



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI**

Criminal Appeal 73 of 2001

PETER IRUNGU MAINA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of M. G.

GITONGA, then Senior Resident Magistrate,

delivered on 1st March 2001, in the Chief Magistrate's Court at Nyeri, Criminal Case No. 78 of 2001).

JUDGMENT

The Appellant and another person were jointly charged with the offence of robbery with violence contrary to Section 296(2) of the penal Code on two counts. In the 1st Count particulars were that on the 4th day of January 2001 at Kabiruini Forest in Nyeri the accused persons jointly with another not before court, robbed Peris Wanja Gakinya of cash Ksh.335/=, three packets of unga Ngano, one Kilogram sugar and a purse containing personal documents all valued Ksh.635/= and that in the process they wounded the said Peris Wanja.

In count two particulars were that on 8th January 2001 at Kabiruini Forest in Nyeri the accused persons jointly with another not before court, robbed Beatrice Nyokabi Ndirangu of cash Ksh.750/=, a sweater, a wrist watch all valued at Ksh.6,750/= and that in the process wounded Beatrice Nyokabi Ndirangu. Evidence was adduced that Peris Wanja (First Complainant P.W.1) was walking home through Kabiruini Forest after 2.30 p.m. when three people accosted her, two of them armed with knives. They robbed her of the items mentioned above as one of them held her and they all ran away disappearing into the forest having passed through a caravat. The First Complainant was not able to recognize them. The robbery had taken place on the 4th January 2001.

On 10th January 2001, the First Complainant heard some people had been arrested for robbing another lady at the same place. The First Complainant went and recorded her statement and was subsequently taken to an identification parade where she could not identify the robbers. She told the court her identity card and bank card were collected by some boys who took them to her and concluded that the knife which she saw in the court was not the one she had been threatened with.

The First Complainant, Peris Wanja Gakinya, did not mention the name of the other lady she said had been robbed. But from subsequent prosecution evidence, it is apparent that lady was Beatrice Nyokabi Ndirangu who gave evidence as P.W.2 and told the court on 8th January 2001 at about 6.30 p.m. she was coming from Nyeri town going home when some men accosted her near Kabiruini show ground

post and robbed a wrist watch, her sweater and Ksh.750/=. They then escaped into the forest. She went and reported to a Police Station she did not name.

P.W.2 went on to say that on 10th January 2001 she was at Nyariba Shopping Centre when she saw three people coming towards the center and she identified them as the ones who had attacked her. She therefore followed them and when they were near P.W.2's house, which was near the road, P.W.2 called her brother who accompanied her to follow those people up to Mweiga/Nanyuki road. When those people were sitting somewhere at that junction, P.W.2 and her brother rushed to a nearby road-block where the Police were and enlisted the assistance of the Police who were there and went with one of them and arrested the three men. They were the First and Second Accused persons in the court and a third person who was not in the court. The two accused persons were each found with a knife while the third person had been found with a compass (mathematical compass). The items were in the court during the hearing.

The Appellant in this appeal was the First Accused before the trial magistrate.

The Second Complainant (P.W.2) continued to tell the court that the robbery upon her had been done during the day and that she was able to identify the accused persons. She added:

“1st accused held the big knife and the 2nd accused was not present. It was the 3rd person not before court who was present.”

During cross-examination by the Appellant, P.W.2 said that she had not known him before but added she was able to see him and identify him and that he had the same clothes he was wearing when she saw him the second time.

P.W.3: Simon Maina Ndirangu was the Second Complainant's brother who was called by the Second Complainant from their home and as a result they caused the accused persons in this case to be arrested. He said the Appellant was searched and found with a knife.

P.W.4 Police Constable Joseph Tongi was the Police Officer at Nyeri/Kiganjo/Nanyuki road-block who accompanied P.W.2 and P.W.3 to the place where the Appellant and two other persons were and arrested the Appellant and his colleagues. P.W.4 said the Appellant had a knife. Like P.W. 3 this witness also said the Second Accused had a Geometrical Compass while the third person had a knife. P.W.4 subsequently learned that P.W.1 was a Complainant in another robbery incident which had taken place on 4th January 2001.

During the cross-examination of this witness by the Second Accused, it would appear that either the trial magistrate changed her name from M. G. Gitonga to M. G. Rintari or another magistrate by the name M. G. Rintari took over further hearing of the case without clearly indicating the change or it was a typing error which is reflected up to the end of hearing at the close of the defence case. We have examined the typed record together with the original hand-written record and it would appear that somehow the typist started writing the name M. G. Rintari instead of writing the name M. G. Gitonga for no apparent reason. Otherwise the hand-writing and the signatures are the same as the hand-writing and signatures seen in relation to the earlier part of the record which are clearly by M. G. Gitonga, then “S.R.M.” and that is the trial magistrate who wrote the judgment and passed the sentence in question before us. We think what happened in changing the name of the trial magistrate was a clerical error by the typist who worked on the proceedings.

Having made that observation, we go back to the evidence in the trial. P.W.4 was the last prosecution witness before the accused persons were put on their defence. Both gave unsworn statements, the Appellant stating that he was from Nyeri Gitamere and worked at a quarry at Kiganjo. He said that on 10th January 2001 he left his work and was at bus stage to get a matatu to go home when some people in company of a police officer went to the stage and arrested people who were there. Some people ran and escaped the arrest while the Appellant was one of those who were arrested and taken to the Police Station where he stayed for four days and was charged with the offence in this case. He said he did not know his

co-accused. When he was searched, he was found with Ksh.30/= only and a matchbox.

In her judgment, the learned trial magistrate said she was satisfied the Second Complainant (P.W.2) was sure that the Appellant is the one who robbed her. That is why she tracked him down and ensured he was arrested. The learned magistrate argued that the robbery had taken place at 6.30 p.m. and the Second Complainant saw her assailants and was able to say the clothes the assailants were wearing were the clothes they were arrested with. She held that there was sufficient evidence to convict the Appellant on the second count and convicted him.

On the first count, the learned magistrate did not find sufficient evidence the First Complainant having failed to identify the Appellant. She acquitted the Appellant on count one.

The learned State Counsel, M/S Ngalyuka, supporting the conviction and sentence said the robbery took place during the day. Appellant was seen. Evidence was reliable and sufficient.

We note that during cross-examination the Second Complainant told the court that she did not know the Appellant before the incident. It was during the cross-examination that she claimed that when arrested the Appellant was wearing same clothes as those he had during the robbery and that may be because the Second Complainant found that answer easy to give at that stage. Otherwise she had not said it in her evidence in chief where her only evidence touching on identification was

“-----some men came, I walked past them. One held my right hand and the other one held my watch. The other held a knife and took my sweater and 750/=. They ran into the forest. I went and reported at the Police station.”

There is no dispute that this was a case of a single identifying witness. The time was 6.30 p.m. and it is common knowledge that sometimes in the course of the year 6.30 p.m. arrives during darkness. It was therefore necessary for the witness to have told the court how bright it was at 6.30 p.m. when she was being attacked. She ought also to have told the court the number of men who came when she walked past them. How long she was with her assailants particularly the Appellant, looking at them, if at all she looked at them as she does not reveal that to the court. Seeing three men three days later and claiming they were the ones who had robbed her on 8th January 2001 may have been as a result of a mistaken identity; particularly if it is realized that this is a witness who, in the first instance, caused three men to be arrested claiming all of them had robbed her on 8th January 2001. After one of them had escaped, she caused the two remaining to be charged and it was not until the trial when she was giving evidence that she claimed that among the two accused persons, the Appellant was the only person who had participated in the robbery upon her.

While in her evidence the Second Complainant said the two accused persons were each found with a knife at the time of their arrest, her brother, P.W.3, and the arresting Police Officer, P.W.4, told the court that the second accused had geometrical compass. That is a notable inconsistency calling for caution with respect to the evidence of P.W. 2.

If it was a matter of having been robbed during the day, the First Complainant was robbed much much earlier in the day, about 2.30 p.m., at the time when the question of darkness could not arise; yet she could not identify any of her assailants. That being so, identification at 6.30 p.m. when darkness could have been around may not be taken to have necessarily been better than that by P.W.1.

From what we are saying therefore, we hold the view that it was unsafe for the learned trial magistrate to have relied upon the evidence of a single identifying witness, in the circumstances of this case, to convict the Appellant.

That being the position, we do allow the Appellant's appeal. Quash his conviction and set aside the sentence imposed upon him. We order the Appellant to be set at liberty forthwith unless lawfully detained in some other cause.

Dated this 15th day of December 2005.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE