



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 102 of 2007

PETER MWANGI KIMATU .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From the original conviction and sentence in Criminal Case No. 1686 of 2005 of the Chief Magistrate's Court at Makadara by S. N. Karani –S.R.M.)*

JUDGEMENT

The appellant Peter Mwangi Kimatu was charged with offence of robbery with violence contrary to section 296(2) of the Penal code. The particulars are on 29<sup>th</sup> day of January 2005 at Muthaiga North Nairobi area jointly with others not before court while armed with dangerous weapon namely bows and arrows robbed **Joseph Jarenga** of a television set make Sharp 22 inches coloured valued at Kshs.10,000/= at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Joseph Jarenga. The evidence of the complainant is that while asleep in his house he was woken up by the dogs barking and that he also got a word from PW2 that there were intruders within the compound. He pressed alarm to alert Group 4 Security. He then ran out of the house and found his worker PW2 and the watchman screaming for help. He said some of the intruders went into PW2's house and took the subject TV which he had given to his employee. He then saw three people running away and jumped over the fence. One of them who was carrying the TV tried to climb over the fence but people came from the other side and he was arrested. He says the person who was arrested was the appellant herein. It is also the evidence of PW1 that the appellant placed the TV on the fence in order to pass it over to his colleagues but the TV fell and it was broken. PW1 confirmed that the TV was not robbed from him since he had given it to PW2 who was his employee. Under cross examination by the appellant PW1 replied '*what I knew is that you were arrested while jumping from my compound about six metres away*'.

The evidence of PW2 **David Ndegwa Ndwiga** says that he works for PW1 and on the material night while asleep at the servant quarter he heard the dogs barking and that the people were talking behind the servant quarter. He ran to the gate to call the security man, he then alerted his boss to press the alarm. He says that the attackers who by then had gained entrance into the compound started to jump over the fence but the appellant was unable to jump over the fence wherein he was arrested. He confirmed that the TV belongs to **Jarenga** but it was given to him for his own use. Under cross examination by the appellant PW2 replied '*you had jumped and left these things in the compound. You were caught behind the fence*'.

The last prosecution witness was **PC Stephen Mwaniki** who rearrested the appellant from a group of people who had earlier arrested the appellant. He also confirmed that the complainant had given the TV to his worker PW2. It is also the evidence of PW3 that he found the appellant outside PW1's compound while he was surrounded by many people who injured him.

The appellant on his part denied the offence and stated that on the material day while in his normal business he was attacked by a group of people who accused him to be part of a group that had earlier attacked the house of PW1.

We have reevaluated the evidence on record and our findings are as follows: First the charge states that the appellant robbed PW1 of his TV worth Kshs.10,000/=. The evidence on record is that the TV was stolen from PW2. Again it is clear that there was no robbery against PW1 as far as the charge sheet is concerned. We therefore think that the charge sheet against the appellant is defective and the conviction that resulted therefrom amounts to miscarriage of justice.

Secondly PW1 and PW2 could not agree how the appellant was arrested and the place he was arrested. They could not agree whether the appellant was arrested within the compound or outside the compound. However, the evidence of PW3 is that he found the appellant lying outside the compound of PW1. There is no explanation as to how the appellant went to outside the compound of PW1 after his arrest. In our view the circumstances and the place of arrest of the appellant raises great doubts in our mind. The appellant in his defence ascertain that he was arrested while going in his normal business. He also said that he was attacked by a group of people alleging that he was one of the thieves. We think that there could be a possibility of mistake or error in the way the appellant was arrested, charged and convicted. In our view the trial court erred in law and facts in convicting the appellant without observing that the evidence tendered by the prosecution witnesses was scanty and contradictory to secure a conviction. We note that some of the essential witnesses who would have shed more light in the circumstances that led to the arrest of the appellant were not called by prosecution. From the evidence on record we are not certain whether the appellant was the one who attacked PW1 and PW2 on the material night. We do not know whether the appellant was arrested within or outside PW1's compound. The people who arrested the appellant were not called as prosecution witnesses to discharge any possibility of error or mistake that the appellant was one of the attackers arrested while running away from the compound of PW1. In short we think the conviction of the appellant was no based on sufficient and satisfactory evidence to discharge the possibility of error. We therefore, make a finding that the prosecution did not prove its case beyond reasonable doubt. And that the appellant was not accorded the benefit of doubt that he is entitled. In the circumstances we allow the appellant's appeal, quash his conviction and set aside the death sentence. We order the immediate release of the appellant unless lawfully held.

**Dated, signed and delivered at Nairobi** this 13<sup>th</sup> day of November, 2008.

**J. B. OJWANG**

**M. WARSAME**

**JUDGE**

**JUDGE**