



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 304 of 2005

FRANCIS KANILA NDANGA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original decision in Kibera Chief Magistrate's Criminal Case No. 2656 fo 2004 – Ms. Muchira SRM)

JUDGMENT

Francis Kanila Ng'ang'a, the appellant, was charged before the subordinate court with two offences of robbery with violence contrary to section 296(2) the Penal Code. The particulars of count 1 were that on 4th April 2004 at cemetery Road, Karen within Nairobi area jointly with others not before court while armed with an iron bar and knife robbed JOHN KIOKO MWANGANGI of one mobile phone, one brief case, two bibles and personal documents all valued at Kshs 8000= and at or immediately before or immediately after the time of such robbery used actual violence to the said JOHN KIOKO MWANGANGI. The particulars of count 2 on the other hand were that on 4th April 2004 at cemetery road, Karen within Nairobi Area, jointly with others not before court while armed with iron bar and knife robbed CAROLINE MUTIE MUTUNGA of cash Kshs 500= and a hand bag all valued at Kshs 1000= and at or immediately before or immediately after the time of such robbery used actual violence to the said CAROLINE MUTIE MUTUNGA. After a full trial, he was convicted and sentenced to suffer death as provided for by law. Being aggrieved, he has appealed to this court. His grounds of appeal in the supplementary petition of appeal can be summarized as follows:-

1. The learned magistrate erred in convicting him on insufficient evidence.
2. The learned magistrate erred in failing to note that the police officers who participated in his arrest, especially PC Ngonga were not called to testify.
3. The learned magistrate prejudiced the appellant by denying his application to recall PW1 contrary to section 150 of the Criminal Procedure Code.
4. The trial magistrate erred in convicting him on contradictory evidence of prosecution witnesses.
5. That his defence was not considered as required under section 169(1) of the Criminal Procedure Code, and that the said defence was unshaken.

The appellant also filed written submissions in support of his grounds of appeal.

Learned state counsel, Mrs Gakobo, opposed the appeal and supported both conviction and sentence. Counsel submitted that the robbery incident occurred in broad daylight, and circumstances were favourable for positive identification. Both complainants, PW1 and PW2, were together at 4 pm when they were attacked and robbed by three men. Counsel contended that the appellant was armed with a knife and cut PW1 on the hand. The said PW1 described the features of the appellant well. The police arrested the appellant shortly and brought him to PW1 and PW2, who were able to identify them. Counsel submitted that the ingredients of robbery with violence were proved, and that there was no possibility of mistaken identify. Counsel also submitted that all important or crucial witnesses testified. The omission to call some police officers to testify was not fatal to the conviction. On the complaint that the appellant was not given an opportunity to recall PW1, counsel submitted that the said witness was actually recalled, but the appellant did not make another application to recall the said witness. Counsel lastly submitted that the defence of the appellant was considered and found not to shake the prosecution case.

The brief facts of the case are as follows. On the 4th April 2004 at 4 pm PW1 JOHN KIOKO MWANGANGI and PW2 CAROLINE MUTIE MUTUNGA, who were boyfriend and girlfriend, came from church and went to the World War cemetery at Karen for photographs. They however did not find any camera man. They decided to go and get transport. As they passed through the Telkom Kenya field, they met 3 young men who approached them and ordered them to lie down. One of those young men was armed with a knife and another with a metal bar. The one with the metal bar hit PW1 with the metal bar and took PW1's briefcase. The one with the knife tried to remove money from PW1's pockets. They struggled and one of the young men took the handbag of PW2, and all the three young men took off. The brief case of PW1 had, inter alia, two bibles, a siemens mobile phone, and Kshs 8 000= . Before PW2's handbag was taken, PW2 was boxed on the head by one of the young men. The handbag of PW2 contained, inter alia, Kshs 500=.

Police on patrol got information that there were some people robbing others in the field and they approached. The police, including PW3 PC NAHID SULEIMAN, went to the field and spotted three people. They gave chase and two of those people jumped over the hedge. The appellant was not able to jump over the hedge and was arrested. He was taken to PW1 and PW2. The two witnesses said that he was one of the young men who had robbed them. The police had someone else in the police vehicle, however, the two witnesses PW1 and PW2 did not connect him with the robbery. None of the allegedly robbed items were recovered.

When the appellant was put on his defence, he elected to give an unsworn defence. He stated that he wanted to call one witness FRANCIS KANILA NDANGA (which name appears to be the same as the name of appellant). Summons was ordered to be issued for the witness. When the appellant ultimately came to defend himself he merely stated his name to the court and said that he had nothing further to say.

Faced with this evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt, and thus convicted the appellant.

This is a first appeal. We have to remind ourselves that this being a first appeal we are duty bound to re-evaluate the evidence on record a fresh and come to our own conclusions and inferences bearing in mind that we were not able to see the witnesses testify to determine their demeanour and give allowance for that see OKENO vs REPUBLIC [1972] EA 32.

We have evaluated the evidence on record. The conviction of the appellant is predicated on identification by PW1 and PW2 as well as the mode of arrest.

The first complaint of the appellant is that he was convicted on insufficient evidence. In effect he is saying that the evidence on record did not prove that he was one of the robbers. As we have stated above the conviction of the appellant was mainly predicated on identification. In KARANJA AND ANOTHER vs REPUBLIC [2004] 2 KLR 140, the Court of Appeal held, inter alia, that:

“1. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.”

In our view, the circumstances of identification were favourable to positive identification as the incident occurred in broad daylight. The three robbers were not masked so their faces could be seen clearly at 4 pm when the incident occurred. The place where the robbery occurred was an open field. The evidence of PW1 and PW2, the complainants, was quite consistent that they could identify the appellant and described what role he played in the robbery as part of the gang of three robbers. He was the one who was armed with a knife. When the appellant was brought to both PW1 and PW2 after about 20 minutes by the police, including PW3, both immediately confirmed that he was one of the robbers. In fact, PW2 stated that the police had another suspect but PW2 could not recognize him as one of the robbers. The appellant in cross-examination did not challenge the evidence of PW3. He also chose to say nothing with regard to the allegations against him in his unsworn defence. In our view, the evidence of visual identification and the circumstances of arrest of the appellant corroborate each other that the appellant was one of the robbers, who robbed PW1 and PW2.

The second complaint of the appellant is that police officers who participated in this arrest especially PC NGONGA was not called. There is no rule of law or practice that requires all police officers who participated in an arrest to be called to court to testify. In our present case PW3 NAHID SULEIMAN, who was one of the arresting officers was called to testify in court. He testified on the circumstances of the arrest. The appellant did not challenge those circumstances. We find no prejudice caused to the appellant by the failure of PC NGONGA to testify in court, as the appellant was arrested near the locus in quo in a chase. We dismiss that ground of appeal.

The third complaint of the appellant was that he was denied the opportunity to recall PW1. We find no basis for this ground of appeal. The record does not show that the appellant requested for a recall of PW1. Instead, on 18th March 2005 when the appellant was informed that he would be put on his defence, he is recorded as having stated that he would give unsworn defence and call one witness. On 5th May 2005 he informed the court that the name of that witness was FRANCIS KANILA NDANGA. Witness summons ordered to issue. On 11th May 2005 he gave his own statement in defence and merely stated –

“I am Francis Kanila Ndanga. I have nothing further to state:”

In our view, the appellant did not ask for a recall of PW1. The witness he mentioned as part of his defence was also an attempt to mislead the court, as he gave his own name as the name of the witness. We dismiss that ground of appeal.

The last complaint of the appellant is that his defence was not considered. We do not agree. We have already highlighted his defence above. The magistrate stated thus in the judgment –

“The accused in his defence did not open any rebuttal to shake the testimony of the prosecution witness.”

We agree with the findings of the learned trial magistrate. The appellant, in his defence, chose not to refute the allegations against him. He willfully gave his name and chose to say nothing more. That was his legal right. But he cannot blame the court for not considering what was not there, as he chose to say nothing.

For the above reasons, we find no merits in the appeal. We dismiss the appeal and uphold the convictions on both counts. On the sentence, the appellant will suffer death on count 1, while the same sentence on count 2 is suspended.

Dated and delivered at Nairobi this 6th day of November 2007.

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J.B. OJWANG

Judge

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G.A. DULU

JUDGE

In the presence of –

Appellant present in person

Mrs Gakobo for State

Eric/Huka - court clerks