



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
Criminal Appeal 74 of 2005

WILLIAM GITARI NDUNGU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No.3915 of 2004 Principal Magistrate's Court, Nyahururu – G. A. M'MASI [Ag. PM])

JUDGMENT

The appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the penal Code. The particulars of the charge stated that the appellant with another Daniel Maina Joseph (*who was acquitted by the trial court*), on the 31st day of August, 2004 at Ngeta forest in Nyandarua District within Central Province, jointly with another not before the court being armed with dangerous or offensive weapons namely pangas and imitation of a pistol robbed **Judy Njeri Muriithi** of cash kshs.1,200/=, 4 skirts, a blouse, a petticoat, an umbrella, 2 pants, all valued at kshs.3,160/=, and at or immediately after or immediately before such robbery used actual violence on the said **Judy Njeri Muriithi**.

The appellant also faced other similar counts being Counts 2, 3,4, 5 6 and 7 which I need not recite as the appellant was acquitted of those charges..

The appellant pleaded not guilty to the charges and after a full trial he was found guilty, convicted of a lesser charge of simple robbery and was sentenced to 4 years imprisonment in respect of count 1 but was acquitted in respect of the other charges.

Being dissatisfied with the conviction and sentence by the trial court, the appellant has appealed to this court and raised several grounds which touch on the evidence of identification by the complainant under difficult circumstances. The appellant also challenged the conviction based on the evidence of recovery of stolen items when there was no evidence to support the fact that the recovered items were indeed recovered in the appellant's possession.

During the hearing of this appeal, the appellant who was unrepresented sought for leave and was granted leave to file a supplementary memorandum of appeal and written submissions in addition to his oral submissions. This appeal was opposed by the State. The learned State Counsel **Ms Opati** submitted that, the appellant was convicted on the basis of the evidence of identification by **PW1** and recovery of items which were stolen from **PW1** which were recovered from the appellant's house and were positively identified by **PW1**.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence before the trial court and to arrive at its own independent determination on whether to uphold the conviction. In so

doing to bear in mind that the court never saw or heard the witnesses and give due allowance for that. See the case of **Njoroge Vs Republic 1987 KLR page 90.**

I now wish to briefly set out the evidence that was before the trial court. The prosecution witnesses namely **Judy Njeri Murithi PW1** was on 31st August, 2004 at about 7.00 p.m. traveling in Nissan matatu Reg. No.KAP 669P among other passengers. The vehicle was traveling towards Nyahururu on the Nakuru/Nyahururu road and when it reached Ngeta forest the vehicle was hijacked by three robbers who stole various items from passengers. **PW1** was robbed of kshs.1,200/=, 3 skirts, one blouse, petticoat and pants which clothes were recovered by members of the public allegedly from the house of the appellant and she was able to identify them at the Police Station. The same items were produced in court as exhibits.

However, from the proceedings from the trial court **PW1** states in her examination in chief as follows “**I never identified anybody from the identification parade. I do not know how first accused was arrested**”. In cross-examination, this witness confirmed that she identified the appellant from the lights by a torch which the appellant flashed through the window.

PW3 was the driver of this matatu. He recounted the same evidence of how the same vehicle was hijacked and he was robbed of money and the vehicle as well as the passengers who included **PW1** was later abandoned. They were able to get help from the members of the public who told them that they had spotted the robbers who had disappeared in the forest. **PW3** with the members of public searched the house of the 2nd accused and found a panga and an imitation of a pistol. He also said that they found 3 skirts which they took to the AP Camp. **PW3** was not able to identify any of the suspects.

PC Gragon Magana(PW5) was stationed at Kipipiri Police Station when on the material day he received the reports of the vehicle that had been hijacked. He and his colleague proceeded to the scene, they met with the members of the public, who public told them that they had recovered the items from the house of the appellant and a jacket was recovered from the house of the 2nd accused. Later the appellants were arrested by members of the public who handed the items recovered to **PW5** and he in turn produced them as exhibits.

Put on his defence, the appellant gave un sworn statement of defence and denied having had anything to do with the robbery. He (appellant) gave an account of how he was looking for potatoes for sale on 3rd August, 2004 at Kipipiri where he was arrested and kept in the police cells for 9 days and charged with the above offence. The trial court found that the prosecution had proved a case of simple robbery against the appellant in respect of count 1 for which he was convicted and sentenced to 4 years imprisonment.

This appeal raises the two fundamental issues of identification and recovery of stolen items. I have reviewed the evidence before the trial court. The evidence by **PW1** regarding whether she identified the appellant is not clear. As stated above during examination in chief she stated that she was not able to identify the appellant. No identification parade was mounted by the prosecution. All the other evidence by other witnesses who were victims of the hijacking did not identify their assailants. It was also about 7.00 p.m., I am not satisfied that the evidence of **PW1** regarding identification which is also not clear from the record is safe from error.

The principles governing the identification and the standards of care when a court is dealing with evidence of identification especially from a single identifying witness or when the circumstances of identification can be said to be difficult were set out in the case of **Maitany Vs Republic KLR [1986] page 198.** The Court of Appeal reiterated the well known authority in the case of **Abdullah Bin Wendo and Another Vs Republic [1953] 20 E.A.C.A. page 166** and reiterated the even repeated words as follows:

“Subject to well known exception it is trite law that a fact may be proved by the testimony of a single witness but his rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be

circumstantial or direct, pointing to guilt, from which a judge or jury can reasonable conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

On the 2nd aspect regarding the recovery of the items that were allegedly recovered from the appellant, **PW5** the investigating officer told the court that they were informed by the members of the public that the items were recovered from the house of the appellant and the 2nd accused. Whereas in the evidence **of PW3** he stated in his evidence in chief that they recovered a panga, an imitation of a riffle and 3 skirts from the house of the 2nd accused. From the above evidence one cannot say with certainty which items were recovered from the appellant. Not a single witness out of the members of public testified of having identified the appellant's house and it is not clear whether PW3 knew the appellant's house.

The items were not recovered in the direct possession of the appellant. I do not find that there was acceptable evidence of how the items were recovered and how they could be connected to the appellant. In view of the above discrepancies, the trial court should have given the appellant the benefit of doubt and acquitted him the same way the 2nd accused person was acquitted. In the upshot the appeal is allowed, the conviction and sentence imposed by the trial court is hereby quashed and unless the appellant is otherwise lawfully held he is to be set at liberty forthwith.

Judgment read on the 10th may, 2007.

M. KOOME

JUDGE