



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 231 of 2001

JARSON KUNO SOBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Judgment and Conviction in the Chief Magistrate's Court at Nyeri in Criminal Case Number 4117 of 2000 delivered on 19th June 2001 by C. D. Nyamweya – S.R.M)

CRIMINAL APPEAL NO.380 OF 2001

DABASO WAKO JALDESA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Judgment and Conviction in the Chief Magistrate's Court at Nyeri in Criminal Case Number 4117 of 2000 delivered on 19th June 2001 by C. D. Nyamweya – S.R.M)

CRIMINAL APPPEAL NO. 381 OF 2001

MOHAMED HAPPI BAGAJAH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Judgment and Conviction in the Chief Magistrate's Court at Nyeri in Criminal Case Number 4117 of 2000 delivered on 19th June 2001 by C. D. Nyamweya – S.R.M)

J U D G M E N T

(CONSOLIDATED)

Jarson Kuno Soba the appellant in Hc. Cr. App. No. 231 of 2001 (*hereinafter referred to as the 1st Appellant*), Dabaso Wako Jaldesa the Appellant in Hc. Cr. App. 380 of 2001 (*hereinafter referred to as the 2nd Appellant*) and Mohamed Hapi Bagajah the Appellant in Hc. Cr. App. 381 of 2001 (*hereinafter*

referred to as 3rd Appellant) were jointly charged before the Senior Resident Magistrate Nyeri with two counts of Robbery with Violence contrary to Section 296 (2) of the Penal Code. The 3rd Appellant also faced alternative charges of Handling Stolen Property contrary to Section 322 (2) of the Penal Code in respect of each count.

During the trial in the lower court the 3rd Appellant was the 1st Accused, 1st Appellant the 2nd Accused and 2nd Appellant the 3rd Accused. The particulars of the 1st charge against the appellants stated as follows: -

On the 10th day of March 2000 at Naromoru Township in Nyeri District of the Central Province, jointly with others not before the court, while armed with dangerous weapons namely pangas, axes and iron-bars robbed one Elizabeth Wangechi Mwangi of jackets, 3 sweaters, 2 pairs of shoes, 2 pairs of bedsheets, 1 cover, 5 pairs of long trousers, 1 sanyo radio, 1 wrist watch, 2 bottles of perfume and cash 1,900/- all valued at Kshs.26,000/- and (sic) or immediately before or immediately after the time of such robbery used actual violence to the said Elizabeth Wangechi Mwangi.

The particulars of the 2nd charge stated as follows: -

On the 10th day of March 2000 at Naromuro Township in Nyeri District within Central Province jointly with others not before the court, while armed with dangerous weapons namely pangas, rungas, axes and iron bars, robbed one Joyce Muthoni Wachira of 4 pairs of bed sheets, 2 bed covers, 2 jackets, 2 blankets, 12 plates, 6 cups and various types of children clothings all valued at Kshs.6,550/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Joyce Muthoni Wachira.

The particulars of the alternative charge faced by the 3rd Appellant were as follows:-

On the 13th day of November 2000 at Kiawara village in Nyeri District of Central Province, otherwise than in the course of stealing dishonestly received or retained one pair of shoes and one bottle of perfume (cobra) knowing or having reasons to believe them to be stolen or unlawfully obtained.

The particulars of the alternative charge in respect of this charge were as follows: -

Mohammed Happi Bagaja on the 13th day of November 2000 at Kiawara village in Nyeri District of the Central Province otherwise than in the course of stealing, dishonestly received or retained 2 bedsheets and one bedcover knowing or having reasons to believe them to be stolen goods or unlawfully obtained.

The evidence adduced before the trial magistrate was that on the night of 10th March 2000, Elizabeth Wangechi Mwangi (*hereinafter referred to as Elizabeth*) and Joyce Muthoni Wachira (*hereinafter referred to as Joyce*) were each asleep in their respective homes in Naru-Moru when they were each woken up by a gang of robbers. In the case of Elizabeth the robbers broke into the house and demanded money. She gave them Kshs.1,900/-. They also took a sewing machine, radio, T.V., sweaters, clothes for her husband and daughter. Elizabeth saw and identified 3 of the robbers. She identified the 3rd Appellant as having been armed with a small axe. She also identified 1st and 2nd Appellant as having been part of the trio.

Joyce was also accosted by 3 people whom she identified in court as the 1st, 2nd and 3rd Appellants. She claimed that one was armed with a small axe whilst the others were armed with sticks. Joyce was robbed of blankets, bedsheets, plates, cups and children clothes. The robberies were reported to Naru-Moru Police Station and P.C. Charles Mwai (P.W.5) visited the scene.

On 13th November 2000 whilst P.C. Mwai was in the process of investigating another robbery He

received information which led him to the 2nd and 3rd Appellants. The two were arrested and their houses searched. An assortment of clothing which included clothes, bedsheets and shoes were recovered. Of the things which were recovered from the house of 3rd Appellant, Elizabeth identified a pair of shoes as belonging to her husband. It was one of the items which were stolen from her house during the robbery. Joyce also identified 2 bedsheets and a bedcovers as one of the items stolen from her house during the robbery at her house.

On 19th November 2000 P.C. Thomas Muriuki arrested the 2nd Appellant from the office of the deputy OCPD Nyeri. On 29th November 2000, Inspector Francis Kituma the Deputy OCS Naru Moru Police Station conducted identification parades during which the 1st Appellant was identified by both Elizabeth and Joyce, the 2nd Appellant was identified by Joyce but Elizabeth was unable to identify him, and the 3rd Appellant was identified by Elizabeth. The Appellants were therefore all charged with these offences.

Each of the Appellants gave unsworn statements in their defence.

The 1st Appellant explained that the police met him and arrested him. They took him to Kiawara Police Post. He was asked for names of Borana who live in that area but He said He did not know. He was taken to Kiganjo Police Station where He stayed for 16 days. He complained to the OCS Kiganjo who called Naru Moru Police Station. He was thereafter collected and taken to Naru Moru Police Station. He maintained that the identification parade was a sham as He was shown to the witnesses before the parade. He also maintained that the O.C.S. Naru Moru has a grudge against him and can fabricate anything against him.

The 2nd Appellant explained that at the material time He was staying in Nairobi. He came to Nyeri to inquire about his father in law who was alleged to have been arrested. On 26th November 2000 He went to the office of the O.C.P.D. to inquire about his father in law. The OCPD handed him over to CID officer who took him to his office. The 2nd Appellants father in law was brought after which the 2nd Appellant was interrogated and taken to Kiganjo Police Station. He maintained that the women who identified him at the I.D. Parade saw him the day before when his fingerprints were being taken He maintained that He had only come to assist his father in law and knew nothing about the alleged offences.

The 3rd Appellant explained that He was arrested at his Kiosk in Kiawara for not having a licence. He was taken to Kiawara Police Post from where He was escorted to his house. The police officers took some of his clothings. He was then taken to Kiganjo Police Station and thereafter to Naru Moru Police Station and Nyeri Police Station. He refused to participate in an ID parade, but was beaten and forced to participate in the parade. He produced an X-ray and treatment notes in support of his alleged beatings.

One Osman Dima Duba testified on behalf of the 2nd Appellant. He explained how the 3rd Appellant was arrested and thereafter efforts to trace him were futile. He contacted the 2nd Appellant who was then working at Kenchick. On 26th November 2000, the witness and 2nd Appellant went to see the OCPD to inquire about the 3rd Appellant. They were handed over to the Deputy D.C.I.O., who asked them their names after which He started beating the 2nd Appellant. The witness was then chased away and 2nd Appellant arrested.

It is evident that all the Appellants were arrested about 8 months after the alleged robberies. Neither Elizabeth nor Joyce knew any of the Appellants prior to the robbery. The evidence implicating the Appellants was essentially their identification by Elizabeth and Joyce, and the items alleged to have been recovered from the house of 3rd Appellants which were identified by Elizabeth and Joyce.

Both Elizabeth and Joyce came into contact with the robbers at a very awkward hour when they were woken up from sleep after 1.00 a.m. According to Elizabeth the ordeal lasted for about 20 to 25 minutes, and that there was light from a *meko* lamp. Joyce had a hurricane lamp on but she did not specify how long she took with the robbers. Although both Elizabeth and Joyce claimed to have given a good

description of the Appellants to the police, no evidence of this description was given by the police, nor did these witnesses explain what description they gave to the police. It is not therefore surprising that the police were not able to make any progress in their investigations until 8 months later when they were investigating yet another robbery. Under these circumstances can the identification made by Elizabeth and Joyce be considered reliable? I believe not. A hurricane lamp and a *meko* lamp would not be sufficient for someone woken up in the middle of the night to see and mark the features of persons He had never seen before so as to be able to identify them 8 months later.

Moreover Elizabeth never testified as to exactly where the light was and the positions of the robbers *vis a vis* the light. In fact Elizabeth's evidence was that she went to hide in the chimney and it was after the robbers entered and demanded money from her that she was taken from there to her bedroom and then to the children's bedroom where she was locked in until the robbers left. The witness did not explain at what point she had the opportunity to clearly see and mark the features of each of the robbers.

All the Appellants complained in their defence that the witnesses identified them at the identification parade only because they had seen them at the police station before the parade. Although the trial magistrate dismissed this as an afterthought, it is evident that during their cross examination of the parade officer Inspector Francis Kituma, the Appellants did raise this issue and the same should not therefore have been dismissed lightly. I find that there was a doubt concerning the identification of the Appellants by Elizabeth and Joyce.

As concerns the items allegedly received by P.C. Charles Mwai. The evidence of this witness was rather difficult to comprehend. He testified that they arrested the 1st and 3rd Appellants and took them to their houses which they searched and recovered several assorted clothing bedsheets and shoes. The witness did not however produce all the items which were recovered, nor did He at least give a list of what was recovered from whose house. When the witness now singles out the items which were identified by Elizabeth and Joyce it becomes difficult to appreciate from which house the items were recovered. The assertion of P.C. Mwai that the items were recovered from the house of the 3rd Appellant is therefore not borne out by evidence. Moreover the items (*i.e. bedsheets, bedcover, shoes, perfume e.t.c.*) were of such a nature that identification by marks such as stains, price tag e.t.c. was not sufficient proof of ownership. The evidence of the alleged recovery could not therefore be relied upon to support the identification of the Appellants.

Further the 2nd Appellant raised the defence of an *alibi* contending that He was away in Nairobi when the offence took place. The trial magistrate however rejected this defence with the following remarks: -

"I find that if accused 3 wanted to avail himself a defence of alibi, He should have called a witness who was with him on the night of the robbery....."

This was wrongly shifting the burden of proof onto the 2nd Appellant as it is for the prosecution to disprove an *alibi* once an *alibi* defence is raised.

Last but not least, it is apparent from the record of the lower court that none of the prosecution witnesses were sworn before giving evidence. We have stated before and we repeat again that in all criminal trials the mandatory provisions of Section 151 of the Criminal Procedure Code which requires all witnesses to be examined on oath must be complied with. The failure to swear the witnesses was a fatal omission which vitiated the proceedings in the lower court.

For all the aforesaid reasons we come to the conclusion that these appeals must succeed. All the appeals are therefore allowed, convictions quashed in respect of each appellant and sentences set aside.

The Appellants shall each be set free unless otherwise lawfully held. ***Dated, signed and delivered this 29th day of March 2006.***

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE