



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 14 of 2004

(From original conviction and sentence in criminal case No.7323 of 2003

of the Chief Magistrates Court at Kibera)

JOSEPH MWANGANGI KATHIMBAAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

JOSEPH MWANGANGI KATHIMBA was convicted for the offence of **ROBBERY WITH VIOLENCE** contrary to **section 296 (2)** of the **Penal Code**. It was alleged that on 6th October, 2003 at Kawangware within Nairobi area, jointly with another not before court and while armed with a knife robbed the complainant **Patrick Mbugua Gitau** of cash 500/= a wallet, and 4 kgs of maize flour. The Appellant was sentenced to death as by law prescribed. Being dissatisfied with the conviction he lodged this appeal.

We have analyzed and evaluated afresh the evidence that was adduced before the lower court as expected of us as a first appellant court. See **GABRIEL KAMAU NJOROGE –V- REPUBLIC (1982 – 88) 1 KAR 1134.**

In this appeal, the appellant has appeared in person while **Miss Gateru** has appeared for the State. She opposed the appeal.

The conviction of the Appellant was based on visual identification by the Complainant and recognition by two eye witnesses, P.W.2 **Kiarie** and P.W.3 **Mbugua** and also on possession of the Complainant's stolen wallet one day after the alleged robbery. The Complainant was walking home from the bus stop at 9.30 p.m. on the material day when the Appellant ran ahead of him and threatened him with a knife. The Appellant's accomplice then frisked the Complainant's pockets who by then had fallen into a trench in a bid to escape. They took his wallet and paper bag with maize flour. The Complainant said that he saw the Appellant well by electric security lights from a nearby hardware shop. **Kiarie** and **Mbugua** were standing at a hotel and they witnessed the robbery. They claim to have recognized the Appellant and his accomplice as they grew up together.

The two said that they heard the Complainant shouting to the two robbers to take everything and spare his life. As they watched without intervening due to fear, they were able to recognize the two accomplices. The two said that they decided to walk towards the scene and that it was then that the two accomplices ran away. **Kiarie** said that he called out their names and requested them to return the Complainant's property but the two escaped from the scene. The next day the Complainant, **Mbugua** and **Kiarie** searched for the appellant and his accomplice at the same bus stage where the incident occurred. They saw **Kiarie** and apprehended him. He was taken to the Chief's Camp where P.W.4, **APC Amano** searched his pockets which yielded the Complainant's wallet with personal papers and notes which the Complainant identified as his. The learned trial magistrate considered the evidence of these three witnesses and was satisfied that the Appellant had been properly identified by all three and that the recovery of the Complainant's wallet from the Appellant one day after the robbery was over whelming evidence against him.

The Appellant challenged the conviction on four grounds. The key ground was that of identification which he contended was made under difficult circumstances and ought not to have been relied upon. The Appellant's second ground was that the evidence of P.W.2 and P.W.3 ought not to have been relied upon as it left much to be desired. The third ground was that the prosecution case was not adequately proved. The last but not least was that his defence was not 'displaced' by the prosecution case and ought not to have been rejected.

On the issue of identification the learned trial magistrate considered the evidence of the three witnesses and found that the three had properly identified the Appellant. The Complainant said that he first passed the duo before one ran in front of him and stopped him with a knife. He said that it was the Appellant who had the knife. The Complainant's evidence as to what the Appellant did during the robbery was corroborated by **Mbugua** and **Kiarie**. The sequence of the events of the robbery as narrated by all three witnesses was also consistent. The Complainant described the scene as well lit from security lights emanating from a nearby hardware shop. **Kiarie** on the other hand described it as a dark spot viewing it from where he stood. In our view however, there was need for corroboration of the evidence of identification by the Complainant and the two eye witnesses due to the absence of clear evidence as to the intensity of light at the scene of crime and the lack of clear evidence of distance of the light from the position of the Appellant and his accomplice. We however find that this corroboration was provided by the evidence of the recovery of the Complainant's wallet with his personal written notes from the Appellant one day after the robbery. The two items were properly identified by the Complainant as those stolen from him the night before. The Appellant denied that the wallet was recovered from him. We agree with the learned trial magistrate's rejection of the Appellant's defence for the reason given. The learned trial magistrate found that questions of the recovery of the wallet were never put to any of the four witnesses. We confirm that fact from the record of the proceedings and add that the one who recovered the wallet was P.W.4, **APC Amano** who in our view was an independent witness. There was no likelihood of a frame-up against the Appellant by any of the prosecution witnesses as he claimed.

The other ground the learned trial magistrate cited for rejecting the Appellant's defence that he was being framed by **Mbugua** and **Kiarie** for refusing to employ them was the fact that the Appellant did not put these questions to the two witnesses during cross-examination. We agree with the learned trial magistrate that raising these issues at the stage he did rendered the defence an afterthought.

We have analyzed the evidence afresh and evaluated it and are satisfied that the conviction was safe. In the result we find the appeal lacks in merit and dismiss it accordingly.

Dated at Nairobi 19th day of September 2006

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LESIIT. J.

JUDGE

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MAKANDHIA

JUDGE

Read, signed and delivered in the presence of;

Appellant for State

Tabitha/Erick – CC

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LESIIT, J.

JUDGE

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MAKANDHIA

JUDGE