



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 222 223 & 224 of 2002

GILBERT MWANGI NJUGUNA.....1ST APPELLANT

JOHN KINUTHIA MUNGAI.....2ND APPELLANT

JAMES MWANGI KANGETHE.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

This judgment is in respect of three appeals which were consolidated and heard together, the same being Criminal Appeals Numbers 222 of 2002, 223 of 2002 and 224 of 2002. The three appellants and one other person were charged with robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the night of 13th and 14th April, 2001 at Mutieme Village in Nakuru District of the Rift Valley Province jointly armed with dangerous weapons namely clubs, iron bars and pangas robbed Samuel Macharia Wamae of cash Kshs.47,250/- one radio cassette, one pressure lamp, two pairs of suits, two jackets, two wrist watches, two somali swords, three belts, one pliers, one travelling clock, two shirts, one calculator and two spot lights all valued at Kshs.66,440/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Samuel Macharia Wamae. The prosecution evidence briefly stated was as follows:-

PW1, Samuel Macharia Wamae said that he was a teacher and was also engaged in the business of buying and selling maize. On the night of 13th and 14th April, 2001 at about 1.20 a.m. the complainant was sleeping in his house when he heard dogs barking and woke up to check why they were barking. He was suddenly attacked by a gang of eight people armed with pangas, axes and other weapons. They robbed him of all the items mentioned herein above. They had torches and flushed torchlight on him but he could not identify any of them. They inflicted serious injuries on him and he reported the matter to Naishi Police Station. On 15th April, 2001 PW1 received a report that some documents which had been stolen during the robbery had been recovered. They were his wife's identity card, his employment card, a bank plate and a note book. He heard that the documents had been recovered near the home of the second appellant, John Kinuthia Mungai, who was the 4th accused before the trial court. However, he neither disclosed the name of the person who gave him that information nor the name of the person who made the recoveries.

On 16/4/2001 he recorded a statement at Naishi Police Station. He told the police that he suspected the second appellant because of the aforesaid documents which had been recovered near his home. He also

said that the second appellant knew that the complainant was to be paid Kshs.100,000/-. He also suspected him because his attackers seemed to know him yet he had not lived in that area for long.

On 5/5/2001 the police arrested some four suspects but one of them escaped. The four had initially been arrested by members of the public. PW1 was told to go to Naishi Police Station and see if he could identify any of the items which the suspects had at the time of their arrest. He identified his maasai sword and a pair of old pliers. The rest of the items were not his. However, he did not show any proof that the two items which he identified were truly his. He said he was also informed that the person who had escaped after the arrest was the second appellant.

On 26/6/2001 the complainant was summoned to Naishi Police Station and he met the second appellant who had been arrested. He alleged that the second appellant beseeched him to withdraw the case then he would assist him to recover his stolen items but the complainant refused.

In cross examination by the first and the third appellants he said that he had neither seen them before nor did he see them on the material night and that he did not know how they had been arrested. He however said that he knew the second appellant very well but he did not see him during the night of the robbery.

PW2 and PW3 told the court that on 2/5/2001 at about 1.00 a.m. they were called by one Mr. Cheserem who told them that he had seen some people lying in some bushes and he suspected them to be robbers. Cheserem was not called as a witness. The witnesses said that they gathered as neighbours and surrounded the people. Six people emerged and started running away. They managed to arrest three of them, among them the first and the third appellant. They said that they had torches and they were able to identify the second appellant who ran away and were unable to arrest him. The arrested people had two axes, two pistols, pangas and swords. The arrested people said that they were planning to go and rob the wife of one Inspector Karanja. The arrested people were taken to a police station. In the morning PW2 and PW3 together with police officers went to the home of the second appellant but he took off, PW2 said. The appellants were charged with another case of preparation to commit a felony in Criminal Case No.1922 of 2001 and were convicted and sentenced accordingly. This was an account of the events of 2/5/2001 as stated above.

PW7, Police Constable Julius Leparash told the court that on 14/4/2001 at about 6.00 a.m. PW1 went to Naishi Police Station and reported that he had been robbed. He recorded his statement and gave him a P3 form to go to hospital for treatment. On 3/5/2001 PW7 heard that some people had been arrested at Njoro Police Station and he visited the station and was shown weapons which had been recovered from them. He took the complainant to Njoro Police Station and he identified two swords and a pliers as being some of his items which had been stolen. He then had the first and third appellants charged. Later on, he heard that the second appellant had been arrested at Njoro.

Each of the appellants gave a sworn defence. They all denied having been arrested at night in the bush with the weapons that were exhibited in court.

The first appellant told the court that he was arrested as he was coming from a church. The second appellant said that on 25/6/2001 he boarded a vehicle to travel to Nakuru and on the way the complainant entered the same vehicle. The complainant then caused the vehicle to drive into a police station and he was arrested after the complainant pointed him out. He denied any knowledge of the robbery.

The third appellant also said that he was arrested during the day by some people who stopped him as he was about to reach his home. The people alleged that he had been involved in a robbery and took him to Naishi Police Station.

The learned trial magistrate rejected the aforesaid defences and held that it was the second appellant who had led the others to the home of the complainant and that is why he ran away when police went to arrest him. He further held that the swords and pliers which were exhibited in court were part of the items that were stolen from the complainant and that the appellants were found with those items two weeks after the robbery against the complainant was committed. The learned trial magistrate then proceeded to convict

all the appellants and sentenced each one of them to death. The appellants were aggrieved by the said conviction and sentence and preferred these appeals.

When the appeals came up for hearing, Mr. Koech, Senior State Counsel informed the court that he did not wish to oppose the same because according to him there was no sufficient evidence that the appellants committed the robbery.

We have carefully considered all the evidence that was tendered by the prosecution against each of the appellants. The complainant said that on the material night he was not able to identify any of the people who robbed him. No identification parade was carried out when the appellants were arrested. The complainant knew the second appellant very well and he said that he never saw him that night. One of the reasons that made the complainant suspicious about the second appellant was that two days after he was robbed, the complainant's wife's identity card, the complainant's identity card and a bank card and a note book were said to have been recovered near the home of the second appellant. The court was not told the name of the person who recovered them and exactly where they were recovered at. That was a serious omission, considering that the recovery was so soon after the robbery. The person who made the recovery should have been called to testify. Those items could have been thrown there by anybody. The alleged recovery of those items could not on its own be sufficient to connect the second appellant with the robbery.

The other important evidence which was advanced by the prosecution was recovery of the swords and pliers and other weapons in the possession of the appellants when they were found hiding themselves in a bush at night. The complainant said that the swords and the pliers belonged to him. There was however no adequate proof to that effect. He said that he bought the masai sword in 1990 from a certain masai. He said that he bought the other sword, a somali sword in May 1998. He said that he had receipts for the two swords but he did not produce them. Even if he had such receipts, it was not easy to tell with certainty that the swords truly belonged to him in the absence of any distinguishing marks as all masai or somali swords look more or less the same. There was also no foolproof way of telling whether the pliers belonged to him. The complainant was categorical that all the other weapons and items that were recovered in the possession of the appellants did not belong to him. It was therefore unsafe to conclude that since those three items belonged to the complainant, the appellants must have been the ones who had robbed the complainant two weeks previously.

The appellants had been charged and convicted for the offence of preparation to commit a felony after they were found in possession of two toy pistols, two axes, two swords, a panga, pliers and other items on the night of 2nd and 3rd May, 2001 but in our view, there was no sufficient evidence upon which they could have been convicted for the offence of robbery with violence. Consequently, we allow the appeals, quash the convictions and set aside the death sentences which had been imposed by the trial court. The appellants should be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED at Nakuru this 2nd day of February, 2006.

D. MUSINGA

JUDGE

2/2/2006

L. KIMARU

JUDGE

2/2/2006