



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 20 of 2002

GEORGE WAMAE alias KAGWERU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Judgment and Conviction in Chief Magistrate's Court at Nyeri in Criminal Case No. 857 of 2001 dated 21st November 2001 by Mr. C. D. Nyamweya – S.R.M. – Nyeri)

J U D G M E N T

George Wamae Muchemi alias Kagweru (hereinafter referred to as the appellant) was tried and convicted by the Senior Resident Magistrate Nyeri on 3 counts as follows:-

Count 1 – ROBBERY WITH VIOLENCE CONTRARY TO

SECTION 296(2) OF THE PENAL CODE.

On 3rd April 2001 at Nyeri Township in Nyeri District of the Central Province, jointly with others not before court, while armed with a dangerous weapon namely a pistol, robbed George Ileri Mukindia cash Kshs.203,000/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence against the said George Ileri Mukindia.

Court II – PERSONATING A POLICE OFFICER CONTRARY TO

SECTION 382(1) OF THE PENAL CODE.

On 4th day of April 2001 at Nyeri Town in Nyeri District of the Central Province, with intent to defraud, falsely presented himself to George Ileri Mukindia as a police officer attached to the Divisional C.I.D. Nyeri.

Count III – EXTORTION CONTRARY TO SECTION 300(1) OF THE PENAL CODE.

On 4th day of April 2001 at Nyeri Town in Nyeri District of the Central Province, jointly with others not before court extorted Kshs.5,000/= from George Ileri Mukindia threatening to accuse the said George Ileri Mukindia of dealing with illegal firearms.

The appellant was sentenced to the mandatory death sentence in respect of count I and 4 years

imprisonment in respect of counts 2 and 3. Being dissatisfied the appellant has now lodged this appeal. His main grounds of appeal are that the trial magistrate erred in convicting him on the basis of the evidence of a single witness without any corroborative evidence and that the charges against him were not proved beyond any reasonable doubt; and that the trial magistrate erred in rejecting his defence which was not challenged.

During the trial in the lower court, the complainant George Ireri Mukindia (P.W.1) testified that he had a motor vehicle Registration No. KAJ 482 U which he wanted to sell and buy a Saloon car. On the 29th March 2001 he met two people who informed him that there was a saloon vehicle for sale.

Following discussions it was agreed that the complainant was to meet the owner of the saloon vehicle at Central Hotel in Nyeri. After waiting almost the whole day for the man, the complainant was convinced by the two people who purported to be acting on behalf of the owner of the saloon to check into South Tetu Hotel and wait for the man.

While the complainant was asleep in the room, sometime between 8.00 p.m. and 9.00 p.m. Some strangers came into the room and purported to arrest him claiming they had information that he had come to the town to deal in guns. The men searched the complainant and took Kshs.203,500/= from him. They claimed to be police officers and warned the complainant that if he wanted his life to be spared he should produce another Kshs.200,000/=. The next day the complainant met the men at Nyeri Central Hotel. One of the men took the complainant to Nyeri police station. He entered the Police Station leaving the complainant outside. After a while he came out claiming he had seen the D.C.I.O. The complainant gave him Ksh.5,000/= promising to pay the balance of Ksh.200,000/=.

The next day the complainant reported the matter to the D.C.I.O. As a result P.C. John Ndambuki (P.W.3) and other officers laid an ambush where the complainant was to meet with the men. The Appellant was identified by the complainant and arrested. He was subsequently charged with this offence.

Apart from the evidence of the complainant and P.C. Ndambuki, there was the evidence of John Mathethia Matinga a taxi driver who claimed to have been hired to go to Central Hotel, Cousin Café and then the police station. He identified the appellant as the person who boarded the taxi outside the police station.

The appellant gave a defence in which he denied having robbed the complainant or having presented himself to him as a police officer. He maintained he was away in Nakuru on the dates the offences are alleged to have been committed. He further claimed that the taxi man who identified him had a grudge against him as they had previously disagreed.

It is evident that the case against the appellant rested entirely on the evidence of the complainant. The conduct of the complainant however leaves some questions unanswered. For instance why did the complainant not report the robbery immediately after the men went away. Why did the complainant instead agree to meet with the men and even give them a further sum of Kshs.5,000/= ? What did the complainant have to hide that made him scared of going to the police? Why were Gitonga, Mwenda and Mathenge who took the complainant to South Tetu Bar not called to testify? Surely the conduct of the appellant and his colleagues as testified to by the complainant was not consistent with that of police officers.

We concur with the learned Principal State Counsel that it was not safe to rely on the evidence of the complainant alone. The trial magistrate laid undue weight on the evidence of the taxi driver because even if his evidence is to be believed it would only confirm that the appellant was in the company of the complainant but would not confirm what the two were doing together. We concur with learned State Counsel that the above evidence was not sufficient to sustain a conviction.

We note further that there was an irregularity which vitiated the proceedings in that none of the witnesses who testified before the trial magistrate were sworn and thus their evidence was obtained contrary to the

mandatory provisions of section 151 of the Criminal Procedure Code.

As regards count 2, the offence under section 382(1) was a general misdemeanour and should therefore have attracted a maximum sentence of one year. The sentence imposed of 4 years was thus illegal.

Similarly with regard to count 3 the maximum penalty provided under section 300 (1) of the Penal Code is 3 years and the sentence of 4 years was also illegal.

For all the aforesaid reasons we find that this appeal must succeed. The appellant's convictions on all 3 counts is accordingly quashed and the sentences set aside. The appellant shall forthwith be set free unless otherwise lawfully held.

Dated signed and delivered this 8th day of March 2006.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE