



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
(CORAM: OJWANG & OMONDI, JJ.)
CRIMINAL APPEAL NO. 411 OF 2005

-BETWEEN-

PETER MWANGI WAINAINA..... APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate Mrs. Mburu dated 29th July, 2005 in Criminal Case No.638 of 2004 at Gatundu Law Courts)

JUDGEMENT

The appellant was charged with robbery contrary to s.296(1) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellant, on 14th May, 2004 at Kimunyu Village in Thika District, Central Province, robbed **Susan Wambui Waiganjo** of a wrist-watch, **Asaei Sport Quarts** by make, valued at Kshs.70/=.

In a second count, the appellant was charged with attempted rape contrary to s.141 of the Penal Code. The particulars were that the appellant on the material date and at the material time and place, attempted to have carnal knowledge of **Margaret Wambui Kihiu** without her consent. This count had the alternative charge of indecent assault on a female contrary to s.144(1) of the Penal Code; and the particulars were that the appellant, at the place aforementioned, on the material date and at the material time, unlawfully and indecently assaulted **Margaret Wambui Kihiu** by touching her private parts.

After reviewing the evidence, the learned Magistrate made her findings as follows:

“The evidence against the accused in this case is overwhelming. On the first count PW2...and PW4.... testified that they were well known to [the accused] and PW2 even asked him why he was harassing them, and he grabbed her and stole her watch, and also threatened her with a knife....”

“On the 2nd count, the complainant gave very clear evidence on how she was confronted by the accused, who was well known to her, and he dragged her [into] the bush, in a bid to rape her, and the only reason....he did not accomplish this was....her spirited struggle, and the appearance of PW3.... and PW7..... at the scene. It is noted that PW1....said....the accused

had a knife, a cap resembling that of Police [officers], and these items were recovered at the scene and were identified by PW2 and PW4 who said that the accused had those items when he robbed PW2.”

In the light of such evidence, the trial Court considered the defence evidence, and found that the defence evidence only “goes to confirm his guilt, as he said that he was arrested in a house which had been locked by a child with a padlock from outside. It is obvious that the accused had caused the house to be locked from outside, [as he knew he was] being sought by the Police, and...if they came to his house they would see it locked from outside, and assume he was absent.”

The Court found the appellant herein guilty on the two counts, and convicted him accordingly. A sentence of 15 years’ imprisonment was imposed on each count, and the two sentences ran concurrently.

In the grounds of appeal, the appellant contended that the learned Magistrate had erred in both law and fact, by entering a conviction on the basis of uncorroborated evidence; that there had been no proof beyond reasonable doubt; that the trial Court had ignored the defence case; that the sentence meted out “was harsh”.

The appellant said little at the appeal hearing; but he brought into Court a set of written submissions, which he said conveyed the thrust of his appeal.

But a *preliminary issue* arose, to be resolved by the Court. It turned out that, when this matter had come up before **Dulu, J.** on 11th April, 2007 learned counsel had *given notice* that if the appeal proceeds, she would ask the Court to consider enhancing sentence, in the event the appeal were held to lack merit. The basis of this notice of enhancement (to capital punishment – for robbery with violence), is that there was evidence that the robbery in question had been committed while the perpetrator was *armed with a dangerous weapon*, namely, a knife.

On 15th April, 2008 **Mrs. Kagiri** brought up the preliminary point that when she had earlier given notice of enhancement-of-sentence, she had been under the impression that the *charge-sheet* carried the offence of robbery with violence under s.296(2) of the Penal Code. But it was now ascertained that the charge-sheet carried only the offence of *simple robbery*, under s. 296 (1) of the Penal Code. Learned counsel was seeking the directions of the Court, and was prepared to withdraw the sentence-enhancement notice which she had earlier given.

The Court’s preliminary direction was set out as follows:

“There are clearly two options. The lawful one [*prima facie*] is that trial should have taken place under s.296 (2) [of the Penal Code], and so it is possible for this Court to nullify the trial, and send the matter back to the Attorney General, to take a decision according to law. It is also technically possible to go by the misplaced charge under s.296(1) of the Penal Code”.

When learned counsel was invited to address the Court on the two scenarios, she stated that she found herself in a dilemma; for “if the prosecution has made a mistake in the lower Court, and [in that situation] the appellant lodges an appeal, the prosecution should not [be allowed to] use that opportunity to cover up its mistakes; indeed the prosecution would [in those circumstances] be asking for a second chance to put its house in order, and this might not be in the interest of justice. In my view, the prosecution which had all the resources to investigate this matter, and had a duty to bring the right charge...[ought now] to go by the charge sheet as it is”.

On the basis of the meritorious submissions of counsel, the Court made a final ruling on the point, as follows:

“This is our ruling on an important point of law touching on the framing of charges, and on prosecution under s. 296 of the Penal Code (Cap.63, Laws of Kenya). Section 296 (1) of the

Penal Code relates to simple robbery, which is punishable by a term of imprisonment; but section 296(2) relates to robbery with violence, which is punishable by the death penalty.

“The situations which qualify for a capital robbery charge, under s. 296(2), are well defined in the Penal Code, and should not ever be mixed up with those situations which qualify for a charge under s.296 (1) of the Penal Code.

“In the instant case, it is apparent that, though a charge should have been framed under s.296(2), it was instead framed under s.296(1) – and it is on that basis that the case was tried by the learned Magistrate, and a term of imprisonment imposed.

“Although learned State Counsel, *Mrs. Kagiri* had earlier given notice that she would seek enhancement of sentence, in the event this appeal ended in a finding against the appellant, it has now been discovered that in the *charge sheet*, the charge originally laid was that of simple robbery under s.296 (1) of the Penal Code.

“The notice earlier given, therefore, cannot be carried through; and as a fundamental principle of law it would unduly prejudice the appellant if he was now subjected to a harsher penalty than the one originally imposed on him, on the charge laid against him.

“In these circumstances, this Court is unable to hear the appeal on the basis of a capital robbery charge; and we hold that the appeal is to be heard on the basis of the mistaken charge which had been laid in the trial Court.

“We direct, therefore, that the hearing of this appeal may proceed on that basis.”

The hearing, for practical reasons, proceeded before the two-Judge Bench. *Mrs. Kagiri* contested the appeal, and urged that the prosecution had shown by evidence that the appellant not only committed the offence of robbery against PW2, but also attempted a rape assault on PW1; the two incidents being separated by only the short interval of half an hour. The two complainants reliably testified that they had recognised the appellant, who they well knew, at the time of the two attacks. PW3 too had witnessed the attack on PW2, by the appellant. The alleged attempted rape, too, had been proved by the detailed evidence of PW1, who had explained how the appellant wrestled with her, pinned her down and tore her underpants, even as he opened up his trousers and grabbed the complainant in her private parts. Evidence was given by passers-by (PW5 and PW7) who heard PW1’s screams, and came to her rescue. During the attempted-rape incident, PW1 had suffered injuries: bruises on her neck, abdomen, chest, and wound in her left breast.

Mrs. Kagiri urged that the evidence brought against the appellant, in respect of both charges, was watertight.

We have no doubts at all, that proof-beyond-any-reasonable- doubt was made in respect of each count of the charge. We dismiss the appellant’s appeal, and uphold conviction on each charge. We affirm a sentence of fifteen years’ imprisonment in respect of count 1, and similarly affirm the sentence of fifteen years’ imprisonment in respect of count 2; and we order that the two sentences shall run concurrently.

Orders accordingly.

DATED and DELIVERED at Nairobi this 7th day of November, 2008.

J. B. OJWANG

H. A. OMONDI

JUDGE

JUDGE

Coram: Ojwang & Omondi, JJ.

Court Clerks: Huka & Erick

For the Respondent: Mrs. Kagiri

Appellant in person