



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 82 of 1999 & 322 of 2000

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in
Criminal Case No. 2130 of 1998 – H. M. OKWENGU –C.M.)

JAMES NDUNGU KIHARA.....1ST APPELLANT

JOHN NJUGUNA GACHARA.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT OF THE COURT

The Appellants, James Ndungu Kihara and John Njuguna Gachara, were charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the charge were that on the night of 8th and 9th December 1998 at Industrial Area, in Nakuru District jointly with others not before court while armed with dangerous weapons namely iron bars robbed Joseph Omutiti Aseka of a bicycle make diamond and a torch all valued at Kshs 3,550/- and at or immediately before or immediately after the time of such robbery wounded the said Joseph Omutiti Aseka. When the Appellants were arraigned before court they pleaded not guilty to the charge. After a full trial they were duly convicted as charged. The 1st Appellant was sentenced to death as is mandatorily provided by the law. The 2nd Appellant was sentenced to be detained at the pleasure of the President as at the time the robbery was committed he was aged below eighteen years. The Appellants were aggrieved by the convictions and sentences imposed and have appealed to this court against the said conviction and sentence.

At the hearing of the Appeals, the Separate Appeals filed by the Appellants were consolidated and heard as one. The 1st Appellant, James Ndungu Kihara in his Petition of Appeal raised five grounds of Appeal faulting the decision of the trial magistrate in convicting him and sentencing him. He stated that the trial magistrate had erred in convicting him having completely disregarded the evidence adduced by the defence; that trial magistrate had erred in convicting the Appellant whilst the 1st Appellant had not been properly identified; that the trial magistrate had convicted the Appellant without considering the fact that the Appellant had not been properly identified by the complainant; that the trial magistrate

erred in convicting the Appellant without considering all the evidence that was adduced especially that which favoured the Appellant. On his part, the 2nd Appellant in his Petition of Appeal stated that he was a minor of 17 years. He further stated that he was not mentally sound and was sick during the trial and therefore did not understand what was going on. The 2nd Appellant stated that he did not understand the proceeding which had been conducted in the English language. The 2nd Appellant was aggrieved that he had been sentenced to a harsh custodial sentence even though he was a first offender.

At the hearing of the this Appeal, Mr Ikuu, Learned Counsel for the 1st Appellant submitted and urged this court to allow the Appeal filed by the 1st Appellant. The 2nd Appellant, with the leave of the court, presented his written submissions in support of his Appeal. He likewise urged this court to allow his Appeal. On his part, Mr Koech, Learned State Counsel opposed the Appeals. He urged this court to dismiss the Appeals and confirm the convictions and sentences imposed by the trial magistrate. We shall consider the arguments advanced by the parties to this Appeal after briefly setting out the facts of this case.

On the 8th of December 1998 at about 7.10 pm PW 1 Joseph Omutiti Aseka (*the Complainant*) was riding his bicycle towards Industrial Area where he lived. He saw three people who were armed with what he thought was a rungu ahead of him. As he passed near them, they used a device which knocked off the complainant from his bicycle. They then set upon him and beat him up. One of this assailants ran off with the bicycle. The two remaining assailants continued beating him up until the complainant was rescued by his neighbours after the said neighbours had responded to the complainant's screams for help. PW 2 Jeremiah Orina and PW 3 Charles Ochieng Otieno testified that on the material day they heard PW 1 screaming for help. PW 2 and PW 3 knew the complainant. They immediately responded to his screams and went to his rescue. PW 2 saw the complainant being beaten by two people. PW 2 and PW 3 then chased the two assailants who by then had ran away from the scene where the complainant has been beaten and robbed of his bicycle.

The two witnesses were able to apprehend the two assailants, who are the Appellants in this case. A torch was recovered from James Ndungu Kihara, the 1st Appellant. The torch, which was blue in colour, was identified at the scene by the complainant to belong to him. A piece of iron bar was also recovered from the Appellants. PW 2 and PW 3 testified that there was no one at the scene when the two Appellants were chased and apprehended. When the Appellants were apprehended and taken to the scene of the assault, the complainant was able to identify the 1st Appellant from the jacket that he was wearing. The said jacket was bloody yet the 1st Appellant had not suffered any injuries. At the time of their apprehension, the complainant was bleeding from an injury that he had sustained on his head. The complainant and the Appellants were taken to the Nakuru Provincial General Hospital. Later that night PW 4, Inspector Paul Gitau went to the hospital and re-arrested the Appellants. The Appellants were later charged with the offence of robbery with violence, the offence of which they were convicted. PW 5 Dr Victor Otieno testified that the complainant had sustained a depressed skull fracture on the anterior region of the head. The probable weapon used was sharp. The degree of the injury sustained by the complainant was assessed to be grievous harm. The duly filled P3 form was produced in evidence.

When the Appellants were put on their defence, the 1st Appellant, James Ndungu Kihara testified that as he was walking home with a lady on the material day, he was accosted by a group of people claiming that he was a robber. He alleges that he was beaten up and in the process lost consciousness. He came to when he was at the hospital. He was later arrested and charged with the offence of robbery with violence. He denied that he had anything to do with the robbery and claimed that he was a victim of mistaken identity. The 2nd Appellant, John Njuguna Gachara, testified that as he was walking home, he saw people who he assumed that he was a thief. He started running. He was chased and apprehended. He was beaten up. He was later arrested and charged with the offence of robbery with violence. The 2nd Appellant, like the 1st Appellant, was alleging that he was a victim of mistaken identity.

This is a first Appeal. As the first Appellate Court, we are mandated to look at the evidence adduced before the trial magistrate afresh, re-evaluate and re-examine it and reach our own independent

conclusion whether or not to uphold the convictions of the Appellants. In reaching our determination we are mandated in law to consider the grounds of Appeal put forward by the Appellants and also put in mind that we did not have the opportunity of seeing or hearing the witnesses as they testified and therefore we are not expected to give any findings on the demeanour of the witnesses. (See Okeno – versus- Republic [1972] E.A. 32 and Njoroge –versus- Republic [1987] KLR 19).

In the instant Appeal, the issue for determination by this court is whether the prosecution proved its case as against the Appellants beyond reasonable doubt. Were the Appellants properly identified as being part of the gang that robbed the complainant of his bicycle and in the process seriously injured him? Are the Appellants victims of mistaken identity? We re-evaluated the evidence on record and also considered the submissions made by the Appellants. The complainant testified that he was accosted by three people who used a device to stop the bicycle as he was riding the said bicycle past the robbers. According to the complainant it was about 7.10 pm in the evening. It was his evidence that it was still light enough for him to see his assailants. He testified that once the bicycle was stopped he fell down and was immediately set upon by the robbers and beaten up. The robbers beat him up using an iron bar. He screamed for help. PW 2 who was guarding a go-down nearby saw the three robbers assaulting the complainant. He recognised the complainant. He called PW 3. Together they went to the rescue of the complainant. One of the robbers picked up the bicycle and rode off. The other two robbers ran away when they saw that PW 2 and PW 3 come to the rescue of the complainant. It was PW 2's testimony, which was corroborated by the evidence of PW 3, that they chased the two robbers (*who happened to be the Appellants*) and were able to apprehend them. They testified that they did not lose sight of the Appellants from the time they saw them assault the complainant to the time they apprehended them. They also testified that there were no other people at the scene other than the complainant and the Appellants. They further testified that when they apprehended the Appellants, they recovered a blue torch from the 1st Appellant. The complainant confirmed that the torch was his. PW 2 and PW 3 also recovered a piece of iron bar which was identified by the complainant as the weapon that was used to assault him. The complainant and the Appellants were taken to Nakuru Provincial General Hospital where the Appellants were later re-arrested by PW 4 Inspector Paul Gitau. The complainant in the course of the assault sustained a depressed fracture of the skull on the anterior region of the head. Due to the injuries that he sustained, the complainant was admitted in hospital for treatment for a period of fifteen days.

We have re-evaluated the evidence adduced by the prosecution before the trial magistrate. Is it plausible as alleged by the Appellants that they were victims of mistaken identity? We do not think so. While it could be true that at the time the robbery took place the daylight was fading and night time was setting in, it is our finding that it was light enough to enable the two critical witnesses in this case (*i.e PW 2 and PW 3*), to see the assault of the complainant and subsequently chase the Appellants and apprehend them. Their evidence was cogent, credible and corroborated each other. They did not lose sight of the Appellants from the time they saw the Appellants assault the complainant to the time they apprehended the Appellants after a chase. They apprehended the Appellant with a torch which was robbed from the complainant. The complainant identified the torch as belonging to him. The iron bar that was used to assault the complainant was also recovered from the Appellants and produced in evidence as an exhibit. The fact that the complainant could not identify the particular weapon that was used to assault him in his testimony does not materially dent the prosecution's case. What is of importance, is that PW 2 saw him being assaulted and later mounted a chase for his assailants with the assistance of PW 3 and apprehended the Appellants. The defence by the Appellants that they were victims of mistaken identity is thus not credible. The critical witnesses in the case (*i.e. PW 2 and PW 3*) testified that there were no other people at the scene other than the complainant, who had been assaulted, and the Appellants whom they apprehended. The trial court did observe that (*at page 2 of the judgment*);

“The evidence of the complainant is supported by the evidence of PW 2 and PW 3 who saw the Accused beat up (the) complainant and ran after the two accused and apprehended them. The 3 witnesses were further consistent that Accused 1 (1st Appellant) was found in possession of the complainant's torch which he had just been robbed of, the defence of the Accused 1 that he was an innocent passer-by cannot hold and according the same is rejected.”

“Likewise Accused 2 was identified by the complainant as one of the attackers. PW 2 and 3 supported the complainant’s evidence, as they saw accused 2 and 1 ran away when they went to the assistance of the complainant. Accused 1 and 2 were chased and apprehended just nearby ... I reject the defence and find that Accused 2 and also involved in the robbery.”

Our re-evaluation of the evidence totally agrees with the assessment of the evidence by the trial court. We find no merit in the Appeals filed by the Appellants. Their Appeals against conviction and sentence are therefore dismissed.

We hereby confirm the conviction and the sentences imposed by the trial magistrate.

DATED at NAKURU this 27th day of January 2005.

MUGA APONDI

JUDGE

L. KIMARU

JUDGE