Kimbo roundabout; he made a report, and so both PW2 and PW3 were sent to arrest the appellant herein. It was only later that the arrest could be effected, and when the appellant's house was searched, several exhibits were recovered.

The learned Magistrate noted from the evidence that the said act of robbery had taken place on 29th August, 2003; that the complainant made a report at Githurai Kimbo Police Station on 30th August, 2003; and that PW1's evidence on this point is corroborated by PW3. The trial Court observed that "no evidence has been brought to rebut PW1's evidence that his assailant had a gun"; and so there was no reason to disbelieve this evidence.

The trial Court noted as a point of law, quite correctly, in our view, that "the fact that [the complainant] was not injured does not mean that the assailant did not threaten or use force so as to steal the Kshs.400/=." What was in issue, the learned Magistrate noted, was "whether the accused was involved in the said robbery".

The Court noted from the evidence as follows: the robbery took place near a shop called Retail General Shop; the security lights were switched on at the time; the complainant said that the appellant herein had pointed a pistol at him, and had demanded money; on 31st August, 2003 the complainant identified the suspect by his voice and appearance, and reported his presence to the Police – and this evidence is corroborated by both PW2 and PW3; a search at the suspect's house led to the recovery of effects linked to the robbery incident; clothes were recovered as exhibits which the complainant had already described in his earlier report of the robbery incident; it was PW2's evidence that the complainant when he reported the robbery incident, had given a physical description of the appellant herein.

The learned Magistrate duly administered the self-warning that there was only *one* identifying witness, namely PW1, at the *locus in quo* at the material time. PW1 had said there was sufficient lighting at the *locus in quo*, emitted from a certain shop, Retail General Store which is located nearby. The learned Magistrate accepted this evidence as true, for: "The accused lives in Githurai Kimbo and I believe he knows the same shop; if there was no light from [the affixed] security lamps, I believe he would have raised the issue during cross-examination". The trial Court recorded its belief that "the attack occurred near the security lights and PW1 was able to identify the accused person". The Court held it to be relevant that the complainant's perception had also captured the appellant's sound-bites: "because on the next day, [the moment he] heard the accused's voice, [he] went to check where the voice was coming from, [and] he saw the accused and was able to identify him."

The learned Magistrate concluded from the evidence that the complainant had had "ample time to observe the accused person under the security lights and especially because....the accused was then standing in front of him and asking for money and pointing a gun at him."

The trial Court rejected the defence evidence, and found that the charge of robbery with violence had been proved against the appellant herein beyond any reasonable doubt. The Court convicted the appellant, and imposed on him the death penalty as provided by law.

In his grounds of appeal, the appellant contended as follows:

- i. that the learned Magistrate erred in relying on the complainant's evidence of visual identification;
- ii. that the complainant had not made a first report in which the appellant herein was identified;
- iii. that at the time of his arrest, the appellant was not found in possession of anything linked to the robbery incident;
- iv. that the charges laid against the appellant were not adequately proved;
- v. that the trial Court wrongly rejected the appellant's defence.

When the appellant turned up in Court for the hearing of his appeal, he was armed with a set of written submissions, which also contained a document bearing the heading, "The Amended Memorandum [and] Grounds of Appeal". In these new grounds, the appellant thus asserted:

- a. that the learned Magistrate erred in holding that he was positively identified at the *locus in quo*; for "the same was made under hectic prevailing circumstances"
- b. that the charges brought against the appellant had not been proved;
- c. that there were irregularities in the conduct of the trial Court proceedings.

Apart from the said written submissions, the appellant made oral submissions in which he contended, though without explanation, that the punishment imposed by the trial Court was contrary to law – because "prosecution was not justified". He contended that the charge brought against him was "a frame-up", and that he was innocent and should be set at liberty.

Learned counsel, **Mr. Makura** for the respondent, contested the appeal, and supported both conviction and sentence. He urged that there was overwhelming evidence set out in the record of proceedings, to support a charge of capital robbery. The offence had taken place at 10.00p.m. at a well-illuminated place, counsel submitted, and the complainant positively identified the appellant. He noted that the complainant had given detailed description of the attacker; and besides, his evidence had been well corroborated by that of PW2, the arresting officer. Counsel submitted that the trial Court had considered the appellant's unsworn evidence, but found it to lack credibility; and he was thus rightly convicted. Counsel urged that the appeal be dismissed, the conviction upheld, and the sentence affirmed.

We have carefully reviewed the evidence on record, and we note in particular that the learned Magistrate exercised the greatest care at every stage, in the assessment of the evidence and in determining the veracity of each material element thereof. We also note that the trial Court duly warned itself of the potential dangers attendant on a reliance on the evidence of a single identifying witness, in the circumstances in which the complainant had averred that he identified the appellant herein. The learned Magistrate also carefully brought out all the evidence that had corroborative value.

The learned Magistrate, after taking all due caution, came to the conclusion, which we agree with, that the prosecution had proved the charge laid against the appellant herein beyond any reasonable doubt.

Consequently, we hereby dismiss the appellant's appeal; we uphold the conviction; and we affirm the sentence imposed by the trial Court.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 16th day of October, 2008.

J.B. OJWANG

H. A. OMONDI

JUDGE

JUDGE

Coram: Ojwang & Omondi, JJ.

Court Clerks: Huka & Erick

For the Respondent: Mr. Makura

Appellant in person