



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAKURU**

Criminal Appeal 423 of 2003

SIMON KIPKEMOI TOO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars were that on 21/6/03 at Tegunot forest, Kericho District, jointly with another not before court, while armed with a panga, he robbed Weldon Kirui of cash Kshs.2,870/- and immediately before or immediately after the time of such robbery, wounded the said Weldon Kirui.

He was tried, convicted and sentenced to death as by law prescribed. He appealed against the conviction and sentence.

This being the first appellate court, it is duty bound to re-examine the evidence that was tendered in the trial court and draw its own conclusion, see **MOHAMED RAMA ALFANI & 2 OTHERS VS REPUBLIC**, Criminal Appeal No. 223 of 2002.

The evidence can be summarised as hereunder:-

Weldon Kirui (PW1) the complainant, used to buy and sell potatoes. On 21/6/03 at about 1 p.m. he sold some potatoes for Kshs.600/- and while he was selling, some two people saw him. As he went home at about 3.00 p.m. he met the two people and they stopped him. He said that they grabbed him by the throat and strangled him. One of them had a panga and the other one had nothing. They also stepped on his chest and hit him on the left leg and robbed him of Kshs.2,870/-. The assailants disappeared and immediately thereafter the complainant went and reported the incident to Londiani Police Station. He also collected the panga which the assailants had and gave it to the police. He did not tell the court the details of what he told the police. The following day the appellant was arrested. The complainant told the court that he knew the two people who had attacked him as he used to meet them at the market. However, he did not state how he knew them and for how long he had known them. In cross examination, he said that he told some people about the appellant and the people arrested him the following day.

Joseph Ndonga (PW2) a police Constable from Londiani Police Station, testified that on 22/6/03 at 7.45 p.m. members of the public took the appellant to the police station and he re-arrested him and locked him

up in the cells. He said that the complainant had earlier reported the robbery incident. PW2 did not tell the court what the complainant actually stated in his report. He said that he issued a P3 form to the complainant and the complainant also handed in a panga which he said was dropped by the robbers as they fled. PW2 said that the appellant was one of the robbers but he did not tell the court why he had reached that conclusion.

Mathew Kipkurui Koech (PW3) a Clinical Officer at Londiani Hospital, testified that on 26/6/03 the complainant attended the hospital and complained that he had been assaulted by some people known to him. Upon examination, he found that he had been injured on his neck, chest and left leg and treated him. Three days later, the complainant went to see PW3 with a P3 form which he filled.

Richard Kipyegon Mutai (PW4) stated that on 21/6/03 at about 2 p.m. he saw the complainant selling potatoes next to a main road. He saw him leave at about 3.00 p.m. but at about 4.00 p.m. he returned and informed him that he had been attacked by two people whom he named as Vincent Kipkemoi and Simon Kipkemoi, the appellant. PW4 knew those people and he told the complainant to report the matter to the village elder and the area chief. PW4 said that he had seen the two aforesaid people along the main road when the complainant was selling his potatoes. He said that the alleged robbers disappeared and the area chief asked him and others to look for them. They managed to arrest the appellant the following day at about 4 p.m. They did not recover anything from him.

In his unsworn statement of defence, the appellant denied having committed the offence as charged with. He said that on the material day he had travelled and when he returned, he was arrested by PW4 and somebody else and taken to the police station where it was alleged that he had robbed the complainant. He said that the panga that was handed in to the police did not belong to him. He said that there existed a grudge between him and PW4 concerning some money which he had been demanding from PW4 on account of some work which he had done for him and for which he had not been paid.

From the evidence as summarised above, it is not in dispute that the complainant was robbed of some money by some people who were alleged to have been armed with a panga at the time of the robbery. The issue that must be resolved is whether there was sufficient evidence upon which the appellant could have been convicted as being one of the two people who committed the said offence.

At the time when the alleged offence was committed, there was no eye witness, the complainant was alone. He said that two people saw him selling potatoes and thereafter they went ahead of him. He did not tell the court who those people were. He said that one of them had a panga but he did not describe the panga to the court so that when PW2 produced the same, the court could see whether it fitted the description as given. Immediately after the robbery, the complainant went and reported to Londiani Police but he did not state the names of his assailants. If a complainant knows the names of the people who attacked him, he should ordinarily state the same to the police at the earliest opportunity. He said that he knew his assailants because he used to meet them at the market. But for how long had he known them or how frequently was he meeting them?

The complainant's evidence did not tally with that of PW4 in some material respects. The complainant never told the court that immediately after the alleged robbery incident he recounted to PW4 what had taken place and told him the names of the robbers. It is PW4 who told the court that the complainant told him that he had been robbed by Vincent Kipkemoi and Simon Kipkemoi. PW4 said that he told the complainant to report to the village elder and the area chief. The area chief was said to have given instructions to PW4 and others to look for the alleged robbers. However, the complainant never told the court that he ever made any report to the village elder or the chief. Neither the village elder nor the area chief were called as witnesses. The circumstances under which the appellant was arrested were not explained. PW4 should have told the court where exactly the appellant was arrested at. It is trite law that where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be water tight to justify a conviction; see *KIARIE VS REPUBLIC [1984] KLR 739*. We find that the evidence of the complainant was not water tight and it was therefore unsafe to found a conviction on the same.

There was also material discrepancy between the evidence of PW2 and PW3. PW1 went to report to the police on 21/6/03 and was given a P3 form the same day, according to the evidence of PW2. However, the P3 form shows that it was issued out on 24/6/2003 and PW3 said that the complainant went to the hospital on 26/6/2003 for treatment and he went back three days later (29/6/2003) with a P3 form which PW3 filled. He indicated that the complainant's injuries were about 24 hours old, whereas the complainant said that he had been assaulted on 21/6/03. If the evidence of PW3 was true, and I have no reason to doubt the same, the complainant went to the hospital five days after the date when he was allegedly robbed and assaulted.

From the evidence of PW2, it seems that no police investigations were carried out to determine whether the appellant had committed the offence as charged with. The panga that was taken to the police station was not dusted for purposes of picking up the finger prints thereon to determine whether it had been handled by anybody else apart from the complainant. Nothing was done to connect the same to the appellant. The investigating officer did not testify. That was prejudicial to the appellant as there were many issues that were left hanging.

All in all, we find that the appellant's conviction was unsafe and consequently we allow the appeal, quash the conviction and set aside the sentence that had been imposed by the trial court. The appellant should be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED at Nakuru this 28th day of February, 2006.

MUGA APONDI

JUDGE

D. MUSINGA

JUDGE

Judgment delivered in open court in the presence of Mr. Koech state counsel and appellant.

MUGA APONDI

JUDGE

D. MUSINGA

JUDGE