REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 205 & 206 of 2005

JULIUS KABERIA M'RINGERA ……1ST APPELLANT

GEORGE KIMATHI MICHUBU……2ND APPELLANT

V E R S U S

REPUBLIC …….. RESPONDENT

(Being an Appeal against both conviction and sentence in Criminal Case No. 2670 of 2004 at Meru, Before J.N Nyaga Esq Principal Magistrate Maua.)

J U D G M E N T

1. The two Appellants were the accused in Maua P.M.'s Court Criminal Case No. 2670/04 where they were jointly charged with the offence of robbery with violence contrary to s. 296(2) of the Penal Code. The particulars of the charge were that on 30.5.2004 at Njoune Sub-Location Kiengu Location in Meru North District they jointly robbed Stephen Kirimi of Ksh.1,200/= and at or immediately before or immediately after the time of such robbery struck the said Stephen Kirimi.

2. The evidence tendered before the trial court was as follows:-

P.W.1 Stephen Kirimi was going to his home at Amaku at about 8.00 p.m. on 30.6.2004 when he met the two Appellants whom he had known before as the 1st Appellant was from his home area while the second was from Maua. They appeared drunk and demanded money from P.W.1 and P.W. 2 Timothy Murithi. As there was moonlight he was able to recognize the two of them as they grabbed him and as they struggled, one removed Ksh.1,200/- from P.W.1's pocket and the 1st Appellant hit him with a stone. P.W.1 went home, slept and the next day reported the incident at Maua Police Station and went for treatment at Maua Methodist Hospital. In his report to the Police he mentioned his assailants and in cross-examination described the clothes that the 1st Appellant was wearing (a black trouser and a black coat). In respect of the 2nd Appellant he stated in cross-examination that he recognized him by voice and also saw him face to face.

3. P.W.2 Timothy Muriithi was with PW.1 when the two Appellants whom he knew as Julius and Kimathi emerged from a bush, attacked them and was hammered with slaps and blows. He heard Kimathi, the 2nd Appellant demanding money from P.W.1 but he did not wait for long as he ran away to escape the attack by the 1st Appellant. He waited for P.W.1 at a distance and when P.W.1 came, he told him that he had lost Ksh.1200/- to the two assailants. P.W.2 confirmed that he saw the two using

moonlight and that the following day he made his report to the police and named the Appellants as the culprits in the attack.

4. P.W.3 Catherine Mankura, a clinical officer did not examine the complainants but produced a P3 form prepared by her colleague Franklin Mwenda and the injuries sustained by P.W.1 were assessed as bruises classified as harm.

5. P.W.4 P.C. Geoffrey Muriithi was the officer on duty at Maua Police Station when P.W.1 made his report and he recorded the fact that the persons who had attacked him the night before were Kimathi and Kaberia whom P.W.1 had recognized on that night. The two were arrested and charged with the offence of robbery with violence.

6. When put to their defences the 1st Appellant denied knowing anything about the charge that he was facing and said that he was arrested for no reason at all. The 2nd Appellant said that he was arrested by one PC. Mbindu for jumping bail in a different case and was surprised when he was charged with the present offence. They were both convicted of the offence and were sentenced to death and they now appeal against both conviction and sentence.

7. The Appellants have argued that identification in the circumstances of their case was unsatisfactory and could not be the basis of a conviction. They also argue that the arresting officer was not called to justify the reason for their arrest and that their defences were ignored.

8. We are as a first appellate court are obligated to scrutinize and make an assessment of the evidence but this does not mean that the court should write a judgment similar to that of the trial court (Semoya vs Airports Services Uganda Ltd [1999] LLR 109. In meeting that obligation we note that the only three serious issues raised in the consolidated appeal are;-

(i) Identification.

(ii) Failure to call the arresting officer

(iii) The claim that the defences tendered were ignored and rejected.

9. On identification, we must state categorically that this is a classic case of recognition as opposed to mere identification. P.W.1 and P.W.2 both knew the Appellants prior to the attack and the two again mentioned their names to P.W.4 when they made their report the next morning at the Police Station. Their evidence was corroborative and was further corroborated by that of P.W.4 who received the report. We must add that P.W.2 went further to add the ingredient of voice recognition to that of facial recognition., As was said by the court of Appeal in the celebrated case of Anjononi vs R.[1980] KLR 59;

"The proper identification of robbers is always an important issue in a case of capital robbery emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of robbers in this case were not favourable. This was however a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

10. This holding was recently cited with approval by the court of Appeal in Josephat Kunyali Kunyamwa and 2 others v R. Criminal Appeal No. 242/2005 (Kisumu) where the court also added as follows:-

"Recognition of the assailants by the Complainant was reassuring and we do not fault the courts below for their treatment of the issue."

We are equally convinced that the evidence of recognition of the Appellants was clear, reassuring and attractive and we shall dismiss any arguments to the contrary.

11. Regarding the second issue, it is true that the arresting officer was not called to testify but we take the view that whereas it is in general terms important that such a witness should be called to link the complaint and arrest with recovery of exhibits, if any, we are not convinced that the evidence would in any extent shift and be in favour of the appellants if the arresting officer had been called. The evidence is still water-tight with or without the arresting officer and that is all to say on that point.

12. As to the defences raised by the Appellants we do not see how they assist their case. They merely denied committing the offence and the trial court as we do, found that proposition unhelpful in light of other evidence against the Appellants especially that of recognition. We find nothing in the defences tendered before the trial court to sway our collective mind to agree with the Appellants.

13. The offence of robbery with violence was proved and the ingredients as set out in s.295 as read with s.296(2) of the Penal Code clearly established and as the court of Appeal said in Moneni Ngumbao Maingi vs R Cr. Appeal No. 141/2005 (msa) (UR), if any one of the following circumstances are proved, the offence has been constituted. The circumstances are:

(i) If the Offender is armed with any dangerous or offensive weapon or instrument

or

(ii) If he is in company with one or more other person or persons

or

(iii) If at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

Ingredients No.2 and 3 are manifestly clear in this case.

The Appeals are wholly without merit and as consolidated must and are hereby dismissed.

Orders accordingly.

Dated, signed and delivered in open court at Meru this 28TH Day of September 2006.

ISAAC LENAOLA

JUDGE

RUTH SITATI

JUDGE