



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 536 & 539 of 2003

(From original conviction(s) and Sentence(s) in Criminal Case No. 758 of 2003 of the Chief Magistrate's Court at Nairobi (Mrs. Kimingi – PM)

**JAMES MUKURIA NJOROGE.....
APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 539 OF 2003

(From original conviction(s) and Sentence(s) in Criminal Case No. 758 of 2003 of the Chief Magistrate's Court at Nairobi (Mrs. Kimingi – PM)

**JAMES MBURU WAMBUA.....
APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

JAMES MUKURIA NJOROGE and JAMES MBURU WAMBUI, the 1st and 2nd Appellants respectively were found guilty and convicted of one count of **ROBBERY WITH VIOLENCE contrary to **Section 296(2)** of the Penal Code and each sentenced to death. They were dissatisfied with the court's finding and therefore lodged these appeals which we have consolidated.**

The facts of the case were that PW2 and PW3, both salesladies in a shop owned by the Complainant PW1 were on duty at the shop when 3 people entered. It was 2.30 p.m. They were robbed of cash, Safaricom and Kencell scratch cars and mobile phones all valued at kshs.2,928,269/-. They had been ordered to lie down at gun point. On rising up as the robbers walked away, PW2 pressed the alarm as

PW3 started screaming. The Appellants were arrested outside the shop with another who died soon thereafter due to mob justice. The Appellants challenge their conviction on the identification of PW2 and PW3 on grounds the prevailing circumstances at the scene were unfavourable and that the possibility of a mistake or error could not be ruled out. The Appellants also challenge the conviction on the basis of their arrests which they claim were tainted with doubt in that there was a broken link between the robbers leaving the Complainant's shop and their arrest. They also contend that their defences were not given due consideration and that the trial magistrate singled the burden of proof against them. The 1st Appellant also challenged the alleged recovery of exhibits stolen from the Complainant's shop from him while the 2nd Appellant contended that he ought to have been given the benefit of doubt since nothing incriminating was recovered from him.

Mrs. Gakobo, learned State Counsel submitted that even though she had been instructed to oppose the Appeal, after perusing the file she requested that we take note of the following. Counsel submitted that even though the Appellants had been arrested by members of public and a toy pistol recovered, none of these members of public were called as witnesses. That the two police officers PW4 and PW5 only re-arrested the appellants and retrieved a toy pistol. Counsel also submitted that PW3, one of the eye witnesses had contradicted herself first by saying that she had seen the 1st Appellant at the place of robbery and later changing her evidence to say she never did. That since she had been lying down at the time of robbery and the fact that it was her who raised the alarm causing the Appellants' arrest, there was a possibility of mistake. Counsel submitted that the trial court relied on the evidence of PW3 but found PW2's evidence doubtful. That in the circumstances conviction was unsafe.

We have re-evaluated and re-analyzed the evidence adduced before the trial court and bearing in mind that we neither saw nor heard any of the witnesses and giving due consideration. The basis of the Appellants' conviction was two fold. That is, the evidence of PW3 on the grounds that she did not lose sight of the robbers from the time of robbery to the time of the arrest. The other ground was that PW2, a colleague at work of PW3 also present during the robbery but who did not go after the robbers identified the Appellants therefore corroborating the evidence of PW3.

The learned State Counsel conceded that PW3 was inconsistent in her evidence of identification. PW3 initially identified the 1st Appellant as the one who had the gun and the 2nd Appellant as the one who entered the counter area to take money. In cross-examination, PW3 retracted her evidence and said that she had not seen the 2nd Appellant during the robbery. PW3 also said she did not witness the arrest of the Appellants and the recovery of any exhibits from them even that of the toy pistol. In other words PW3 identified only one of the Appellants which was the 1st Appellant. PW3 identified the 1st Appellant as one with the gun during the attack. That is also what PW2 said about the 1st Appellant. However, it is very important to consider all the conditions prevailing at the scene at the time of the incident. Both PW2 and PW3 admitted that the shop was located in a public area. The fact was that the moment the robbers walked outside the shop, they must have mingled with members of the public. That is quite critical considering the evidence of PW3 who said that after the robbers walked out of the shop is when she stood up, walked out and started screaming. Up to that time PW3 did not say what could have enabled him identify any of the robbers. The fact she came out to scream after the robbers walked out where she admits there were many members of public, that puts to question the correctness of PW3's evidence of identification of both Appellants.

The other good pointer is the recovery of exhibits. Quite a few items stolen from the Complainant's shop, whose value was unfortunately not given, were recovered. These were exhibits 2 to 7. PW2 and PW3 are clear they did not witness the recovery. PW4 and PW5 the re-arresting officers also never witnessed the recovery. Without the evidence of those who recovered the exhibits, it cannot be said without a doubt that the exhibits were recovered from all or any of the Appellants. The same applies to the toy pistol exhibit. No one saw its recovery and therefore no one could definitely say that it was recovered from the 1st Appellant as alleged.

In conclusion therefore the evidence of arrest had no links whatsoever to the robbery that took place in the Complainant's shop. Further the recovery of the exhibits was not proved to have been made from the

persons of the Appellants. The evidence before the court was therefore disjointed and due to this breach, was insufficient to safely sustain a conviction.

We have considered all issues raised by the Appellants apart from that of identification. We agree that the Appellants' defences were not given due consideration. The Appellants' defences were that they were walking past the area when members of public who were not called as witnesses apprehended them.

Their defences were sufficient to create doubt in the prosecution case especially on the issue of their identification. We find that if the learned trial magistrate had given their defences the due consideration, he may have arrived at a different conclusion.

Having considered these appeals we find that they should succeed. We allow them. Consequently we quash the conviction and set aside the sentences. The Appellants should be set free unless they are otherwise lawfully held.

Dated at Nairobi this 25th day of July 2006.

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LESIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellants

Mrs. Gakobo for the State

Huka/Erick CC

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LESIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE