



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL 364 OF 2002

JOHN NGACHA GITHINJI APPELLANT

VERSUS

REPUBLIC RESPONDENT

Criminal Appeal 365 of 2002

TIMOTHY WACHIRA KIAMBO APPELLANT

VERSUS

REPUBLIC RESPONDENT

Criminal Appeal 366 of 2002

SIMON MUGO KIRAGU APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

(Consolidated) John Ngacha Githinji (hereinafter referred to as the 1st appellant) is the appellant in High Court Criminal Appeal No. 364 of 2002, whilst Timothy Wachira Kiambo (hereinafter referred to as the 2nd appellant) is the appellant in High Court Criminal Appeal No. 365 of 2002, and Simon Mugo Kiragu (hereinafter referred to as the 3rd appellant) is the appellant in High Court Criminal Appeal No. 366 of 2002. The three were tried and convicted by the Senior Resident Magistrate Nyeri for the offence of Robbery with violence contrary to section 296(2) of the Penal Code. They were each sentenced to the mandatory death sentence. Being dissatisfied they have now each appealed, which appeals have been consolidated for purposes of hearing. During the trial in the lower court, the 1st Appellant was the 3rd Accused, 2nd appellant was 2nd Accused, and 3rd Appellant the 1st Accused.

The particulars of the charge of which the appellants were convicted stated that on the 19th October 2001 at Burgulet village in Nyeri District of Central Province, jointly with others not before the court while armed with dangerous weapons namely pangas and stones robbed Onyengo Motanya Ogwenyi a pair of shoes, two jeans trouser and cash Kshs.1,400/= all valued at Kshs.2,200/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Onyengo Motanya Ogwenyi.

A total of 7 witnesses testified for the prosecution. Briefly their evidence was as follows:

On the 19th October 2001, the Complainant Onyiego Motanya Ogwenyi received some money from someone who owed him. The 1st Appellant was present and saw complainant being given the money. The complainant went into a bar and drunk upto 9.00 p.m. after which he bought meat and went home. Shortly thereafter the three appellants accosted him demanding the money he had. The complainant resisted. He was then pulled out of the house where he was beaten, kicked and hit with stones. His trousers, pair of shoes and Kshs.1,400/= were stolen in the process. Peter Mwangi Mundia (P.W.4) who is a neighbour had woken up in the night to check on his animals. He came across the complainant being beaten by the three appellants and three others. He noted that none of the assailants was armed. He also noted that earlier in the night he had chased away the 3rd & 2nd appellant from the bar where he works after the 3rd & 2nd appellant started creating a disturbance demanding to be bought a drink by the complainant.

Mwai Wanjohi (P.W.3) who is also a neighbour of the complainant heard the commotion and recognized the voice of the 3rd appellant telling one Wanjambi "to stop beating the man." P.W.3 however never went out of his house and therefore never physically saw the persons. The next morning Judith Karuerwa Nkaru (P.W.2) received information from one Anne Njoki acting on which she went to the house of the complainant. She found him injured and noted that the house was in disarray. She contacted the village elder. David Munga Mungata (P.W.5) a village elder received a report of the assault and also visited the house of the complainant and found the same situation as noted by P.W.2. He reported the matter to the police giving the names of the appellants and 3 others as the suspected culprits.

P.C. James Wathanga (P.W.6) an officer attached to Naru Moru police station received the report of the assault and proceeded to the house of the complainant. He found him lying unconscious with a swelling on the head. He noted stones at the scene and things scattered all over in the house. He took the complainant to hospital. He later went back to the scene and re-arrested 3rd and 2nd appellant who had been apprehended by members of the public. He also arrested the 1st appellant who was also identified to him. He produced in evidence the stones recovered from the scene. Michael Ocholla (P.W.7) a clinical officer attached to PGH Nyeri examined the complainant and found deep cuts on the right parietal and occipital of the head and left parietal region. He formed the opinion that the injuries were inflicted by a sharp object. Each of the appellants gave a statement in his defence denying having robbed or assaulted the complainant. The statements were fairly detailed but we do not find it necessary to go into the details.

It is common ground that the complainant and the appellants knew each other well and were in fact neighbours. In their defences each of the appellants testified to having heard about the complainant having been assaulted and being taken to hospital. They however denied having been involved. The question therefore was whether the appellants assaulted and robbed the complainant.

Apart from the complainant who identified the 3 Appellants as having been amongst the persons who beat him up and robbed him, P.W.4 testified that he actually came across the 3 Accused persons and 3 others beating up the complainant. This was consistent with the evidence of P.W.3 who heard the voice of 3rd appellant asking Wanjambi to stop beating the man.

The evidence of P.W.3 and P.W.4 actually confirm that the appellants did beat up the complainant. There is however only the evidence of the complainant relating to the alleged robbery. It is noteworthy that the appellants were initially charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. The offence of Robbery with violence was only substituted after the complainant had given his evidence in chief. This raises a question as to whether the complainant had included in his statement to the police the allegations of robbery and if so why the appellants were not charged with this offence in the first instance.

Further although the particulars of the charge stated that the appellants were armed with pangas and stones, P.W.4 who saw the appellants beating the complainant testified that none of the assailants were armed. The complainant on his part never mentioned the presence of any pangas. Moreover it is unlikely that the appellants who were not only well known to the complainant but also his neighbour would have violently robbed the complainant without concealing their identity and still remain within the vicinity. It appears that there was an element of exaggeration. We find that the evidence adduced before the trial magistrate supported the offence of assault causing actual bodily harm and not Robbery with violence.

We therefore allow this appeal to the extent of setting aside the conviction and sentence in respect of each appellant for the offence of Robbery with violence and substituting thereof a conviction for the offence of assault causing actual bodily harm. The appellants having already served about 3½ years imprisonment they are hereby each sentenced to the period already served.

Each appellant shall therefore be forthwith released unless otherwise lawfully held.

Dated this 6th day of December 2005.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE