



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 46 of 2002

FRANCIS MWAURA MWANGI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT OF THE COURT

The appellant, **Francis Mwaura Mwangi** was charged before the Senior Principal Magistrate's court at Naivasha with three counts of **robbery with violence contrary to Section 296 (2) of the Penal Code**.

The particulars of the first count are that on the 27th day of July, 2001 at Gitaru shopping centre Gilgil, in Nakuru District within Rift Valley Province, jointly with another not before court, while armed with axes, simis, rungus and knives, robbed Isaac Ndung'u Gekaga cash Kshs.4,500/-, ½ dozen of batteries valued at Kshs.262.50, sportsman valued at Kshs.538/-, all valued at Kshs.5,300.50 and or immediately before or immediately after the time of such robbery used personal violence against the said **Isaac Ndung'u Gekaga**.

In the second count on the same night, he was charged with having robbed Stanley Njoroge Mwangi, in that on the 27th day of July 2001 at Gitare shopping centre Gilgil in Nakuru District within Rift Valley Province, jointly with another before court, while armed with axes, simis, rungus and knives, robbed **Stanley Njoroge Mwangi** Kshs.6,150/-, cigarettes worth Kshs.505/-, four bottles of soda and five bottles of juice valued at Kshs.200/-, all valued at Kshs.6,855/- and at or immediately before or immediately after the time of such robbery used personal violence against the said Stanley Njoroge Mwangi.

In the third count, it was alleged that, on the 27th day of July 2001 at Gitare Shopping centre, Gilgil in Nakuru District within Rift Valley Province, jointly with another before court, while armed with axes, simis, rungus and knives robbed James Thung'u Kshs.4,200/-, a pair of safari boots valued at Kshs.2,000/-, wrist watch valued at Kshs.350/-, all valued at Kshs.6,550 and at or immediately before or immediately after the time of such robbery used personal violence against the said **James Thung'u**.

The appellant pleaded not guilty to the three charges and after a full trial by the learned Senior Principal Magistrate, he was convicted of the three counts of robbery with violence and sentenced to suffer death as per the law authorized on each of the three counts.

The appellant was dissatisfied with the conviction and sentence and he has appealed to this court and

raised the following principle grounds of appeal, *inter alia*,

§ ***The prosecution failed to call a vital witness i.e. the arresting officer and thus prejudiced the appellant's case.***

§ ***The learned trial Magistrate relied on insufficient and contradictory evidence from the complainants.***

§ ***The appellant's defense that could have entitled him to an acquittal was ignored by the trial Magistrate.***

During the hearing of this appeal the learned Senior State Counsel Mr. Koech, supported the conviction and sentence on the grounds that the appellant was convicted on evidence of recognition by six witnesses who were present when the offence was committed. These witnesses said they knew the appellant very well and even knew his nickname 'Blackie'. When the report was made to the Gilgil police station, they recorded in the occurrence book that among the robbers, there was one member of the gang popularly known as 'Blackie'. It was his submission that all the witnesses could not have mistaken the identity of the appellant.

The summary of the evidence that led to the conviction and sentence of the appellant can be summarized as thus;

On the night of 26th and 27th day of July 2001, a gang of more than ten men, descended on Gitaru shopping centre, Gilgil while armed with crude weapons and broke into the several houses and shops and thereby stole several assorted shop goods and other items as specified in the particulars above. After the robbery, the members of public regrouped and chased away the robbers. During the commotion when the robbery took place, Isaac Ndungu Gikanga, PW 1, gave evidence and narrated how he identified the appellant whom he had known since his primary school days. He also identified another member of the gang, Peter Kario.

Stanley Mwangi Njoroge, PW 2 another victim of the robbery also gave evidence and narrated how he was terrorized on the same night. His premises was forcefully broken into by a gang of thugs and in the course of the commotion, he managed to identify two thugs, Peter Kario and Mwaura, the appellant. He said he had known the appellant for a long time prior to the robbery incident as his customer in the shop that was broken into.

James Muigai Ndungu, PW 3, also a trader at Gitaru Shopping centre, who was also a victim of the same robbery, gave evidence of how his shop was broken into and the course of the robbery he said he identified the appellant and one Peter. According to his evidence, each of the thugs had torches.

James Ndungu Nderitu, PW 4, a trader in the same Shopping centre, gave evidence and narrated how the door to his premises was broken into with the stones and about eight people entered armed with clubs, axes and pangas. They terrorized him and stole money, shoes and a watch. He said he managed to identify the appellant known as Mwaura who was also known by the nickname 'Blackie'

There was also the evidence of Beth Wanjiku, PW 5, the wife of PW 2, Stanley Mwaura Njoroge. She said she was also able to identify the appellant and another member of the gang.

Peter Kihumbe PW 6 was also attacked in the same night by the same gang. He managed to identify the appellant as a person he has been seeing in the neighborhood since the year 2000.

The other prosecution witness was Corporal Alex Ngewa, PW 7, who said he was the duty officer at the Gilgil Police station and he recorded the reports of the robberies on 27th July 2001. He produced the occurrence book of Kanyiri police post which apparently was requested for by the appellant.

That was the evidence by the prosecution on the basis of which the appellant was put on his defense. The

appellant gave a sworn statement in his defence and said that he used to sell mangoes at Githurai No. 44 in Nairobi where he lived and sometimes in the month of November 2001 he had visited Gilgil and while in the house of a lady prostitute, the house was broken into by the people who said they were the police. They searched the house but did not take away anything. They arrested the appellant and charged him with this offence. He claimed he was arrested during a police swoop and his true name is Francis Mwaura Mwangi. He denied that he was ever referred to as 'Blackie' nor did he know the complainants in this case.

This being the first appeal, this court is mandated to reconsider and evaluate the evidence adduced so as to reach our own independent determination on the guilt or otherwise of the appellant in this appeal. (See the case of **Okeno vs. Republic [1972] E.A page 32.**)

We have carefully considered the submissions including the additional supplementary grounds of appeal and written submissions by the appellant as well as the submissions by the State Counsel, and the issue for determination in our view is whether the appellant was found guilty according to the required standards of prove beyond reasonable doubt as per the law provided.

The critical issue we have to determine is whether failure by the prosecution to call the evidence of the arresting officer caused prejudice to the appellant who was arrested after about three months since the offence took place.

The evidence which was adduced by the prosecution to secure the conviction of the appellant is that of identification. The robbery took place at night. The five witnesses who gave the testimony of identification testified that they were able to identify the appellant by the light of the torches that were in the possession of the robbers. Each of the five witnesses narrated how he or she was able to recognize the appellant as being among the gang of robbers who robbed them.

Each of the five witnesses was familiar with the appellant prior to the robbery incident. Indeed they knew him very well considering that some of them even referred to him by his nickname 'Blackie.' We recognise that the said identification was made in circumstances which may be described to be difficult. It was at night. The source of light was the beams of the torches that were possessed by the robbers.

We have however re-evaluated the evidence of the five identifying witnesses and further warned ourselves of the danger of convicting an accused person based on the sole evidence of identification and we are satisfied that the said five identifying witnesses properly identified the appellant. (See **Maitanyi – vs- Republic [1986] KLR 198** at page 200).

The said evidence of identification was the best possible evidence; that of recognition. Whereas there is a possibility that one of the complainants could have been mistaken in his/her identification of the appellant, the possibility that all the five witnesses could have erred in their identification of the appellant is remote. The complainants were in no doubt that they had identified the appellant as being among the gang of robbers who robbed them, that is the reason why they told the police when they made the report that it was the appellant, among other robbers, who had robbed them.

Having carefully re-evaluated the evidence, it is clear that there was sufficient light which would have enable the complainants to recognise the appellant. Furthermore the appellant was not prejudiced in the circumstances of this case that the arresting officer did not testify. The evidence of identification adduced against him was overwhelming.

It is our considered view that if the appellant wished to rely on the evidence or to cross examine the arresting Officer he should have requested the court to summon him or her the same way he requested for the production of the O.B. This would have given the defense an opportunity to cross examine him but this did not happen and therefore we cannot fault the trial court on this.

Similarly we cannot detect any miscarriage of justice as evidence was adduced of how the reports of the spate of various robberies were recorded at the police station.

We have re-evaluated the evidence which the appellant adduced in his defence and we are in agreement with the trial Magistrate that the said defence was a mere denial and did not dent the otherwise strong prosecution case against him.

We have re-evaluated the evidence adduced and we are convinced beyond any reasonable doubt that the prosecution adduced overwhelming evidence which proved its case against the appellant on the charge of robbery with violence contrary to **Section 296(2) of the Penal Code**.

Taking all the circumstances into careful consideration we are satisfied that the learned Principal Magistrate properly convicted the appellant. The appeal is therefore dismissed. The conviction and the sentence imposed on the appellant by the trial Magistrate is hereby confirmed.

It is so ordered.

Judgment read and signed on 23rd March 2006.

MARTHA KOOME

JUDGE

L. KIMARU

JUDGE