



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 53 OF 2001**

**(From original conviction and sentence in Criminal Case No. 2420 of 1998 of the Principal Magistrate's Court at Nyahururu – C. O. Moitui –S.P.M.)**

**SIMON KIHARA WAINAINA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF THE COURT**

The Appellant, Simon Kihara Wainaina, was charged with the offence of attempted robbery contrary to **Section 297 (2) of the Penal Code**. The particulars of the offence were that on the nights of the 16th and 17th August 1998 at Gathanji trading centre, Nyandarua District, the Appellant jointly with others not before court, while armed with pangas and a home made gun attempted to rob Samuel Maina Mwangi and at or immediately before or immediately after the time of the attempted robbery assaulted Samuel aina Mwangi. The Appellant pleaded not guilty to the charge and after a full trial the Appellant was convicted as charged. He was sentenced to death as mandatorily provided by the law. The Appellant was aggrieved by the said conviction and sentence and has appealed to this court.

In his Petition of Appeal, the Appellant faulted the trial magistrate for convicting him on evidence which clearly showed that the Appellant had been a victim of mistaken identity. The Appellant was further aggrieved that the trial magistrate failed to consider the evidence which was adduced by the prosecution witnesses which pointed to the fact that the Appellant had not been arrested with any weapons that were allegedly used by the assailants who attacked the complainant. The Appellant further faulted the trial magistrate for convicting him on the evidence of dock identification. The Appellant was further aggrieved that the trial magistrate had failed to consider the fact that the arresting officer had not testified and therefore failed to consider that the evidence of the said arresting officer would have been adverse to the prosecution's case. Finally the Appellant was aggrieved that the trial magistrate failed to consider the alibi defence offered by the Appellant and thereby convicted him.

At the hearing of the Appeal, the Appellant, with leave of the court, presented written submissions in support of his Appeal. He also made oral submissions urging this court to allow his Appeal. On the other hand, Mr Gumo, Learned Assistant Deputy Public Prosecutor supported the conviction and the sentence meted out to the Appellant by the trial magistrate. He urged the court to dismiss the Appeal. Before we consider the arguments made by the Appellant and the Learned Assistant Deputy Public Prosecutor, it is imperative that we set out the facts of this case, albeit briefly

On the night of the 16th and 17th of August 1998 at about 10.00 am, PW 1 Samuel Maina Mwangi (*hereinafter referred to as the complainant*) was asleep in his house. He heard someone knocking at the front door. He woke up, picked his torch and panga and went out of the house using the back-door. When he stepped outside, he was hit by an object on his forehead. The complainant screamed and went towards

the front of the house. He met with three robbers. He cut one of the assailants with a panga. The assailants then fled. The complainant followed the assailants while at the same time raising an alarm. He testified that one of the robbers fell down into a culvert. The complainant pounced on him in a bid to apprehend him. The complainant and the robber struggled on the ground in the course of which the robber bit the middle finger of the complainant.

At that moment the neighbours came to the rescue of the complainant. Among the neighbours who came was one Charity Waitherero, a Community Development Officer and an Administration Police Sergeant. The Appellant was arrested. A homemade pistol was recovered at the scene of the struggle. The complainant testified that although it was dark, he used the light emitted by his torch to enable him see the robbers. The complainant further testified that he did not lose sight of the robbers when pursuing them until the Appellant fell down and was pounced upon and arrested. It was further his testimony that a home-made gun was recovered at the scene where the complainant and the Appellant were struggling on the ground.

PW 3 Charity Charagu (*also known as Waitherero*) testified that while asleep at her house about 1.00 am on the material night, she was woken up by screams. She identified the screams as emanating from the direction of the house of the complainant. She went to the rescue of the complainant. She found the complainant struggling on the ground with another person (*the Appellant in this case*). The complainant was naked. The Appellant was arrested by the Administration Police Sergeant who came to the scene. The following day, PW 3 found the Appellant at the Administration Police Camp trembling with cold. She bought the Appellant tea and a half a loaf of bread.

PW 4 Joseph Maina Kingori also heard screams at about 1.00 am on the material night. He identified the person who was raising the alarm to be the complainant. PW 4 rushed to the scene. He found the complainant on top of the Appellant. One of the fingers of the complainant was bleeding. The Appellant was arrested. PW 4 testified that he found PW 3 at the scene. PW 4 testified that the Administration Police Sergeant and himself found a home-made pistol about five metres from the place that the complainant and the Appellant were found struggling on the ground. He further testified that the distance of the house of the complainant from the scene where the complainant was found struggling on the ground with the Appellant was about thirty metres. PW 2 Constable Julius Kobia testified that on the 18th of August 1998, he went to Nyahururu Police Station. He picked up the Appellant and took him to Ol Joro Orok Police station. He investigated the case, issued a P3 form to the complainant and took custody of the home-made gun and one round of ammunition which was recovered at the scene of the struggle, when the Appellant was arrested. During the hearing of the case, PW 2 produced the home-made gun and one round of ammunition as exhibits in the case. The P3 form duly filled was produced in evidence by the prosecution under the provisions of **Section 33(b) of the Evidence Act**.

When the Appellant was put on his defence, he testified that the charge facing him was a fabrication. It was his testimony that he was attacked by the complainant when he responded to the alarm raised by the complainant. He testified that when he was attacked by the complainant, he identified himself as the son of one Maina Waweru. It was his testimony that the home-made gun which was recovered was planted on him. He further testified that the complainant had sought to extort Kshs 20,000/- from him as an inducement to abandon the complaint against him. The Appellant denied that he was involved in the robbery.

This is a first Appeal. As the first Appellate court in criminal cases, this court is mandated to look at the evidence adduced before the trial magistrate afresh, re-evaluate and re-examine it and reach its own independent conclusion whether or not to uphold the conviction of the Appellant. In reaching its decision this court has always to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore could not be expected to make any finding as to the demeanour of the witnesses. This court is further mandated to consider the grounds of Appeal put forward by the Appellant in support of his Appeal (*See Njoroge –vs- Republic [1987] KLR 19*).

In the instant Appeal, the Appellant has submitted that he was arrested when he went to the scene in response to the cries of help by the complainant. He has further submitted that he was able to respond to

the screams by the complainant as he was residing about two hundred metres from the house of the complainant. He further submitted that the home-made gun and one round of ammunition which were found at the scene of the struggle did not belong to him. The Appellant submitted that he was therefore innocent and a victim of a mistaken identity.

In response to the Appellant's submissions, what was the evidence that was offered by the Prosecution? The complainant testified that he was asleep in his house at about 1.00 am on the material night. He heard knocks at his front door. He armed himself with a panga and picked his torch and went out of the house through the backdoor. When he reached outside his house, he was hit by an object on his forehead. He went to the front of the house and saw three robbers. He was able to see the three robbers by the light from his torch. He raised an alarm. The three robbers ran away. The complainant ran after them. It was his evidence that the three robbers were running away in a single file. The Appellant was the last one at the back. It was the complainant's testimony that he saw the Appellant fall down into a culvert. The complainant pounced on him. In the ensuing struggle the Appellant bit the complainant's finger. The neighbours responded to the alarm raised by the complainant.

PW 3 and PW 4 testified that they found the complainant and the Appellant struggling on the ground. According to PW 4, the complainant was naked save for the underpants that he was wearing. PW 4 testified that a home-made gun was recovered about five metres from the scene where the Appellant and the complainant were struggling. The neighbours and an Administration Police Sergeant who responded to the complainant's cries for help arrested the Appellant. PW 2 the investigating officer testified that he issued the P3 form to the complainant. He also produced the homemade gun and one round of ammunition which were recovered at the scene of the struggle between the complainant and the Appellant. The Appellant's evidence is that he went to the scene in response to the cries of help by the complainant. He denied that he attempted to rob the complainant or that he was one of the robbers.

We have re-evaluated the evidence adduced by the witnesses of the prosecution and the evidence offered by the Appellant in his defence. It is our evaluation that the evidence by the complainant was credible. It was further corroborated by the evidence of PW 3 and PW 4. The complainant testified that he ran after three robbers whom he had seen at the front of his house using the light by his torch. He ran after the three robbers without losing sight of them. He saw the Appellant fall down into a culvert. He pounced on him and in the ensuing struggle was bitten on his finger by the Appellant. PW 3 and PW 4 came to the scene in response to the screams of the complainant. They found the complainant on the ground struggling with the Appellant. They arrested the Appellant. PW 4 testified that a home-made gun was recovered about five metres from the scene of the robbery. The home-made gun and one round of ammunition were produced in evidence by the prosecution.

From our further re-evaluation of the evidence, it is our finding that the evidence adduced by the prosecution witnesses was cogent and offered an explanation of the events that took place on the material day. The defence offered by the Appellant was incredible. The Appellant states that he went to the scene in response to the cries of help by the complainant and was therefore a victim of mistaken identity. This testimony is however contradicted by the evidence of the complainant and PW 4 who testified that they did not know the Appellant. Could the Appellant, a total stranger, respond to the cries of help of another stranger at 1.00 am at night? We do not think so. The time span between the time the Appellant was pounced on by the complainant and the time PW 3 and PW 4 arrived at the scene of the robbery is such that there can be no doubt that the Appellant was one of the robbers who attempted to rob the complainant. The evidence offered by the Appellant in his defence was thus rightly dismissed by the trial magistrate as implausible. The Appellant must have been a superhuman to wake up from his alleged house which was two hundred metres away and arrive at the scene at the same time the robbers were escaping from the scene. The only possible explanation is that the Appellant was one of the robbers.

It is therefore our finding that the prosecution established its case against the Appellant beyond reasonable doubt. The Appellant in the company of two others, while armed with an offensive weapon, namely a home-made gun, attempted to rob the complainant. In the course of the said attempted robbery the complainant was injured. The robbery was foiled by the bravery of the complainant who managed to scare away the robbers and managed to arrest one of them, the Appellant in this case. We find no merit in

the Appeal filed by the Appellant against both conviction and sentence. His Appeal is consequently dismissed.

The conviction and the sentence imposed by the trial magistrate is hereby confirmed.

It is so ordered.

**DATED at NAKURU this 27th day of January 2005.**

**DANIEL MUSINGA**

**JUDGE**

**L. KIMARU**

**JUDGE**