



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL 200 OF 2004**

PETER KARIUKI MWANGI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

CRIMINAL APPEAL 202 OF 2004

JOSEPH MURIMI MWANGI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

***(Being appeals from the judgment of G. K. Mwaura,
Principal Magistrate, dated 23rd June 2004 in the
Principal Magistrate's Court Murang'a, Criminal
Case No. 1078 of 2003)***

JUDGMENT

The above two appeals were consolidated for hearing and in this judgment therefore, we will treat the Appellant in Criminal Appeal No. 200 of 2004 as the First Appellant while we will treat the Appellant in Criminal Appeal No. 202 of 2004 as the Second Appellant. They were the First Accused and Second Accused respectively in the subordinate court.

The two faced a charge of robbery with violence contrary to Section 296(2) of the Penal Code particulars alleging that on the 26th day of July 2003 at Makima Village in Murang'a District, Central Province, the two Appellants jointly robbed Daniel Kamau Waithaka his mobile phone make Siemens Serial No. 350019555603782 and cash Kshs5000/= all valued at Kshs.11000/= using actual violence to the said Daniel Kamau Waithaka.

In the alternative, Peter Kariuki Mwangi was charged with handling stolen goods contrary to Section 322(2) of the Penal code. Particulars alleged that on the 27th day of July 2003 at Makima Village, Murang'a District, the First Appellant, otherwise than in the cause of stealing dishonestly retained or handled one mobile phone Serial No. 350019555603782 make Siemens knowing or having reason to believe it to have been stolen or unlawfully obtained.

Both appellants were convicted and sentenced on the main count of robbery. They have appealed each listing his grounds of appeal which we have read. During the hearing of the appeals, each appellant addressed us before Mr. Orinda, the Provincial State Counsel replied opposing both appeals.

According to the evidence, the victim of robbery Daniel Kamau Waithaka, a teacher who gave evidence as P.W.1, was coming from a local bar on 26th July 2003 at about 9.00 p.m. when he met with two people who had waylaid him. He told the court that the spot where he was attacked by the two people was well lit by electricity light from houses about five metres away and that therefore he was able to see his attackers. He recognized them because they were people he knew from the locality. People he was meeting often and he could therefore tell the court that it was Murimi who wrestled him down before Kariuki went and searched his pockets taking his cell phone and Kshs.5000/= as Murimi strangled the Complainant and stepped on the Complainant's neck causing injuries on the head and neck and on the knees. It was painful and he screamed as the attackers ran away and escaped before helpers arrived. Due to the pain, the Complainant had to go to his house and rest until the following day when he returned to the spot to see whether he could recover any of his stolen items but found none.

Since he was still in great pain, he sent colleagues to report the incident to the area D.O. and as a result of that report, the two appellants were arrested and the Complainant saw them at Nyakianga (Mathioya) D.O.'s office. The First Appellant said he had the Complainant's cell phone and when he led the Complainant and other people to his home, he produced the Complainant's cell phone from under a bed. The Complainant identified it and even used code number to put phone on showing personal particulars of owner and was produced in the court during the trial as exhibit 1. Police Constable Albert Gakango, who gave evidence as P.W.2, was based at Nyakianga Police Post when on the 27th day of July 2003 he received the Appellants under arrest from Mathioya D.O.'s office. Thereafter this witness is the one who was with the Complainant when the First Appellant led them to his home and produced the Complainant's cell phone. P.C. Albert Gakango clarified that it was Peter Kariuki Mwangi, and not Joseph Murimi, who led them to the recovery of the cell phone. P.W.3, Paul Gathugo was a Clinical Officer from Kangema Health Centre. He told the court he examined Daniel Kamau Waithaka, the Complainant in this case, on 30th July 2003. He had a history of having been assaulted by two persons on 26th July 2003. P.W.3 said he saw swellings on the head and bruises on the right knee. Approximately four days old, caused by a blunt object. Classified the injuries as harm and signed the P3 form exhibit 2.

P.W.4 was Administration Police Constable James Karanja from Mathioya D.O.'s office. This is the officer who received a report of the alleged robbery from the person the Complainant was not naming when the Complainant told the court he had sent a colleague to the D.O.'s office to report the incident. APC James Karanja told the court that he received the report from one Julius Mwangi Maina who said was a workmate of Daniel Kamau Waithaka. The two went to the house of Daniel Kamau Waithaka who had injuries on his neck and knee and it is then that Daniel Kamau Waithaka gave names of the two suspects to APC James Karanja. That was on 27th July 2003. The time is not given but this witness said he had received the report at his office at 1.00 p.m.

From the house of the Complainant therefore, APC James Karanja went and arrested both Appellants. Time not given. The witness told the court in his evidence in chief:

“I arrested them and took them to the home of JOSEPH MURIMI to search. I searched MURIMI's shop but didn't recover anything. From there I was taken to PETER KARIUKI's house where I also didn't find anything. From there I took them to Nyakianga Police Station and booked them there.”

According to the evidence of P.W.2, the two Appellants were taken to the Police Post at Nyakianga on 27th July 2003 at 5.50 p.m. APC James Karanja told the court that he was not present when a mobile phone was recovered. During cross-examination he told the court:

“I searched the houses of the two suspects thoroughly and did not recover anything.”

During re-examination the same witness APC James Karanja told the court:

“I only did a quick search at the two homes.”

The inconsistency between what this witness told the court in cross-examination and what he

said during his re-examination concerning the search for the cell phone is clearly apparent. The contradiction between his evidence as a whole on that issue and the evidence of P.W.2, P.C. Albert Gakango is another. Did the Prosecution do anything about those inconsistencies?

The answer is that the Prosecution did nothing as the evidence of P.W.4 as quoted above was the last part of the Prosecution's evidence in the trial. There followed defence evidence on oath each Appellant denying that he committed the offences as charged. Each Appellant adduced evidence to the effect that on 26th July 2003 he was at his home busy doing shamba work throughout the day and stayed there without going anywhere until about 10.00 p.m. when he retired to bed to sleep until the following day. The Prosecution who had the opportunity to cross-examine each Appellant and his witness could not show that apart from the claim of the Complainant that he had seen the Appellants at the scene of the robbery, the Appellants had been seen anywhere else in the vicinity of the scene of the alleged robbery. In the circumstances therefore, we note the following points in this case.

Firstly the fact that there exists an unexplained inconsistency between the evidence of P.W.2 and the evidence of P.W.4 on the issue of the search for and the recovery of the Complainant's cell phone, creates serious doubt on that issue in the prosecution's case and the benefit of that doubt must go to the Appellants

. Secondly the veracity of witnesses in this case must not be taken for granted. The Complainant in his evidence spoke as if he gave his workmate, whom he sent to the D.O.'s office, names of the suspect so that after the workmate made the report at the D.O.'s office, Administration Police went straight to arrest the Appellants. But when the Administration Police gave evidence, what came out was different as after the Complainant's workmate had sent a report to P.W.4, the Administration Police Officers had to go and see the Complainant at the Complainant's house for the Complainant to give P.W.4 names of the Appellants before P.W.4 went to arrest the Appellants. Not only that. P.W.4 arrested the Appellants on 27th July 2003 and handed them over to the Police on the same day later in the day and that was the day P.W.4 earlier on, had to go to the Complainant's house because the Complainant could not go to the D.O.'s office himself on that day as he was injured and sick. But listening to the Complainant in his evidence, he still went to the D.O.'s office. Found the Appellant's there under arrest. Heard one of them admit he had the Complainant's cell phone, accompanied them to that Appellant's home, recovered the cell phone and returned to the D.O.'s office before the Appellants were taken to the Police. But who is the officer at the D.O.'s office who was doing all that with the Complainant? None is identified.

That was still the date on which the same Complainant also claimed was sick and unable to reach the D.O.'s office. Yet from the evidence of P. W. 2, on that same day P.W.2 was with the Complainant as P.W.2 recovered the Complainant's cell phone from the house of the First Appellant. P.W.2 was a Police Officer at Nyakianga Police Post, and not at the D.O.'s office. Looking at the evidence of P.W.2 further, he was a Police Constable, yet he could take admissions from the First Appellant and have the same admitted in the evidence during the trial.

At the same time P.W.4 would come up with the evidence that the Appellant had been in the bar together with the Complainant taking beer on the evening of the alleged robbery, yet the Complainant himself says nothing of that kind and his evidence on record reveals he had in fact taken so much beer that he could not even remember any of the people who had been with him in the bar. But that is the gentleman who claimed to have identified his attackers on his way home from the bar, the attack said to have taken place only five metres away from residential and occupied houses at a spot said to have been well lit by electric light from those houses inhabited by people who knew the Complainant who said he raised alarm as he was being attacked, yet no witness came from any of those houses to testify before the trial magistrate in this case that indeed such an incident took place at that place involving the Complainant. A man who would thereafter go straight to sleep and wake up the following day to begin looking for his cell phone, and may be, money at the bar from the owner of the bar and discover he has failed to find those items before beginning to claim he had been robbed and thereafter imagine the robbery spot as well as the would be robbers and proceed to name them for their subsequent arrests and prosecution, a returned cell phone from a friend or good Samaritan, being disguised as a recovered item of the alleged robbery. If the items had been robbed, why go on looking for them in various places instead

of going straight for the robbers claimed to have been known?

In the circumstances we entertain the feeling that the defence of the Appellants could be true and that therefore the Prosecution did not succeed in proving this case against any of the two Appellants beyond reasonable doubt. The Appellants ought not to have been convicted.

Accordingly, we do hereby allow the appeal of each Appellant. Quash his conviction and set aside his sentence.

Each Appellant be set at liberty forthwith unless lawfully detained in some other cause.

Dated this 31st day of October 2005.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE