



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Criminal Appeal 44 & 45 of 2004

BENJAMINE NJOROGI KIMANI.....1ST APPELLANT

BENSON ORWA MIDILA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No.1451 of 2003 of the Senior resident Magistrate's Court at R. K. Kirui, SRM)

JUDGMENT OF THE COURT

The appellants were charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars are that on 15th March 2003, at Kahurura Village, Kericho District, they jointly robbed Peter Njoroge Munga of Kshs.200/- and at the time of such robbery, wounded him. The appellants were also charged with grievous harm contrary to **Section 234** of the **Penal Code**, the particulars being that on the aforesaid date and place, they jointly assaulted Peter Njoroge Munga and occasioned him grievous harm. They both denied both counts and after a full trial each was convicted on the two counts and sentenced to death in the first count. In the second count, each of the appellants was sentenced to serve three years imprisonment. They were aggrieved by the said conviction and sentence and each preferred an appeal before this court against the conviction and the sentence. At the hearing of the appeals, both of them were, with consent of the appellants, consolidated and heard together as one.

The brief facts of the evidence before the trial court were as follows:-

The complainant, **Peter Njoroge Mwaura, PW1**, testified that on the 23rd April 2003, at 5.00 p.m., he was at Kahurura trading centre and was standing outside a butchery when one Mr. Kuno claimed that PW1 was an informer. He threatened to harm PW1 but PW1 did not take him seriously. After a short while, the said Mr. Kuno accompanied by two other armed men approached PW1 and PW1 started running away. When PW1 saw that his assailants were going to catch up with him, he entered a certain house and locked the door. The assailants kicked the door open and pulled out PW1. They hit him with clubs on his legs and every part of his body. Thereafter PW1 reported the matter to the police who issued him with a PW3 and he went for treatment at Londiani hospital. On the following day, PW1 met the appellants and they asked him why he had obtained a P3 Form. PW1 further stated that the appellants searched him and took Kshs.200/- that he had. The appellants then beat up PW1 until he lost consciousness. PW1 said that he knew the two appellants.

Maina Kimonyoi, PW2, testified that on 22nd April 2003, at around 5.30 p.m., he was in his house when PW1 suddenly entered therein and told him that he was being followed by the appellants. PW1 locked himself in the house of PW2. The appellants followed him up there and started banging the door and the windows. They broke the door and pulled out PW1 and started beating him up. When they left him, PW2 accompanied PW1 to make a report to the police. PW2 said that he knew the appellants.

Teresia Njeri Njoki, PW3, happened to pass by outside the house of PW2 and she saw the appellants beating up PW1.

Police Constable Brutos Marwa, PW4, told the court that on 18th June 2003, at about 11.00 p.m., he was on patrol with other police officers from Molo police station. They were tracing some highway robbers at Kahurura village. They met the first appellant and arrested him and they proceeded to a certain house where the second appellant was hiding and they arrested him also. The appellants were escorted to Molo police station where they were wanted for various offences of robbery.

Dr. Daniel Langat, PW5, examined PW1 on 14th May 2003 and filled his P3 Form. He found that he had a healed scratch mark on the back of his right shoulder, a healed wound on the right arm and hand and on the back. He said that the injuries were approximately one week old.

In his unsworn defence, the first appellant, testified that on 14th April 2003, he went to his farm and worked upto 1.00 p.m. Thereafter he decided to go and visit his girlfriend. While he was in his girlfriend's house, PW1 also went to her house and the first appellant discovered that PW1 was also having an affair with his girlfriend. They took some chang'aa but PW1 left without paying for the same. As a result, he was apprehended and beaten by the sons of that woman. He further alleged that on 1st May 2003, as he was in his girlfriend's house, PW1 showed up again when he was dirty and drunk. PW1 was told not to enter the house and he was pushed out. The first appellant said that he was arrested on 26th May 2003 and charged with robbery with violence which he was not aware of.

The second appellant also gave an unsworn defence. He testified that on 1st January 2003, he went to Kisumu and returned to Kahurura on 7th April 2003. Sometimes thereafter, he was arrested on the allegation that he was one of the people who had assaulted PW1. He denied having robbed PW1 or having assaulted him.

The appellants filed more or less the same grounds of appeal. They stated that there was no sufficient evidence to warrant their conviction for robbery with violence. They also stated that the trial was a nullity because in most of the proceedings there was no competent prosecutor and if there was, the record did not show that. They further alleged that the learned trial magistrate erred in law by failing to comply with the provision of **Section 211** of the **Criminal Procedure Code**.

Each of the appellant filed written submissions and chose to rely on the same entirely. They urged the court to allow their appeals, quash their conviction and set aside the sentence that was passed against each one of them by the trial court. Mr. Mugambi, learned state counsel, opposed the appeal and submitted that there was overwhelming evidence that the appellants assaulted and robbed PW1. He urged the court to dismiss their appeals.

This being the first appellate court, we are mandated to reconsider and re-evaluate the evidence that was adduced before the trial court and arrive at an independent decision as to whether to uphold the conviction or not. In reaching our decision, we are alive to the fact that we neither saw nor heard the witnesses as they testified and therefore we cannot make any determination regarding their demeanour, see **NJOROGE VS R [1987] KLR 19**.

We have carefully considered the evidence that was adduced before the trial court.

The plea was first taken on 26th June 2003 and the prosecutor was one Inspector Chebii. The proceedings show that Inspector Chebii continued to prosecute the case upto the date when the hearing was

concluded. However, there are a few occasions when the matter was mentioned and the coram is not properly indicated. That in our view did not prejudice the appellants in any way. In **FUAD DUMILA MOHAMED VS REPUBLIC, Criminal Appeal No. 210 of 2003 at Mombasa (unreported)** the Court of Appeal held that the mention of a case before a magistrate by an officer below the rank of inspector does not render the trial a nullity if the summoning and examination of witnesses is conducted by a qualified officer. We therefore dismiss that ground of appeal.

It is not in doubt that the appellants assaulted PW1 and caused him grievous bodily harm. The evidence of PW1 was corroborated by that of PW2 and PW3. There was also the evidence of PW5 even though the P3 Form was filled several days after PW1 was assaulted. The witnesses gave very clear evidence as to how the appellants assaulted PW1. The appellants were well known to PW1 and PW2. The offence was committed in broad day light and there was no possibility of mistaken identify. We are therefore satisfied that the conviction of the appellant on the second count of grievous harm was quite safe and cannot be faulted.

Regarding the appellants' conviction on the count of robbery with violence, we are not satisfied that the conviction was proper. Although PW1 alleged that the appellants assaulted him and robbed him of Kshs.200/-, there was no sufficient evidence to prove that any robbery took place. The appellants assaulted PW1 and for that they were convicted accordingly. PW1 alleged that they searched him and took Kshs.200/- from him. If that was true, PW1 would most likely have told PW2 about it. The report that was made to the police by PW1 was that he had been assaulted by the appellants. Even the P3 Form that was issued to him on 4th May 2003, referred to an assault. The police had initially charged the two appellants with assault causing actual bodily harm contrary to **Section 251** of the **Penal Code** but later on substituted the same with charges of robbery with violence and grievous harm. In our view therefore, the appellants' conviction on the charge of robbery with violence cannot stand as there was no evidence to sustain the same. The trial magistrate should have convicted the appellants on the second count only. Having stated so, we need to point out that even if the appellant had rightly been convicted to the two counts, it was improper to sentence him to imprisonment as well as to a death sentence. In **ABDI HUSSEIN KAIMOI VS REPUBLIC Criminal Appeal No.47 of 2001 at Nyeri (unreported)** the Court of Appeal stated that the prevalent practice by subordinate courts of sentencing an accused person to a prison term in addition to a sentence of death should be discouraged.

We therefore allow the appellants' appeal against conviction and sentence on the count of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. We uphold the conviction of the appellants by the trial court on the count of grievous harm contrary to **Section 234** of the **Penal Code**. With regard to the sentence of three years imprisonment, we deem it appropriate to reduce the same to the period already served. Consequently, the appellants should be set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2006.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE

Judgment delivered in open court in the presence of the appellants and Miss Opati for the state.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE