REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 302 OF 2002

(From original conviction and sentence in Criminal Case No. 3058 of 2002 of the Senior Resident Magistrate's Court at Limuru:E.O. Awino Esq.

VICTOR WAIHARU MWANGI…..……..……....…..…APPELLANT

VERSUS

REPUBLIC………………………………...………..…RESPONDENT

JUDGMENT

The Appellant herein, **VICTOR WAIHARO MWANGI** Criminal Appeal No. 302 of 2002, was charged with **ROBBERY WITH VIOLENCE** contrary to Section 296(2) of the Penal Code, at the Senior Resident Magistrate's Court, Limuru; Criminal Case No. 3058 of 2001.

The particulars of the charge were that on 5/9/01 at Ngecha Village, jointly with others not before court while armed with a pistol and rungus robbed **PETER NJUNGE WAKANGU** of a mobile phone – Siemens C 35, Cash 3,750/- all valued at Kshs.19,700/- and that they threatened to use actual violence to the said **PETER NJUNGE WAKANGU**.

Being dissatisfied with both the conviction and the mandatory death sentence, he has appealed to this court on the following grounds:-

1. **That the lower court erred both in law and fact in convicting the appellant on reliance of the evidence of P.W. 1 and P.W. 4 by failing to consider that the witnesses owed appellant money and that is why they fabricated a case against the appellant.**

2. **The lower court erred in convicting the appellant for an alleged pistol which was not produced before court.**

3. **The lower court based his conviction on contradictory evidence.**

4. **The lower court erred in law and fact when it heard the prosecution case in isolation and therefore rejected the Appellants defence, without reference to Section 169(1) of the Criminal Procedure Code.**

Briefly the prosecution's case was that P.W. 1 – the complainant - was at home at about 7.30p.m. taking supper with his family, when their dog barked outside, and he sent his son – P.W. 2 – to check. Immediately thereafter, the appellant and two other strangers, and the mother of P.W. 1 entered. Appellant then demanded his money from P.W. 1's wife, P.W. 4, who wondered what money appellant wanted.

Evidence showed that the appellant was employed as a farm hand by P.W. 1 between 1996 and 1998.

P.W. 1 testified that appellant gave orders to the two others and one drew a pistol and demanded money, took the mobile phone of P.W.1, which was on the chair. P.W. 1 was then led to the bedroom by the robber with the pistol where he, P.W. 1, gave out Kshs.3,700/- and another 150/- from his coat. P.W. 1 was then led to the bathroom where he closed the door from inside, then screamed, raising alarm.

The robbers left soon thereafter and a few minutes later, P.W. 1 heard noise on the road “thief, thief” and he proceeded there and found appellant under arrest. He accompanied them to Ngecha Chief’s Camp where they reported the incident.

P.W. 2 and P.W. 3 son and wife, respectively, of P.W. 1 testified to the same effect as P.W. 1. P.W. 3 recognised the appellant who had been there – the complainant’s residence – about 5 years earlier. P.W. 3 said apart from the money nothing else was taken.

In his defence, the appellant stated that he had not been paid his two months salary, and that he had gone alone to demand his salary arrears and that he was not in good terms with P.W. 3 due to the death of some chicks during the period of his employment. Appellant went further and stated that he ran away to Nyathuna Market where the brother of P.W. 1 came and caused his arrest that he was a thief.

We have reviewed the proceedings and re-evaluated the same in light of the grounds of appeal raised by the appellant.

We begin with the critical issue of identification of the appellant and the evidence in support of that. The record shows that the appellant was a former employee of P.W. 1 for two years, some 5 years prior to the robbery herein. There can be no doubt that P.W. 1, knew the appellant very well from those years of employer/employee relationship. In any case, and without jumping the gun and discussing different ground of appeal, the appellant admitted, in his own defence that he went to the residence of P.W. 1 to demand the arrears for his salary. In other words, Appellant does not deny being at the P.W. 1’s residence at the time of the robbery herein. What he reiterates is that he had gone there alone.

But from the evidence of P.W. 1; P.W. 2, and P.W. 3, all of whom knew Appellant from the earlier employer/employee relationship, there can be no doubt in their evidence that when the dog barked and P.W. 1 went to check, with full electricity lights on at 7.30p.m., appellant was accompanied by two others, one of whom was armed with a pistol. In our view, there could not be any mistaken identity of the appellant under those circumstances, and that he was with other two persons. His defence that he was alone, is, in our view, an after thought, as found by the lower court.

Further, the appellant was arrested a few minutes after the robbery, just outside P.W. 1’s house.

The appellant stated that there was no investigation by P.W. 5 . Our reading of the evidence of P.W. 5 and the entire proceedings don’t agree with that challenge by the appellant.

P.W. 5 was the officer who re-arrested the appellant who had been arrested outside P.W.1’s house when P.W. 1 raised the alarm by screaming. P.W. 5 stated that after re-arresting the appellant who was identified by P.W. 1 he, P.W. 5, recorded the statement. That was investigation by P.W. 5 given that the Identification of the appellant was not an issue, since the appellant had been arrested at the scene of the robbery. No more investigations were necessary.

The last ground of appeal was the appellant’s defence. Having admitted that he was at the P.W. 1’s house at the time of the robbery, the only defence appellant gave was that he had gone to demand his salary arrears, and that he was alone.

The lower court accepted the appellant’s explanation as to why he had gone to the P.W. 1’s house at that hour; but clearly rejected that as a defence because whereas he had a right to be paid the money owed to him, the fact that he was accompanied by two others, one of whom was armed with a pistol, was

sufficient to convict him under Section 296(2) of the Penal Code.

That the pistol was not produced in court as exhibit does not in any way diminish the prosecutions evidence and case on the ingredients under Section 296(2) of the Penal Code.

All in all therefore, the appeal fails, and we dismiss the appeal; confirm the conviction and uphold the sentence of the lower court.

DATED and delivered in Nairobi this 17th day of May, 2005.

O.K. MUTUNGI

JUDGE

F.A. OCHIENG

JUDGE