REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI
Criminal Appeal No. 344 of 2002

JOHN WAMBUGU NDUNGU…….....……..APELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(Being an appeal from the judgment of M. R. Gitonga, Principal Magistrate, dated 13the May, 2002, in the Chief Magistrate's Court Nyeri, Criminal case No. 542 of 2002)

JUDGMENT

The Appellant was charged with the offence of robbery violence contrary to section 296 (2) of the Penal Code. He also faced on alternative count alleging the handling of stolen goods contrary to section 322 (2) of the Penal Code. He was convicted of the offence of robbery and sentenced to death.

Particulars of the offence of robbery with violence were that during the night of 15th and 16th February 2002 at Ruringu Estate in Nyeri town the Appellant jointly with another not before court robbed Patrick Gathogo Kamau of two packets of cigarettes, two Kg of sugar, four packets of maize floor, one Kg of salt, 100 gms of Kasuku cooking fat and one toilet paper roll, to the total value of kshs506/- and that during the robbery, violence was used upon the said Patrick Gathogo Kamau.

During the hearing of this appeal the Appellant pointed out that the exhibits produced in the trial to support the charge were not the same as the items mentioned in the charge sheet. He also said the weapons witnesses said the robbers had were not weapons in the charge sheet. He further argued that if true he had been a robber, he would not have been held by PW1 and PW2 and left to go for some other people to get hold of him latter. The Appellant also stated that PW2, John Murigu Kamau, who was the person selling in the kiosk and more familiar than PW1, with the goods that were in the kiosk had not mentioned any items that had been taken from goods in the kiosk.

The Appellant maintained that his defence had been wrongly rejected by the learned trial magistrate who relied on what witnesses who were not truthful told her.

The appellant in his defence had told the trial court in a sworn defence that he was from Kinunga and had come to Ruringu in Nyeri Town on Valentine day to visit one Margaret Wanjiru but missed her and decided to spend the night in a bar where there was a disco. At about 6.00 a.m. he went out of the bar and found a kiosk open and went there to ask for cigarettes. A person standing at the kiosk asked him where he was from. When he told that person that he was from Tetu, another person said he used to see him at Waka. An argument ensured as that person alleged the Appellant was a robber and slapped the Appellant and another man went and held the Appellant's neck. The Appellant hit that person's hand. A person from the kiosk armed with a panga cut the Appellant on the head.

That seems to have made the then alcohol intoxicated Appellant see the need for going away from those

people and he struggled and crossed the road. A lady, who learned from the Appellant that he could not take himself to hospital, went and called the police and by the time the police found the Appellant, he was unconscious and gained consciousness when he was in Nyeri Provincial General Hospital where the police had taken him. Thereafter the police told him some three days latter that he was being accused of having been a robber at a kiosk. The Appellant said he was not a robber and had carried no breaking implements. But the police charged him.

On the side of prosecution the learned trial magistrate streamlined the case and the learned Provincial State Counsel Mr. Charles Orinda adopted it saying that there was sufficient evidence to show that the complainant PW1 was sleeping in a kiosk with his brother PW2 when after PW2 had gone out at 5.00 a.m. to answer to a call of nature, returned to the kiosk and did not look the door because he felt it was already morning. After he returned into his bed two robbers pushed the door open and entered the kiosk to where the two brothers were sleeping. They ordered the two brothers to remain in bed as one of the two robbers went to the kiosk to take some goods he was putting in a pillow case as the Appellant guarded the two brothers. In the process, PW1 picking courage, threw a blanket at the Appellant and followed to grab and struggle with the appellant as PW2 joined to assist PW1. The other robber seeing what was happening, fled and the Appellant was taken out of the kiosk where PW2 shouted for assistance from neighbours and after one neighbour had come and hit the Appellant hard with a stick, they surprisingly let the appellant go, crossing the road, where another group of members of the public apprehended the Appellant, as they were being told he was a robber, and they held him until the police found the Appellant and took him. By that time PW1 and PW2 do not seem to have been where the Appellant was found and their mother told the court that she was with PW1 at Nyeri Provincial General Hospital that morning when she saw the police take the Appellant there.

We have looked at the evidence and what was said on both sides and we have noted the following important factors:

First, there is evidence that when the Appellant was found by the police he was drunk and empty handed with no shop goods and no weapon along the road. The shop goods that came to be associated with him later were given to the police at the kiosk of PW1 and PW2 while inside a pillow case in the absence of the Appellant.

Secondly, the charge sheet did to state that the Appellant or the alleged robbers were armed with any weapon. But when PW1 was giving evidence said the robbers had a knife and a club while PW2 said both robbers had a panga and a long knife and police constable Joshua Otieno, PW5, said the robbers had a sword and one was produced as exhibit 9.

Thirdly, while PW1 told the court that he is the one who threw a blanket at the Appellant and jumped and got hold of the Appellant and the two struggled before PW2 went to assist PW1, his brother PW2 said

“We jumped and covered him we struggled.”

That is they both did it at once together.

Fourthly, comparing the items witnesses talked about in their evidence and therefore produced as exhibits which the robbers had taken from the kiosk, they do not tally and further, as the Appellant pointed out, PW2 the full time worker in the kiosk, does not seem to have seen those shop items. He was a younger brother PW1 whose evidence and that of PW5 included the exhibits.

Fifthly, while in his evidence the clinical officer Michael Ocholla, PW4, did not give the date on which he saw PW1, the clinical officer told the court that PW1 told him that he (PW1) was assaulted on 16th February 2002 at 11.00 p.m. Obviously that is not the same as 16th February, 2002 at 5.00 a.m.

Further, according to PW4, the complainant PW1 told him that he had been assaulted by people known to him and that is what is stated also in Exhibit 1, the P3. But in his evidence PW1 was attacked by people he did not know. He never indicated anywhere he knew them.

That exhibit 1, the P3, makes the situation worse as it states on page 1 paragraph 2 under part II at the bottom that the assault took place on 15th February 2005 superimposed on March, 2002 at around 5.00 p.m. That is another time outside the time given in the charge as the night of 15th and 16th February 2002 because 5.00 p.m. cannot be said to have been at night.

With all those discrepancies, we think that the defence of the Appellant could be true. That defence casts doubt at the prosecution's case and we think that a conviction in this case is unsafe even if the charge were amended to be under section 297 (2) of the Penal Code as suggested by Mr. Orinda.

Accordingly, we do hereby allow the appeal of the Appellant. Quash his conviction and set aside the sentence imposed upon him. The Appellant be set at liberty forthwith unless lawfully detained in some other cause.

Dated this 31st day of march, 2006.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE

Present:

The Appellant in person,

Mr. Orinda for the Republic

Martin Mwangi – Court clerk