



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 697 of 2001

(From original conviction and sentence in Criminal Case No. 21037 of 2000 of the Chief Magistrate's Court at Makadara: *Juma (Mrs)*)

JOSEPH KINYANJUI WAINAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant **JOSEPH KINYANJUI WAINAINA**, Criminal Appeal No. 697 of 2001 was charged with **ROBBERY WITH VIOLENCE** contrary to Section 296(2) of the Penal Code, tried, convicted and sentenced to death, as by law prescribed.

The particulars of the charge were that: On 26/10/00 at Kiariadudu Village, Nairobi, jointly with others not before court while armed with a pistol robbed **HARRISON MWANGI KIMOTHO** of Kshs.2,610/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **HARRISON MWANGI KIMOTHO**.

The appellant was convicted and sentenced to death as by law prescribed. Being dissatisfied by both the conviction and the sentence, he appealed to this court on 6 (six) grounds, three of which grounds he abandoned, in his Amended Grounds of Appeal, choosing to rely on grounds 1,2, and 5 only. Consequently, the three grounds of appeal are as under:

- “1. The Learned Trial Magistrate erred both in law and fact in holding that I was found in possession of the complainant's money purely on the basis which was contradicted in material factors.
2. The lower court erred in believing the prosecution witnesses evidence without observing that the links of chain leading to my arrest were unsound.
3. The trial court erred in law in failing to consider my defence – alibi – which was supported by an independent defence witness which shows that I was away at the time.”

Briefly, the prosecution case was that P.W. 1, the complainant, operates a shop at Kariandudu, and while there selling on 26/10/00, at 7.00p.m., three men came in and shoved aside the customers, many of whom were school children; one on the left, one in the middle, and the third one on the right of the counter, which has grills apart from the small window used by P.W. 1 for going out goods and receiving payment.

The man on the left produced a small pistol and demanded for all the money there was. Some customers

ran away, but P.W. 1 declined to give any money and the man who was at the center stage made for the counter-drawer from which he removed money and passed it to the man with the gun. P.W. 1 raised alarm and the armed man ran away. The center man continued picking coins from the drawers with his head inside the small window.

People started coming to the scene and P.W. 1 held the hand of this man. P.W. 1 was assisted by members of the public to arrest this man who had been busy putting silver coins in a paper bag.

This man, who was arrested, is the appellant.

On being searched, the appellant was found to have Shs.110/- worth of coins. The appellant was taken to Ruaraka Police Station. P.W. 1 used to see the appellant prior to that date. P.W. 1 denied that his shop was leased from the appellant's grandmother or having sued the appellant for stealing a radio and a Volkswagen tyre. He testified that he never leased a plot from the appellant.

P.W. 2 was on his way to the shop when he heard noise and screams, and saw two people ran away from the shop carrying something he could not identify. One of the persons was struggling with P.W. 1, who was at the counter and calling for help. P.W. 2 went and held the hand by getting hold of the appellant from outside the shop, and was assisted by another. The appellant had coins in a black paper bag, and the coins amounted to Shs.110/-. On cross-examination, P.W. 2 said he never saw any pistol.

P.W. 3 also happened to be near the scene at the time of the alleged robbery; and he responded to P.W. 1's cries for help by going there. He saw two people run off and one was struggling with P.W. 1 – the shopkeeper. Another person had intervened and held the appellant from the outside. P.W. 3 went and assisted in holding appellant, who on being searched, had a black paper bag in his pocket.

P.W. 4, a police officer attached to Ruaraka Police Station, re-arrested the appellant after receiving P.W. 1's report. He, P.W. 4, also received the Shs.110/-. P.W. 4 did not visit the scene of crime of the alleged robbery.

In his unsworn defence, the appellant said he operates a matatu on route 25. On the material date and time, at about 7.30p.m. he said he was on his way home when he met P.W. 1, with some village youth. He said that P.W. 1 was his enemy and ordered him – appellant – to sit down. P.W. 1, who was with others, beat him up claiming that he was one of the village thieves. He, appellant, screamed, neighbours came out and implored P.W. 1 to take the appellant to the police station if he had wronged him. Appellant was taken to Ruaraka Police Station, where P.W. 1 claimed that appellant had stolen from him and appellant was charged with this offence.

D.W. 1, is the mother of the appellant, and testified that P.W. 1 was her mother's tenant, in the shop, which belongs to D.W. 1's mother. Otherwise, she knew nothing about the case. All the three prosecution witnesses testified that the shop was lit with electricity; the two suspects escaped and the appellant was the one held at the counter. Members of the public who came by wanted to lynch the appellant and that would probably explain why the appellant claimed to have had injuries.

We have reviewed, and re-evaluated, the evidence on the lower court's records, in light of the grounds of appeal, and have reached the following conclusions. On ground one of the appeal, the appellant challenges the lower court's finding that he was found with the P.W. 1's money, which he alleges was contradicted in material factors. We have found no contradictions in the evidence that the appellant was found with the coins, amounting to Shs.110/- in his pocket. Of even greater importance, at J 3, the lower court had the concrete eye witness evidence from the three prosecution witnesses who arrested the appellant, red-handed, at the scene of the crime, before the appellant could escape. He, appellant, was the one found with the coins, which P.W. 1 alleged to have been picked from the cash – drawer. Further, as submitted by the Learned State Counsel, and evident from the lower court's record at J4, there was no brake in the chain of events. Appellant was held by P.W. 1, who upon screaming for help, was assisted by P.W. 2, and P.W. 3 in holding the appellant. Upon search, there and then, at P.W. 1's shop, which was the scene of the crime, appellant was found with Shs.110/- worth of coins in his pocket, the money P.W. 1

claimed to have been robbed of him by the appellant.

We note that the appellant never had a chance of escape, and upon re-arrest by P.W. 4, the same amount of Kshs.110/- is confirmed by the arresting officer.

Accordingly, we dismiss this ground of appeal as without merit, and against the weight of evidence by the three eye witnesses of the prosecution. Ground two of the appeal, has been dealt with in our findings and conclusions in ground 1 above and we need not spend any time on it. As we have held above, the chain of events from the robbery and the immediate arrest of the appellant, red-handed, left no room for speculation about the brake of the chain of events. P.W. 1 held appellant's hand over the counter, until P.W. 2 came to assist, and P.W. 2 continued holding onto the hand of the appellant from the outside of the counter, until P.W. 3 came to assist by holding onto appellants second hand while P.W.1 went round the shelve; and members of the public came onto the scene wanting to lynch the appellant.

We now turn to ground three of the appeal, which is based on an alibi; and which the appellant claims was not considered by the trial magistrate.

Our perusal of the evidence on the record of the lower court shows that the learned trial magistrate carefully considered this aspect, in J3 through J4, and dismissed it as an after thought. There is no doubt in our minds that the lower court arrived at the right conclusion, on the available evidence. The appellant's effort on alibi is based on his method of arrest; which, as found by the lower court, was unbelievable; given how, and where, the appellant was arrested, at the scene of the crime, and red handed, and taken to the police station without any brake of that chain of events.

We accordingly dismiss the same as baseless and totally lacking in merit.

All in all therefore, we reject the grounds of appeal; dismiss the appeal and confirm both the conviction and the sentence.

DATED at Nairobi this 10th day of May, 2005.

O.K. MUTUNGI

JUDGE

F.A. OCHIENG

JUDGE