



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 89 of 2004

JOHN NJOROGE MWANGI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being appeal against conviction and sentence by G. K. Mwaura, P.M., in the Principal Magistrate's Criminal Case No. 777 of 2003 at Muranga)

JUDGMENT

The Appellant herein was on 19th July 2006 warned by the court that in respect of count 1,3 4 and 5 which were reduced by the trial court to charges under *Section 296(1)* that in hearing his appeal if this court was to find that the evidence was sufficient for the charge under *Section 296(2)* that the court would be minded to enhance his sentence. The matter was then adjourned to enable the Appellant consider the consequence of that warning. When the matter appeared before us on 22nd March 2007, he opted to proceed with his appeal, the warning notwithstanding. He had, however, been convicted and sentenced to death by the learned magistrate in respect of count two.

The Appellant at the trial court was charged with one other person with six counts. His co-accused was acquitted by the trial court. He was however convicted on counts one, three, four and five which the trial court reduced to simple robbery under *Section 296(1)*. He was sentenced to ten years imprisonment on each count which sentence was to run concurrently. He was also sentenced to five years police supervision after his sentence on count two.

The background to this matter is that on the 16th May 2003 at 12.45 a.m. a group of robbers descended on the house of P.W.1. P.W.1 says that she was asleep when she heard her window being hit very hard. When she asked what was the matter she was asked to open the door quickly. She refused to open the door and the robbers threatened to break down the door. She therefore opened the door for them. She said that she did not put the lights on but that the four men had torches with them but she confessed that she did not see them very well and could not identify the men. She stated that the men blinded her with their torches. She was however able to tell that the men had pangas, spears and an axe. After being made to sit down the intruders demanded money from her. They stole from her 300/-. They also stole many items of property from the house. P.W.1 further stated that on the following day she was informed that certain items had been recovered and she was able to identify those items as the ones that had been stolen from her house the night before. She was able particularly to identify cassettes which she said that she had written her husband's name among other things.

P.W.2 stated that on the 15th May 2003 at night whilst he was in his house at 9.00 a.m. men broke down his door with a large stone. He said that at the time he was in his bedroom and he switched on the solar light and saw that there were several men about six of them. He was able to identify one of them whom he said he saw clearly. He gave his physical appearance and stated that it was the Appellant herein. He was ordered to switch off the light and on switching off the light the people robbed him of many items of property from his house. He noticed that they were two men who carried those items in a sack. He sated that later he was able to identify the items that had been recovered as being his property. He also was injured during the robbery when he was hit with a panga.

P.W.3 stated that on the 16th April, 2003 at 1.00 a.m. he was in his house which was in the compound of his mother's house. He confirmed that his mother is P.W.1. He stated that shortly he heard people attacking his mother's house and he too was ordered to open his door and on so doing a man came in and demanded money. He had no money and the man took away his shoes. He was unable to identify any of the robbers. He later was able to identify the shoes when they were recovered.

P.W.4 stated that on the night of 6th and 7th May at 2.00 a.m. whilst he was in his house, some intruders came. He stated that it was raining. The intruders broke the door using a stone. And on entering he noticed that there were five men who were shining their torches in his face. He was made to lie down and they demanded money from him whereupon he gave them 500/-. The robbers also stole items of property from this witness. One week later at Kiroho Police Station he was able to identify a jacket and a black long trouser that had been recovered which belonged to him. He particularly stated that the leather jacket was torn and as a result was able to identify it as the one that belonged to him. P.W.5 stated that on 13th May at 2.30 a.m she heard her bedroom door being knocked. She was told that if she wanted peace she would open the door. She proceeded to open the door. On opening the door she saw torches being beamed directly to her face. The robbers took her to the kitchen and robbed her of Ksh80/=. She confirmed that the robbers were three in number. The robbers also took her personal property from the house and later she was able to identify her personal property that had been recovered.

P.W.6 was an A.P. who was stationed at Gikandu A.P.'s post. On the 16th May 2003 at 2.00 a.m. whilst at the chief's camp on duty, he received a report that there were robbers that were at P.W.2's home. He said that that home was not far from the chief's camp. He together with P.W.7 ran to the home of P.W.2 and met both P.W.2 and his wife standing at the door. P.W.2 confirmed that a robbery had taken place in his home and P.W.6 stated that he was able to see torches which were being beamed in the ridge opposite. He was able to notice that the beams were going up the ridge. He suspected that the torches belonged to the robbers and they began to follow those beams and also the footmarks on the ground. They followed those prints even across the river and the prints led them to a certain house. Outside that house they saw foot skid shoes that had made prints. These shoes were outside the door. He called out to the person inside the house asking him to open the door. The door was not opened and he therefore broke down the door where he met a man and a woman in the room. The man refused to come out but he was eventually pulled out and he was able to confirm that he was the first accused the appellant herein. The Appellant was arrested and on searching his house P.W.6 was able to recover items that would be used in breaking down a door, that is, a crow bar and pliers. He was able also to recover items of property that had been stolen from P.W.1 to P.W.5.

P.W.7 is also an A.P. He was able to corroborate the evidence of P.W.6 on how they were able to trace the robbers' foot prints and how those foot prints led them to the Appellant's house and he confirmed that the Appellant was arrested. There was also evidence given by clinical officer with regard to the injury occasioned by P.W.2. The Learned magistrate in his judgment acquitted the Appellant's co-accused but proceeded to convict the Appellant as stated herein before on the lesser charge of robbery under *Section 296(1)* in respect of count one, three, four and five.

In his written submissions the Appellant has sought that the court will consider that he was identified under very difficult circumstances and that therefore his identification had error and he further found fault in the items of property that were found in his house stating that they were not conclusive to show his guilt. He was of the view that the evidence against him was circumstantial and that therefore the court should allow his appeal as prayed.

As the evidence which had been analysed herein before will show, the Appellant was arrested when the robbery took place in respect of P.W.2 and the arrest took place on the same night. The items of property that were found in his house were positively identified by the complainants and relate to the counts number one, three, four and five. In regard to the issue raised by the Appellant, that the evidence against him was circumstantial, we rely on the case of **PAUL -V- THE REPUBLIC KLR 1980**. In that case the court in respect of circumstantial evidence had the following to say:

“In a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than of guilt”.

What we need to consider is whether the circumstantial evidence is incompatible with the Appellant's innocence. We find in the affirmative that the Appellant, having been found on the same night the robbery took place in possession of the items that were stolen, such findings are incompatible with his innocence. We also wish to rely on the case of **R V LOUGHIN 35 Criminal Appeal R 69**, where the Lord Chief Justice of England said:

“If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shopbreaker.”

Indeed the finding of the property in the Appellant's house would lead this court to infer that the Appellant was one of the robbers that was in the robberies that took place in respect of the charges in this case. Indeed the learned magistrate in his judgment did find that the Appellant undoubtedly was one of the gang that robbed the complainants in this case. In reducing the charge to simple robbery in respect of counts one, three, four and five on the ground that there was no medical evidence, the learned magistrate grossly misdirected himself. Indeed we find that the essential ingredients of robbery were present in the evidence that was adduced at the trial court. Those ingredients were set out in the case of **JOHANA NDUNGU -V- R Criminal Appeal 116 of 1995**. Indeed the robbers were armed as clearly shown in the evidence of the Appellant. They were in the company of more than one person and immediately or before did use violence against one of the complainants. Since more than one ingredient was present in the case against the Appellant we find that the charge of robbery under *Section 296(2)* of the Penal Code was properly proved beyond a reasonable doubt at the trial in respect of counts one, three four five and accordingly we do find that the Appellant is guilty of robbery under that section in respect of those counts. Having so found, we would enhance the sentence of the Appellant to death as provided by the law. With regard to those counts. As the Appellant cannot be hanged five times over, See **ABDUL DEBANO BOYE & ANOTHER -V- R CRIMINAL APPEAL NO. 19 OF 2001** we direct the sentence of death imposed in respect of count two by the magistrate and ourselves in respect of counts three, four and five be stayed pending the execution of the sentence in respect of count one. Otherwise the appeal stands dismissed.

Dated and delivered at Nyeri this 11th day of May 2007.

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE