REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 237 of 2005

GEORGE MATHU WANJIRU……...……..……APPELLANT

VERSUS

REPUBLIC……..…..……..RESPONDENT

(From original conviction and sentence in Criminal Case No. 5177 of 2004 of the Chief Magistrate's Court at Kibera- Miss C. Mwangi SPM)

JUDGMENT

GEORGE MATHU WANJIRU, the appellant, was charged before the subordinate court with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on 20th June 2004 at Saigon village in Karen within the Nairobi Area Province jointly with another not before court, while armed with dangerous weapons namely a pistol and a knife robbed JOHN LWANGELE WANYAMA one brief case, one bible, one mobile phone make SIEMENS C35, one wrist watch, one wallet and cash Kshs.200/= all valued at kshs.5850/= and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said JOHN LWANGELE WANYAMA. After a full hearing, he was convicted of the offence and sentenced to death. Being dissatisfied with the decision of the trial court, he has appealed to this court. The grounds of appeal in his amended petition of appeal are that –

1. The learned trial magistrate erred both in law and fact in convicting him without observing that the language used both by the court and the witnesses was not indicated, thus violating section 77(2) (b) and (f) of the Constitution and section 198 of the Criminal Procedure Code.

2. The learned trial magistrate erred in law and facts by upholding the evidence of identification by recognition of a single identifying witness which was not satisfactorily proved.

3. The learned trial magistrate erred in law and facts by basing the judgment contrary to the evidence adduced by the complainant.

4. The learned trial magistrate erred in law and facts by failing to observe that some vital witnesses were not summoned to clear doubts especially the investigating officer.

5. The learned magistrate erred in law and facts by being impressed by the mode of arrest which had no affirmative nexus.

6. The learned trial magistrate erred in law and facts by rejecting his defence without giving her points for determination as required under section 169(1) of the Criminal Procedure Code.

The appellant also filed written submissions.

At the hearing of the appeal, the appellant relied on his written submissions. The learned State Counsel, Mrs. Kagiri, conceded to the appeal. Counsel submitted that the prosecution called only two witnesses, the complainant and one police officer. The evidence of PW1, the complainant, was that he recognized the appellant. However, in cross-examination, the issue of an existing grudge was brought up. The arresting officer, on the other hand testified that he did not know why the appellant was arrested, but that a report had been recorded in the OB. Counsel contended that the prosecution closed its case prematurely. The evidence of the investigating officer, who was a very crucial witness, was not tendered in court. Counsel also submitted that the court misdirected itself by making a finding that there was no evidence of a grudge while such evidence arose in cross-examination.

We have re-evaluated the evidence on record as we are required to do in a first appeal. At the trial only two witnesses testified on the side of the prosecution. It was PW1 the complainant and PW2, one of the arresting officers.

The conviction of the appellant is predicated on evidence of visual identification or recognition by PW1, the complainant. The time of the incident was during the day at 8 am. Therefore there must have been sufficient light, which was a favourable condition for positive identification or recognition. Secondly, PW1 claims that he knew the appellant. The evidence of the circumstances of recognition in this case is generally favourable to remove the possibility of mistaken identity.

Having observed as above, if is trite that the burden of proof to establish all the ingredients of an offence beyond any reasonable doubt is on the prosecution. The burden never shifts to an accused person. This position was emphasized in the case of **AJWANG –vs REPUBLIC [1983] KLR 333**, in which the court of Appeal held, inter alia, that –

"**2 The burden of proving the ingredient of the offence is entirely on the prosecution and the accused cannot be called to prove his innocence. The evidence showed, in the court's opinion, that the appellant knew that the goods were uncustomed, hence the offence was proved as required by law"**

The prosecution in our present case was required to tie all the loose ends to prove the guilt of the appellant beyond any reasonable doubt. They did not, as they called merely the complainant PW1 and an arresting officer PW2 to testify. The arresting officer stated in court that he did not know why the appellant was charged. Apparently the decision to arrest the appellant was made by someone else who did not testify in court. Secondly, the investigating officer of the case did not testify in court. The absence of the evidence of these two crucial witnesses left a big gap on why the appellant was arrested and also what the complainant, PW1, actually reported to the police and when. We observe that the appellant was on 7/7/2004 several days after the day when the offence is said to have occurred on 20/6/2004. The absence of these witnesses leads us to make an adverse inference that if their evidence was tended, it would have tended to be adverse to the prosecution case – see **BUKENYA –vs- UGANDA [1972] EA 549.** We will allow the appeal on that ground. Learned Stated Counsel conceded to the appeal on this ground, and we respectfully agree with her.

Learned State Counsel also submitted that the learned trial magistrate misdirected herself in holding that the appellant's defence of the existence of a grudge was an afterthought. We observe that in cross examination, PW1 the complainant, is recorded as having replied.

"**There is no relation between me and your people. You never sent village elders to me"**

In his unsworn defence, the appellant stated that he told IP NYAMBURA that the appellant had been going to his house and that they had differed over his wife. He also stated that he had sent elders to PW1

to stop him using his house.

The learned magistrate found that the appellant's defence of a grudge was an afterthought, and that the appellant never put that allegation in his cross – examination. We respectfully also agree with the learned State Counsel that, indeed, the appellant raised the issue of grudge in his cross-examination. The finding by the learned trial magistrate was not borne by the record. In our view, the existence of the grudge could have been a reason for the pastor (PW1) to frame the appellant. Pastors are not known to be angels.

Having re-evaluated the evidence on record we find that the conviction is not safe and cannot be sustained.

Consequently, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty, unless he is otherwise lawfully held.

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 in person

Mrs. Kagiri for State

Eric - court clerk