



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

Criminal Appeal No. 290 of 2003

SAMMY KANYI MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant has appealed against the original conviction and sentence in Molo Senior Resident Magistrate criminal Case No. 348 of 2003. In that case, the appellant had been charged for two counts of robbery with violence, contrary to **Section 296(2)** of the **Penal Code**. The facts of the prosecution case as stated in the charge sheet for the first count are as follows:-

“On the 5th February, 2003 at Kasarani Estate, Elburgon in Nakuru District of the Rift Valley Province, jointly with others not before court while armed with pangas robbed Geoffrey Muigai of one mobile phone make siemens A35 and cash Kshs.300/- all valued at Kshs.5,300/- and immediately before or immediately after the time of such robbery used personal violence to the said Geoffrey Muigai.”

The facts of the prosecution as stated in the charge sheet for the second count are as follows:-

“On the 5th February, 2003 at Kasarani Estate, Elburgon in Nakuru District of the Rift Valley Province, jointly with others not before court while armed with pangas robbed Susan Njeri Hinga of one radio make Naiwa and cash Kshs.80/- all valued at Kshs.780/- and immediately before or immediately after the time of such robbery used personal violence to the said Susan Njeri Hinga”.

After a full trial, the appellant was found “**guilty**” and convicted on both counts. Consequently, the learned magistrate viz, Mr. R. Kirui, Senior Resident Magistrate sentenced the appellant to death for both counts. During the hearing of the appeal, the appellant opted to hand in written submissions. Since the said submissions are lengthy, court will only reproduce a summary of the same. These are as follows:-

1. That the learned trial magistrate erred in law and fact in relying on identification by recognition of PW2 which was not free from errors or mistakes.
2. That the magistrate erred in law and fact in failing to find enough doubts were created to secure my (appellant’s) “**acquittal**”.
3. That the magistrate failed to consider and take into account or failed to give reason why he disregarded the appellant’s defence.

On the other hand, the state, through Mr. Gumo, Assistant Deputy Public Prosecutor supported both the conviction and sentence. In addition to the above, he submitted that the 2nd count was proved overwhelmingly since the scene was well lit by security lights which emanated from the Timsales premises. According to Mr. Gumo, the light was bright enough to enable PW2 to recognise the appellant who was previously known to her. He was of the opinion that there was no doubt about the identification of the appellant who was in the company of other persons at large. He concluded by stating that the ingredients of the offence were met satisfactorily. In reply, the appellant stated that PW2 had not mentioned him by name. He further stated that the fact that the complainant had to use a torch meant that there was insufficient light.

This court has carefully perused the above together with the entire record of appeal. Being the first appellate court, we have the duty and obligation to re-evaluate and re-examine the evidence afresh before reaching our own independent conclusion. Having stated the above, we are conscious of the fact that we never saw nor heard the witnesses when they gave their evidence. (See **NJOROGE VS REPUBLIC [1987] KLR 19**).

In his evidence, PW1, Maina Muigai Geoffrey deposed that on 5th February, 2003 at around 11.30 p.m. while he was heading home with AP Lang’at they met a friend called Susan. On reaching the Timsales premises, Mr. Lang’at branched and entered his place while PW1 and Susan proceeded on. However, after a short distance, they saw three people who were following them. Despite the fact that there was light, the three people flashed torches at them. When they demanded all the money that they had, PW1 gave them Kshs.250/-. In response, the group ordered him to lie down and one of them removed Kshs.50/- that PW1 had in his trouser pocket. Apart from that, they also took the

wrist watch and mobile phone of PW1. Further to the above, PW1 also stated that when Susan hesitated, one of the guys cut her jacket with a panga. PW1 noted that the thugs were armed with pangas and clubs. On the advice of PW1, Susan gave the thugs, cash Kshs.80/- and a radio set. After the thugs had bolted away, Susan informed PW1 that she was able to identify one of the thugs. In the evidence, PW2, Susan Njeri Hinga confirmed that she had met PW1 on the material night while she was heading home. Later they saw some people who followed them and later ordered to stop. Susan confirmed that the three people were armed with pangas and rungas and that they flashed their torches at PW1. Susan also confirmed how they were robbed of cash, mobile phone and wrist watch. Susan was categorical that she was able to see the thugs clearly through the security light from Timsales which is just a few metres away. Apart from the above, Susan stated that she saw the accused clearly. In addition to the above, the accused talked to her stating that he knew that she operates a hotel. The accused even had the cheek to tell her to scream, as she normally does. In his evidence, PW3, Cpl Richard Rotich explained how they had received information that some suspects had wanted to cause chaos in church. They later arrested sic suspects who included the accused. Subsequently, PW2 went to Elburgon Police Station where she identified the accused positively as among the robbers who had attacked them on the material night.

In his defence the appellant explained how he had gone to visit his grandmother on 5th January, 2003. When he returned home on 7th February, 2003 he was hired to one Joseph Maina to do some farm work. On the following day he went to his farm where he assisted him to harvest his maize before the same was transported. While on the way, the tractor got struck on a number of occasions before its tyre got a puncture near a church. While guarding the tractor, the appellant and others, started warming themselves besides a fire outside. It was while they were there that the police officers went and arrested them while they had pangas that they had used to harvest the maize. The appellant and others not before the court were later taken to the police station where they were locked in up to 11th February, 2003. On her part, DW2, Jane Wanjiru who is the mother of the appellant stated that she had sent her son to the home of the grandmother at Kiambogo on 5th February, 2003 and after two days, he went to harvest some maize. However, the son never went back home and on 9th February 2003, she was informed that he had been arrested.

From the above evidence, it is crystal clear that the eye-witness who recognised the appellant was PW2 who stated clearly that she had known him earlier. She was able to see the appellant through the security lights from Timsales. In addition to the above, PW2 also had the opportunity to have a conversation with the appellant who dared her to scream as she normally does. The appellant also acknowledged that PW2 was operating a hotel.

Given the above evidence we are satisfied that the conditions at the scene were favourable to a positive identification. Apparently, PW2 had no grudge against the appellant to motivate her to frame the appellant for such a serious charge. We are also satisfied that the learned magistrate viz, Mr. R. Kirui, SRM had the advantage of perusing, the manner and demeanor of all the witnesses carefully and correctly believed the prosecution witnesses. Having perused the evidence carefully, we are of the considered opinion that the conviction is safe and well merited. The upshot is that we hereby dismiss the appeal and uphold the conviction. We also confirm the mandatory sentence that had earlier been imposed.

These are the orders of the court.

MUGA APONDI

JUDGE

6/2/2006

DANIEL MUSINGA

JUDGE

6/2/2006

Judgment read, signed and delivered in open court in the presence of the appellant and Mr. Gumo, Assistant Deputy Public Prosecutor.

MUGA APONDI

JUDGE

6/2/2006

DANIEL MUSINGA

JUDGE

6/2/2006