



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Criminal Appeal 288 of 2004

JAMES MWANGI GITAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by G. K. Mwaura (P.M.) in the Senior Principal Magistrate's Criminal Case No.117 of 2003 dated 14th September, 2004)

JUDGEMENT

The appellants were charged in lower court with the offence of robbery with violence c/sec. 296(2) of the Penal Code. The court consolidated this appeal with High Criminal Appeal No.299 of 2004 filed by James Mwangi Gitau. This file was made the lead file. At the very beginning of the hearing of the appeal the appellants were warned by us that on hearing the appeal and on consideration of the evidence if the court was of the view that the charge of robbery with violence c/sec 296(2) was founded the court would convict them and sentence them for that charge. This is because the learned trial magistrate convicted the appellants for simple robbery under section 296(1) on the basis that the complainant was not injured during the incident. The appellants were sentenced to serve 7 years imprisonment each. The prosecution evidence is as follows:

PW1 stated that on 23rd August, 2003 at about 11 p.m. he was coming from Githagara centre from a club. He was carrying one Kilogram of sugar, tomatoes and he had with him Kshs.100/= . He confessed that he was drunk. Then he stated that the accused attacked him and stole from him the items he had on him. He however was unable to identify them but the watchman who responded to his screams came and found the appellant's still attacking him. The watchman asked the appellant to stop beating him which they did and went away. PW1 was told by the watchman that the attackers were the two accused. He sustained an injury on the face and trousers were torn. The watchman Lawrence Kamau Mwiru confirmed that he is a watchman at Githagara centre. He guards a shop. On the material date he had began working in the afternoon and at about 11 p.m. he was doing his rounds. He met two people beating a person. He flashed his torch and saw the two attackers and the victim. He confirmed that the appellants were the attackers. On being asked why they were beating the complainant they left and went away. At that time this witness was in the company of another watchman. He left that watchman guarding the complainant whilst he went to report to the headman. The headman came to the scene and was told by

the complainant that he had lost some items and money. On the following day on going to the assistant chief's office where the appellants were also present together with the complainant, the complainant said he wanted to be paid Kshs.2,000/= as compensation for his torn trousers. The appellants refused to pay.

PW3 was the other watchman who confirmed that the complainant was screaming and when he went to the scene he found the appellants beating the complainant. He corroborated the evidence of PW2 that he was left guarding the complainant while the report was made to the assistant chief. He however did not confirm that the assistant chief came on the scene. The assistant chief confirmed that a report was made of the robbery. That report was made at his office. By then the complainant had not made a report. It was until the 26th August, 2003 that the complainant, the watchmen went to him and reported the attack. In cross examination this witness said that after the report by the watchmen the complainant did not come to him and he had to summon him to appear before him on 26th August, 2003. This witness confirmed that they had been allegations that the watchmen at the shopping centre were attacking and robbing people. The appellants were put on their defence when the 1st appellant in his defence said he is a barber at Kahuro market. On the material date he was at his business place where he sometimes works at night. He closed the business at 9.30 p.m. and went home in company of the 2nd appellant whom he had cut his hair and had waited for him to go home together. At the shopping centre at about 11 p.m. they found the complainant lying by the roadside very drunk. The complainant was related to the 1st appellant. They flashed their torch on him and noticed that he had no item of property on him. The watchmen came before they could lift the complainant and told them to leave him alone. That watchman PW2 is also a distant relative of the 1st appellant. He said they did what they were told and left for home. It was later that he was summoned by the headman to appear at the Chief's camp. It was at the Chief's camp that he heard the allegation of robbery. He refused to pay the alleged compensation of torn trousers, because he denied being involved in the robbery. The 2nd appellant corroborated the evidence of the 1st appellant. He also confirmed that the complainant did not have any item of property on him.

It is clear that the complainant on the night he was attacked he was very drunk. He admitted it in his evidence. He did not identify the appellants at the scene. Instead it is PW2 and 3 who said to have gone to the rescue of the complainant and identified the appellants. The two witnesses said that they found the appellants attacking the complainant. They recognized them from the lighting of the torch.

As we evaluate the prosecution's evidence, we come to the conclusion that there is doubt whether the complainant was indeed robbed as he alleged. There was no independent evidence that he had in his possession one kilogram of sugar, tomatoes and Kshs.100/=. Even his rescuers PW2 and 3 did not see those items either on the complainant or the appellants. The two witnesses said that on going to the scene they found the appellant still assaulting the complainant. They had torches and one would expect that they would have been able to see with those torches the tomatoes and sugar. These would have certainly been visible. In view of the drunken state of the complainant, we find that we cannot rely on his evidence alone. There was need of corroboration that he was robbed. The definition of robbery is found in section 295 of the Penal Code. It states as follows:-

“Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery”.

We are of the view that there is doubt if indeed anything was stolen from the complainant. That doubt must be resolved in favour of the appellants. Additionally in our evaluation of the evidence, we find that the evidence of the complainant cannot be relied on for the conviction of the appellants. The complainant on being attacked, he did not report the matter. On that night a report was made to the head man by one of the watchmen. The complainant did not follow that report and it had to take the summoning by the assistant chief for the complainant to attend his office. On being summoned the complainant asked the appellants to pay him Kshs.2,000/= for him to withdraw the complaint. PW2 and 3 alleged that the complainant was seriously injured. The complainant on the other hand said that he was not seriously injured and therefore he did not seek medical assistance. The nagging question is, was he really

attacked?

In considering the totality of the evidence by the prosecution we find we cannot rely on the same for the conviction of the appellants of the charge of robbery with violence. In considering the defence offered by the appellants, we find that in the light of the prosecution's evidence, it comes out as consistent and credible. 1st appellant is related to the complainant. The appellant on approaching the shopping centre on their way home they found the complainant drunk and lying on the ground. They decided to assist him, then come along PW2 and 3 who tell him to leave him where he was. The appellants stated that their wish was to assist the complainant go home. The appellants evidence is supported by the evidence of PW2 and 3 who stated that on approaching the scene the appellants did not run away. They only walked away on being asked. One would expect that if the appellants were in the process of stealing from the complainant on noticing PW2 and 3 they would have run away before being identified. The appellants alleged throughout their cross examination of witnesses and in their defence that there were rumours that the watchmen at the shopping centre were attacking people. This was also confirmed by the Assistant Chief. Prosecution did not disapprove that evidence.

Our finding is that the prosecution failed to prove a case against the appellants beyond a reasonable doubt. In the light of that finding, the judgement of this court is that the appellants' appeals against conviction and sentence does succeed. **The appellants are hereby set free unless otherwise lawfully held.**

Dated and delivered at Nyeri this 3rd day of October, 2007.

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE