



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 135 & 138 of 2003

OSMAN ABDI IDOAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original Judgment and Conviction in the Senior Resident Magistrate's Court at Nanyuki in Criminal Case Number 1891 of 2002 by P. C. Tororey – S.R.M.)

HIGH COURT CRIMINAL APPEAL NUMBER 138 OF 2003

JOHN KIMATHI MAJI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original Judgment and Conviction in the Senior Resident Magistrate's Court at Nanyuki in Criminal Case Number 1891 of 2002 by P. C. Tororey – S.R.M.)

J U D G M E N T

CONSOLIDATED

Osman Abdi Ido the Appellant in High Court Criminal Appeal Number 135 of 2003 (*hereinafter referred to as the 1st Appellant*) and John Kimathi Maji the Appellant in High Court Criminal Appeal Number 138 of 2003 (*hereinafter referred to as the 2nd Appellant*) were tried and convicted by the Senior Resident Magistrate Nanyuki for the offence of Robbery with violence contrary to Section 296 (2) of the Criminal Procedure Code.

The charge against them alleged that on the night of 21st and 22nd October 2002 at Muthaiga Estate in Nanyuki the two Appellants jointly with others whilst being armed with pangas, arrows and iron rods robbed Rahab Wanjiru Karingithi of Cash Kshs.10,400/- and one Motorola T190 mobile phone, all valued at Kshs.17,400/- and at or immediately before or after the time of such robbery used actual violence to the said Rahab Wanjiru Karigithi.

Four witnesses were called to prove the prosecution's case. These were the Complainant Rahab Wanjiru Karingithi, her husband Stephen Karingithi. P.C. Julius Manyara (P.W.2) and P.C. Francis

Gichuhi (P.W.4).

Briefly the prosecution case was that the Complainant and her husband were on the material night asleep in their house when they were woken up by the barking of dogs. On looking through the window the Complainant and her husband saw 2 people jumping over the gate. The Complainant's husband identified one of the two men as a watchman who had been guarding their estate for about 3 months. The Complainant screamed but undeterred the men broke into the house. In the meantime, the Complainant's husband sneaked out through the rear door and went to hide in the maize plantation.

The two men who were armed with a bow, arrows and a panga demanded money and Complainant gave them Kshs.10,400/-. One of the men also took a mobile phone belonging to the Complainant. The men then left. Shortly after the robbers left, the Complainant and her neighbours met police officers on the way as they were going to report the incident. The officers who were on patrol duties with a dog, included P.C. Julius Manyara (P.W.2). They visited the home of the Complainant and released the dog who followed the trail of the robbers. The dog led the officers and the Complainant to a house where they found the 2nd Appellant sleeping. He claimed to be a watchman but could not name his employer. P.W.2 therefore arrested the 2nd Appellant.

The next morning the Complainant's husband went to the police station to record his statement. The Complainant's husband spotted the 1st Appellant who was within the precincts of the station. He identified him to P.W.4 as one of the persons who had robbed his wife. P.W.4 arrested the 1st Appellant.

Both Appellants gave unsworn evidence in their defence. The 1st appellant explained that He was arrested outside the police station where He had gone to deliver charcoal to his customer. He maintained that He knew nothing about the allegations made against him. The 2nd Appellant explained that He was arrested from his home. At that time He was drunk. He was informed that He would be charged with the offence of robbery.

The trial Magistrate rejected both Appellants' defences and found them guilty of the offence. The Appellants are dissatisfied with this judgment and have each separately appealed against conviction and sentence. The appeals have been consolidated for purposes of hearing.

From the evidence that was adduced, it is clear that the Complainant was robbed by some two armed people and that the incident occurred during the night. The main question is whether the Complainant and her husband were properly able to identify their assailants and whether the two appellants have been properly identified as having participated in the robbery.

In her evidence the Complainant testified that it was when the police dog traced the trail of the robbers to the home where the 2nd Appellant was found that she recognized the 2nd Appellant as one of the robbers who had just robbed her. She stated clearly that she did not know the 2nd Appellant before. However, P.W.2 who actually arrested the 2nd Appellant never testified that the Complainant identified the 2nd Appellant at the time of his arrest. P.W.2 in fact explains that He arrested the 2nd Appellant because the dog led him to the place where the 2nd Appellant was found, and because the 2nd Appellant could not give the name of his employer, and also the owner of the home where the 2nd Appellant was found denied having employed him to guard the place. Now one would have expected if the Complainant identified the 2nd Appellant as the person who had just robbed her, that she would have been quick to point out this fact to P.W.2. Moreover the fact that the Complainant was subsequently called to an identification parade is further indication that she never identified the 2nd Appellant at the time of his arrest. Further no evidence of the alleged parade was tendered in evidence. The circumstances of the identification having been difficult as the offence occurred at night, the possibility of a mistaken identification cannot be ruled out. The Complainant could easily have been influenced by the suspicion resulting from the dog leading the officers to the place where 2nd Appellant was.

As for the 1st Appellant, He was identified by the Complainant's husband. Now the Complainant's

husband only managed to see the robbers through the window using his neighbour's security light and the moonlight. I find that the circumstances were not very favourable for a positive identification. This is confirmed by the fact that although the 1st Appellant was said to have been a watchman who had worked in the estate for about 3 months, the Complainant did not tell P.W.2 to whom He reported the incident that she had identified one of her assailants as a watchman previously employed in the estate. In fact the Complainant did not even mention this fact in her evidence in chief and only stated it under cross examination. We find that if the Complainant was so positive about her identification of the 1st Appellant, that would have been the first thing that she would have mentioned.

We concur with the learned Principal State Counsel that there was a doubt in the evidence of identification, the benefit of which ought to have gone to the Appellants. Accordingly we find that the Appellants' conviction was not safe. We allow the appeals, quash the conviction and set aside the sentences imposed. Both the Appellants shall be forthwith set free unless otherwise lawfully held.

Dated, signed and delivered at Nyeri this 5th day of May 2006.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE