REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
Criminal Appeal 11 of 2006

JACKSON MUCHIRI GACHUNGA …… 1ST APPELLANT

JOSEPH CHEGE MARITA …….…….. 2ND APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Mbaluto & Onyancha, JJ) dated 29th July, 2003

In

H.C.Cr.A. Nos. 3 & 9 of 1998)

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JUDGMENT OF THE COURT

Jackson Muchiri Gachinga (1st appellant) was the 2nd accused, while Joseph Chege Marita, (2nd appellant) was the 4th accused before the Chief Magistrate's Court at Kiambu, before which they were jointly charged with three others, whose appeals are not before us, with three counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code and one count of rape contrary to ***section 140*** of the same code. Both the appellants and another person whose appeal is not before us faced an alternative count of being in possession of stolen property otherwise than in the counts of stealing. Upon trial, the appellants were convicted of the first two counts as charged, but their conviction in the third count was on the reduced charge of robbery contrary to ***section 296(1)*** of the Penal Code. The 1st appellant was in addition convicted of the 4th count as charged. Their co-accused were acquitted of all counts. As expected, both the appellants were aggrieved and appealed to the superior court against their respective convictions and sentences which were imposed against them for the respective counts. Their respective appeals were dismissed and hence these appeals. Although their respective appeals were registered under one number, in truth, they are separate appeals in view of the clear provisions of ***rule 58*** of the Court's Rules which requires that:-

"***(1) Any person who desires to appeal to the Court shall give notice in writing …. and the notice of appeal shall institute the appeal."***

These being second appeals, only issues of law fall for consideration by reason of the provisions of ***section 361*** of the Criminal Procedure Code; and reading through the memoranda of appeal filed by both appellants, it is quite clear, that the main if not the only legal point raised is identification.

Before discussing the issue it is important to outline the setting of the ***locus in quo***, as we are persuaded that by doing so the issues raised by Mr. Mogikoyo, for both the appellants will become clearer. There were four named complainants in the charges against the appellants and their co-accused.

Erastus Ng'ang'a Gichimu, (PW1), was a resident of T, and owned a supermarket at D Market which he was personally running with his wife EW N (PW2). The second complainant, Caroline Achieng Adongo, (PW3), was a tailor, who was employed at a shop at Kikuyu, and like PW1 and PW2, she lived in the T area in Kikuyu Division. The 3rd and 4th complainants, N W M (PW4), a house keeper with Nairobi University, Kikuyu campus, and her daughter M N M (PW8), also lived in the T area. It is instructive that the residences of all the complainants were in one compound. This is clear from PW2's evidence, who testified thus:-

"***They (robbers) took me to C's house, then to N's house. We found they had broken the house and a short dark man was breaking the TV set."***

Later, under cross-examination, she stated thus:

"***There were 3 families in that residential area. There are no nearby neighbours. We live in rental premises."***

With the foregoing background, it is now essential to outline the attack on the complainants. The attack occurred at 2.00 a.m. on 1st August, 1996. A gang of at least six people raided the complainants' residences, apparently simultaneously. They gained access into their respective houses by breaking either the doors or windows. All the three houses were lit with electric lights. PW1 and PW2 testified that when some of the robbers gained entry into their bedroom electric lights were on. They were, therefore, able to observe their attackers. PW1's evidence was that he recognized both appellants as among their attackers. They are people he knew before. He used to see them at Dagorretti market, and on occasions they bought items from his supermarket. They remained in his bed-room for about 15 minutes during which time they faced each other as they demanded money from him. They physically assaulted him to make him give them money. He initially gave them Kshs.10,000/- but they did not consider it enough. Due to much beating he told his wife to check under their bed mattress for more money, which she did. A further Kshs.90,000/- was given to them after which they relented and left.

PW2 did not know the appellants before, but it was her evidence that both the appellants are the people she saw in her bed-room and who led her to C's house and later to N's house. She had ample opportunity and time to observe them.

PW3, like PW1 and PW2 testified that robbers broke into her residence about the same time as they broke the houses of PW1 and PW2. They gained entry through a window. She climbed into the ceiling and hid there, and through a nail-hole she looked and was able to identify the raiders. She testified that she was able to identify some of them. The trial Magistrate did not, however, believe her testimony on this score, nor do we. In her case, conditions favouring a correct identification were difficult. It is, however, significant that she was able later to identify items which were stolen from her house in the course of that robbery, among them a sewing machine, traveling bag and pieces of cloth and sunglasses.

PW4's house was broken into after that of PW1 and PW2. PW4 first heard a bang from PW1's house before the door into her house was smashed. In her estimate, the attackers numbered between 7 and 10. On gaining entry into her house the attackers slapped and boxed her and as they did so they demanded money. Electric lights were on, but they smashed them. There were lights on in a corridor in that house. With the help of those lights, she was able to identify some of the attackers. They were armed with pangas, axes, and a heavy metal cutter. She identified the 1st appellant as the person who entered her house first, and who threw an axe intending to hit her but missed. She further testified that she was not able to identify any other person. The robbers took some of her property and two of them raped her daughter (PW8) before they left with her into a nearby forest. PW4 identified the 1st appellant as the person who compelled her daughter to go with him into the forest. On this aspect, PW8 supported her testimony.

In her evidence, PW8 testified that she was woken up by a tall and black man who demanded some money from her. Her room had no lights on, but with the aid of lights from the corridor in the house she was able to observe the person. He was armed with an axe. Her mother was standing by. There were other men inside and outside the house. The man was annoyed when she was unable to give him money. So he joined her in bed and raped her, after which he compelled her to accompany him. Outside the house there were other men, and together they left and headed to a nearby forest with her. In the forest, the man whom she identified as the 1st appellant, and another man whom she described as short and brown raped her in turns after which they set her free to return to her residence. The person she identified as short brown, was acquitted on 1st appeal.

Under cross-examination by 1st appellant, PW8 stated that apart from using the corridor and security lights to identify him, she was able to identify him when they walked together as he led her out of her bed-room into the corridor and sitting room, and eventually out of the house. Her evidence is supported with regard to identification by the evidence of PW2 who testified that a person she identified as 1st appellant led her to the house of PW4 and left her with a short brown man outside the house, and himself entered PW4's house. Later he came outside and led PW2 back to her house.

The robberies were reported at the Thogoto Administration Police Post, and two APs went to the scene, and in the company of PW1 the APs followed the robbers in PW1's car. They went to a place on the other side of the forest and laid an ambush near a railway line. They saw 5 people carrying some things walking along the railway line. They did not confront them for fear of attacking innocent passersby. They took time to observe them, and in doing so they had to follow them for some distance. Later, however, they ordered the 5 people to stop. These five people defied the order to stop. The APs chased them. They dropped the load they had and ran away. But one of them called Waweru was arrested. He named, among others both the appellants as having been with him. The load that was dropped was later picked up. It included some of the items which had been stolen from the respective houses of PW1, PW3 and PW4. However, when the appellants were later arrested nothing was recovered from either of them.

It is noteworthy that the appellants and all their co-accused refused to take part in identification parades which the police organized, arguing that the people who had been lined up as identifying witnesses knew them before.

In their respective defences both appellants denied all the charges against them, and merely recounted how they were arrested and circumstances relating to their arrest, which in no wise related to the charges they faced.

In his submissions before us, Mr. Mogikoyo, expressed the view that the robbery counts having been committed about the same time it was not humanly possible for both appellants to be in two places at the same time in absence of any lapse of time between the two robberies. In addition, Mr. Mogikoyo, submitted that as the arrest of the appellants was not as a result of information by eye witnesses, it meant that the court was left with circumstantial evidence. In his view the circumstances as outlined by witnesses was not watertight with the result that the appellants' respective convictions are not safe.

In answer, Mr. Kaigai, Senior State Counsel, expressed the view that the evidence against the appellants is overwhelming as the appellants were both recognized and identified by witnesses. In his view, there was no basis for reducing count three from robbery with violence contrary to ***section 296(2)*** to simple robbery under ***section 296(1)*** of the Penal Code, respectively. Likewise he was of the view that sentence on the rape charge should have been ordered suspended instead of a discharge.

We earlier set out the circumstances at the ***locus in quo*** of the four counts. All the offences were committed more or less at the same spot. The residences of all the complainants abutted each other. The offences were concurrent. As we stated earlier, PW2 was led from her residence to the other two residences before being brought back to her residence. She identified the 1st appellant as one of the robbers who led her to the other two houses and returned with her to her own residence. That answers Mr. Mogikoyo's first concern.

As regards the issue of identification, it is tied together with the issue we first dealt with. The circumstances regarding the identification of the 1st appellant, as earlier on explained, clearly show they were conducive to a correct identification. Electric light was on, the 1st appellant stayed with PW1, PW2, PW3 and PW8 long enough to have provided them with ample time and opportunity to observe him. They were close to him and we are satisfied he was positively identified as one of the robbers.

As regards the 2nd appellant he was the 4th accused. PW1 testified that he was the person he surrendered the Kshs.10,000/- to. He gave the 2nd appellant's name to the police. When he was eventually arrested the witness identified him as one of the robbers. An identification parade for him would have been worthless in the circumstances.

PW2 testified that she saw the 2nd appellant in Court for the second time, the first time having been during the robberies. The evidence against him on the robbery count is, as stated by Mr. Kaigai, overwhelming.

Only the 1st appellant was convicted on the rape charge, and we are satisfied, on the evidence on record, that he was positively identified by PW4 and PW8 as the person who raped PW8. PW2's evidence lends support to their evidence. It should be recalled that PW2 testified that the 1st appellant led her to Naomi's house and on reaching there left her outside under guard and went into the house. That places 1st appellant at the scene of the rape. He was properly convicted of the rape count.

On sentence, the superior court affirmed the sentences meted out to the appellants, but overlooked the fact that the evidence against the appellants in the third count clearly showed that an offence under ***section 296(2)*** of the Penal Code, had been committed and there was no basis for reducing the charge to simple robbery. The appellants were accompanied by other people in the course of the robbery. ***Section 296(2***), above, as material, provides as follows:-

"***296(2) if the offender is armed with any dangerous or offensive weapon or instrument/or is in company with one or more other person or persons …. he shall be sentenced to death."***

In the circumstances, both the trial and first appellate courts erred in principle, and that being the conclusion we have come to, it behoves us to correct that error. We set aside the conviction and sentence in the third count for simple robbery and substitute therefor a conviction for robbery with violence contrary to ***section 296(2)*** of the Penal Code and a sentence of death as provided under that sub-section.

Likewise in the rape count, the trial court should not have ordered a discharge. This Court has consistently held that where a person is sentenced to death upon conviction for an offence which provides for a death penalty and at the same trial he is convicted of any other offence carrying a lesser sentence, such lesser sentence should be ordered suspended. The first appellate court, like the trial court also overlooked that fact and thus erred in principle as well. We set aside the order discharging the 1st appellant of the rape charge, and substitute therefor an order for a suspended sentence of 10 years imprisonment. We have decided on a 10 year imprisonment term considering the seriousness of the charge and the circumstances under which it was committed.

In the result, the appellants' consolidated appeals are dismissed and conviction and sentence in count 3 are varied; likewise the sentence in count 4. The net result is that both the appellants shall suffer the death penalty without more unless the death penalty is commuted in which case the imprisonment term will take effect.

Dated and delivered at Nairobi this 12th day of October, 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.