REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 10 of 2004

(From original conviction and sentence in criminal case No. 7233 of 2003 of the Chief Magistrate's Court at Kibera – Ms. Siganga – S. R. M)

GEORGE MBUGUA THIONGO …….....……APPELLANT

VERSUS

REPUBLIC…….....…… RESPONDENT

JUDGMENT

The Appellant was charged in the Chief Magistrate's Court at Kibera with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge alleged that on 23rd September, 2003 at League Ndogo in Nairobi within Nairobi area Province, the appellant while armed with a dangerous weapon namely a knife robbed Nancy Nkatha of one mobile phone make Nokia 5210 valued at Ksh 15,000/= and at or immediately before or immediately after such robbery used actual violence to the said Nancy Nkatha.

The appellant was convicted of the offence and sentenced to death as prescribed by the law. He was aggrieved by the conviction and sentence, hence he lodged the instant appeal. In his six grounds of appeal, the appellant faults his conviction by the learned magistrate on the basis that the magistrate failed to consider that the complainant was his former girlfriend and therefore could have framed him, that the alleged robbery was committed by one person, that the knife allegedly used in the robbery was planted on him, that essential witnesses were not called, that there were various contradiction in the prosecution evidence which were not resolved in his favour and finally that the appellant's defence was not given due consideration.

The brief facts of the case as given by the various witnesses who were called by the prosecution, were that on 23rd September, 2003 at about 7.40 a.m. the complainant,P.W.1 was on her way to her place of work at Tea Board of Kenya, Dagoretti Corner. She was being escorted by P.W.2. The complainant had her cell phone in an envelope in her hands. As they approached Ngong Road from Jamhuri Estate they were confronted by a man wielding a knife. That man ordered the complainant to surrender her cell phone pointing the knife at her but the complainant declined. The complainant retreated and ran away whilst screaming. P.W.2 also ran away. The man chased them. The complainant tripped on a stone fell down. In the process she threw the cell phone to P.W.2. The cell phone however fell down and the man picked it up and ran away. The two PW1 and PW2 then ran after the man up to Impala grounds gate which the man attempted unsuccessfully to access as it was locked. P.W.2 then grabbed the man and caused him to fall from the gate. The complainant then hit the man with a stone. The man handed back the cell phone to the complainant and ran away. He ran towards Hekima College compound. Members of the public who had been attracted by the screams and commotion pursued the man and arrested him in a trench at the gate of Hekima College. He was severely beaten. The knife the man had during the

robbery incident was recovered. As the man had been severally beaten and injured by the members of the public, he was taken to Kenyatta National Hospital where he was treated. The complainant thereafter proceeded to Kilimani Police Station where she made a report and recorded a statement. The witnesses identified the man as the appellant. After treatment the appellant was subsequently charged with the offence.

Put on his defence, the appellant in an unsworn statement stated that the complainant was his former girlfriend. That on the material day, he was looking for a job when he bumped into the complainant who upon seeing him, dropped the cell phone and started screaming. A police officer responded to the screams and arrested him. He then found himself in the hospital having been thoroughly beaten by the police officer. He was not at all involved in the crime.

In support of the appeal, the appellant tendered written submissions which we have carefully considered. The state opposed the appeal. Mrs. Obuo learned state Counsel, submitted that the evidence tendered by the prosecution against the appellant was overwhelming. That the evidence of P.W.1 was corroborated in material particulars by the evidence of P.W.2. Counsel further submitted that as the cell phone was recovered from the appellant the doctrine of recent possession applied. With regard to the evidence of P.W.3, Counsel submitted that P.W.3 was the investigating officer and his evidence corroborated the evidence of the complainant as well as that of P.W.2. The evidence on record according to the state Counsel was consistent and believable. Counsel therefore urged us to dismiss the appeal.

As we consider the submissions by the appellant as well as by the State Counsel, we are aware that as this is a first appeal we are enjoined to re-examine and re-evaluate the evidence on record so as to reach our own conclusion in the matter, while bearing in mind that we had no advantage, as the trial Court did, of seeing and hearing the witnesses and therefore cannot make any determination as to their demeanor. See ***OKENO –VS- REPUBLIC (1972) E.A.32.***

It is also an established principle that an appellate Court will not normally interfere with a finding of fact by the trial court, unless it was not based on any evidence, or on misapprehension of the evidence, wrong principles in arriving at the finding. See ***CHAMAGONG –VS- REPUBLIC (1984) KLR 611.***

The conviction of the appellant was solely based on the fact that, one the appellant was positively identified at the scene of crime by P.W.1 and P.W.2 as the incident occurred at 7.40 a.m. when there was sufficient light. Secondly that he was arrested in the vicinity of the scene of crime, two minutes after the robbery.

It is common ground that the appellant was arrested in the vicinity in which the robbery was alleged to have been committed. The appellant admits that much in his own unsworn statement of defence. However, he takes the position that he was framed by P.W.1 who was his former girlfriend. That he unexpectedly bumped into the complainant who was in the company of another boyfriend P.W.2. That she then suddenly dropped the cell phone and started screaming. The Appellant was then arrested beaten and found himself in a hospital. The trial magistrate considered this defence and found it wanting and rightly so in our view. The defence in our view is simply incredible. Why would a normal person suddenly drop a cell phone and start screaming merely because, she has met with her former boyfriend? Why would a police officer respond to the screams and without being told what the appellant had done cause his arrest? The Appellant was arrested somewhere else and not at the scene of the incident. Why then did the Appellant find it necessary to run away merely because his former girlfriend screamed. When arrested he had a knife similar to the one he had earlier used to threaten PW1. Was this knife also planted on him? The appellant says, upon his arrest, he thereafter found himself at a hospital. He does not say in which hospital he found himself. The fact of the appellant being in hospital ties in with the evidence of P.W.1 and P.W.2 who testified that the appellant was chased and cornered in a trench at Hekima College. That mob justice was administered on him and that he was badly injured. It was then that he was taken to Kenyatta National Hospital by a good Samaritan.

The appellant has submitted that the ingredients for the offence of robbery with violence were not met since the robber acted alone and the cell phone allegedly stolen from the complainant was returned to him

before the robber was cornered and arrested and finally that there was no violence visited upon the complainant during the robbery.

As stated by the Court of Appeal in the case of ***SIMON MUCHINO THIAKA –VS- REPUBLIC C.A. NO.118 of 2002, (unreported)***

*"……**There are three ingredients, any of which is sufficient to constitute the offence of robbery with violence under Section 296(2) of the Penal Code. If the offender is armed with a dangerous or offensive weapon or instrument that would be sufficient to constitute the offence. Secondly, if the offender is in the company with one or more other person or persons that would constitute the offence. And lastly if at or immediately before or immediately after the time of robbery he wounds, beats, strikes or uses any other violence to any person that would be yet another set to constitute the offence…"***

In the present case, the evidence adduced and accepted by the trial Court was to the effect that the appellant was armed with a knife with which he threatened the complainant. A knife is not ordinarily an offensive or dangerous weapon. It becomes offensive or dangerous depending on what use it is put to and the circumstances under which it is used. In the instant case, the appellant used the knife to force the complainant to part with her mobile. He threatened to harm her with the knife. In those circumstances the knife was dangerous and offensive weapon. The case falls in the first category of the ingredients of robbery with violence. Clearly, the offence of robbery with violence was committed. It matters not that the robber acted alone or that no violence was visited upon the complainant. We note that in the charge sheet it is stated that

"……***immediately before or immediately after such robbery used actual violence to the said Nancy Nkathia ……."***

The evidence on record shows that no actual physical violence in the nature of battery was visited upon the complainant in the course of the robbery. The complainant was merely threatened with violence by the Appellant knife pointing at her. She was apprehensive that violence was about to be visited upon her. That was sufficient violence. On the whole, we think that this variance did not occasion the appellant any prejudice. Clearly the prosecution set out to prove the appellant was armed with a dangerous or offensive weapon during the robbery.

Upon the appellant dispossessing the complainant of her cell phone, he ran away. He was unable to make good his escape. He was pursued by P.W.1 and P.W.2 and cornered at Impala grounds gate where he was stoned. He thereafter handed the cell phone back to the complainant before running away. To the appellant, the foregoing does not consist robbery with violence. We do not agree with the said submission. The act of robbery with violence was complete the moment the appellant dispossessed the complainant of her cell phone under threat of causing her harm with a knife. He ran away thereafter with the cell phone. The intention of the appellant running away with the cell phone was to permanently deprive the complainant of the same. There was taking of the stolen item from the Complainant. It matters not that the Appellant was forced to give it back after he was not able to make good his escape.

On the knife found on the appellant, the appellant takes the position that no such knife was found on him. However on our appreciation of the evidence, we are in no doubt at all that the appellant was in possession of the knife that was tendered in evidence as an exhibit. Both P.W.1 and P.W.2 testified as to the possession of the knife by the appellant. When he was pursued and eventually arrested, the knife was retrieved from him. Indeed in his cross-examination of the witnesses, the appellant does not dispute the fact that a knife was involved in the incident. All that he questioned was why the knife had blood stains. The answer was provided by P.W.1 who suggested that the blood stains found on the knife was the appellant's as a result of the mob justice. The appellant seems to suggest that the knife was planted on him. Going by the evidence on record none of the witnesses had any knife. The knife was recovered on the person of the appellant by the members of the public who pursued him. There is no reason why the 3 witnesses or any member of the public would have planted the knife on him. As prove that the knife was planted on him, the Appellant relied on an answer given to him by PW1. Under cross-examination by the

appellant to this effect

"……***The knife was up planted on you. It was recovered from you……"***

The appellant thinks the word "***up planted"*** means it was planted. This cannot possibly be correct. The next answer by P.W.1 obviously rules out such interpretation. We have also looked at the original hand written record of the trial court and it does appear that the word used was "***not"*** and not "***un".*** Consequently the Magistrate meant:

*"…**..The knife was not planted on you….."***

It would appear therefore the word "un" was a typographical mistake.

As prove that the case was fabricated against him, the appellant submits that the prosecution case was riddled with contradictions. He refers to the evidence of P.W.3 with regard to the recovery of the knife, the fact P.W.3 talked of receiving a report about the robbery at 7.00 a.m. when according to P.W.1 and P.W.2 the offence was committed at 7.40 a.m. and that P.W.3 testified that after the crowd pursued the appellant, they managed to retrieve a cell phone and gave it to the owner whereas P.W.1 and P.W.2 had claimed that the appellant returned the cell phone to the complainant before he ran away. It would appear that it is only the evidence of P.W.3 that is in some aspects contradictory. We have borne in mind that this particular witness came to the scene after the event. He did not find the victim at the scene. He had already been taken to Kenyatta National Hospital for treatment. This witness was merely repeating what he was told by those who were present at the scene. The evidence cannot be regarded as contradictory to that of PW1 and PW2 who were themselves eye-witnesses of the incident. Besides his evidence was not the basis upon which the Court returned the conviction. In any event we think that the contradictions are not substantive enough to effect the veracity of the evidence on record which was relied on to convict the appellant. The appellant has also submitted that certain important witnesses were not called to testify viz, a member of the public who pursued him and had him arrested and traffic police officer to whom P.W.1 first made a report. Yes, it would have been desirable for the prosecution to call these witnesses. The law in this respect is that the prosecution has, in general, discretion whether to call or not to call someone as a witness. If the prosecution does not call a vital witness without a satisfactory explanation it runs the risk of the court presuming that may the evidence of the witnesses not called to testify, have been un favourable to the prosecution See Section 119 Evidence Act and ***NGONDIA –VS- REPUBLIC (1982 – 88) 1 KAR 454.*** We are satisfied however that failure by the prosecution to call the said witnesses to testify did not at all weaken the prosecution case nor did it prejudice the appellant in any manner.

Regarding the appellant's defence, we are of the respectful view that the appellant's complaint that the same was not given due consideration is without merit. The learned trial magistrate extensively dealt with the appellant's defence in her judgment before discounting it. This is how the learned magistrate delivered herself

"…….***..The accused claim that the complainant was his former girlfriend was denied by the complainant who said she has never seen accused prior to this incident. There is no proof that the Complaint has framed accused this incident or that she even had a motive to frame the accused. P.W.2 also had no motive to lie about the accused. The accused defence has in my opinion, been controvanted (sic) the prosecution evidence".***

In our view the appellant's defence was an after thought calculated to mislead the Court.

For the foregoing reasons, we are satisfied that the appellant was convicted on very sound evidence of identification.

In our view, the appellant conviction was indeed, inevitable. Consequently this appeal is dismissed in its entirety.

Dated an delivered at Nairobi this 19th day of September, 2006

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LESIIT

JUDGE

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MAKHANDIA

JUDGE