



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 673 & 674 of 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 3715 of 2003 of the Chief Magistrate’s Court at Makadara (Mr. C. O. Kanyangi – SPM))

ANTHONY MURIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH
CRIMINAL APPEAL NO. 674 OF 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 3715 of 2003 of the Chief Magistrate’s Court at Makadara (Mr. C. O. Kanyangi – SPM))

CYRUS MWANGI KOIGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

ANTHONY MURIUKI (hereinafter referred to as the 1st Appellant, and **CYRUS MWANGI KOIGI**, the 2nd Appellant were jointly charged with **ROBBERY WITH VIOLENCE** contrary to Section 296(2) of the Penal Code. The particulars of the charge were: -

“That on 8th February 2003 alone Race Course Road in Nairobi, jointly and while armed with a dangerous weapon namely a sword robbed one Bonface Obaga Machuka of a siemens C-35 Mobile phone valued at Kshs.9,000/- and at or immediately before or immediately after such robbery used actual violence.”

The Appellants were both found guilty of this offence, convicted and sentenced to death. They were dissatisfied with the conviction and therefore lodged these appeals which we have consolidated having arisen out of the same trial.

The facts of the prosecution case were that the Complainant was walking from Wakulima Market at about 5.00 p.m. intending to go home. As he crossed the road near OTC he had to stop to let a vehicle pass. It is when 4 men surrounded him. Two identified as the two Appellants came in front of him and two behind. One took his mobile phone, identified as the 1st Appellant and passed it to another, identified as 2nd Appellant, who in turn gave to another before they dispersed. The Complainant said he then walked a distance and saw Police Officers to whom he identified both Appellants and they were arrested. PW2 was one of these officers.

The Appellants have raised several grounds of appeal. The 1st Appellant who was unrepresented raised seven grounds. One that the charge was defective in that the evidence adduced supported theft from person contrary to **Section 279** of the **Penal Code** in that Complainant claimed his property was snatched from him. Second and fourth grounds are similar that identification was unreliable since the attack on the Complainant was swift and abrupt and circumstances stressful to enable positive identification. The third ground was that there was a broken line between the committal of the offence and the Appellants' arrest. The fifth ground was that the learned trial magistrate erred in not finding that the evidence of the prosecution was full of contradictions and inconsistencies in that the Complainant was not clear how far the Police Officers were from the scene of crime and further that the Complainant's evidence that one of the Police Officer was in uniform was contradicted by PW2. The sixth ground was that the prosecution failed to call essential witnesses. The last ground was that the learned trial magistrate failed to adequately consider the 1st Appellant's defence.

The 2nd Appellant was represented and his Counsel relied on a Supplementary petition of appeal in which three grounds are cited. The first ground concerned identification and recognition. **Mr. Njanja** for the 2nd Appellant submitted that the Complainant created an impression that the Appellants were arrested together and on the spot after the robbery. That PW2's evidence proved otherwise in that the two were arrested separately and that it was a distance from the scene of crime. Counsel submitted that an identification parade was necessary to confirm the identification by the Complainant. The second ground was that the particulars of the charge that a sword was used in the attack was not supported in evidence. The last ground argued was that the totality of the evidence was circumstantial and that there were co-existing circumstances which could negate inference of guilt.

This appeal was opposed by the State. **Mr. Makura** for the State submitted that the offence took place at 5.00 p.m. and that the Complainant was able to clearly see the attackers. That the Complainant identified both Appellants as his attackers 200 metres from the locus in quo. Counsel submitted that under **Section 143** of the **Evidence Act** no minimum number of witnesses are required to support a case and the two called were sufficient. Counsel also submitted that even if no evidence was adduced to support the particulars of the charge that a sword was used in this attack, the evidence that the Appellants and others carried out this attack was sufficient to sustain the charge.

We have carefully considered this appeal and have evaluated and analysed afresh the evidence adduced before the trial court while bearing in mind that we neither saw nor heard any of the witnesses who testified and giving due allowance. See **OKENO vs. REPUBLIC 1972 EA 32.**

It is true that the evidence of identification was by a single witness who was also the Complainant in this case. The consistency of the Complainant's evidence and reliability of his identification has been put in question by both Appellants in their submissions. The Complainant in his evidence said he was surrounded by 4 people as he waited to cross the road. One had a knife and stood behind him while there were two in front. One removed his mobile phone and passed it to the other who gave to a third person before they dispersed. Even though the Complainant claimed that the robbers took 10 minutes we are doubtful about the estimation of his time. If the four men surrounded him, threatened him with a knife before his phone was removed and they all dispersed, that sounds like it was an abrupt and swift attack as the 1st Appellant put it. We noted that no sooner had his phone been taken away than the group dispersed. The Complainant clearly stated that he feared to follow them which means they left the scene and from his evidence each went their different directions. The Complainant said that five minutes later he saw 2 Police Officers whom he took back to the scene and to whom he then identified the two

Appellants as his attackers. As clearly put by the 1st Appellant in his written submissions, there was a broken line between the commitment of the offence and the Appellants' arrest. Since the offenders had dispersed, if the Complainant went back to the same scene the offenders had already abandoned, there is no assurance that the persons he identified were the same who had attacked him. It is clear that the Complainant must have had a fleeting glance at his attackers and in the circumstances his ability to subsequently identify his attackers was questionable. We do agree with the Appellants that the possibility of an error or mistake in the identification by the Appellants could not be ruled out especially because the Complainant could not give any basis for his identification. We do not think that conducting an identification parade could have removed the possibility of a mistaken identity and in any event since the Complainant had identified the Appellants to PW2 who arrested them, conducting an identification parade in the circumstances would have served no purpose.

We wish to conclude this appeal by stating that the Appellants' defences in the trial court were quite reasonable and probable. The defences indicated that they were going about their business when they were arrested for the offence. From the evidence of PW2, the two did not resist the arrest an indication of an innocent mind which further supported their defences. It is likely in the circumstances of this case that indeed the Appellants were unknown to each other, were about their separate businesses and completely unaware of the incident when arrested. We agree that had the learned trial magistrate given due consideration to their defences that the learned trial magistrate may have arrived at a different conclusion. We find that these appeals have merit. We quash the convictions and set aside the sentences. We order that the Appellants should be set free unless they are otherwise lawfully held.

Dated at Nairobi this 25th day of July 2006.

.....

LESIIT, J.

JUDGE

.....

M.S.A. MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant) present

Mr. Njanja for the 2nd Appellant

Mr. Makura for the State

Huka – Court clerk

.....

LESIIT, J.

JUDGE

.....

M.S.A. MAKHANDIA

JUDGE