



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 20 & 21 of 2000

PAUL MAINA MWANGI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

CRIMINAL APPEAL NO. 21 OF 2000

MOSES KIRINYA APETET.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being appeals from the judgment of S. M. Kibunja, Senior Resident Magistrate, dated 27th January 2000 in the Senior Resident Magistrate's Court at Nanyuki, in Criminal Case No. 1552 of 1999)

JUDGMENT

These two appeals were consolidated for hearing as they both came from Criminal Case No. 1552 of 1999 in the Senior Resident Magistrate's Court Nanyuki. In this judgment we shall be referring to Paul Maina Mwangi as the First Appellant and Moses Kirinya Apetet as the Second Appellant. They were, respectively, the First Accused and the Second Accused in the lower court – where they faced two counts.

In the first count, they were jointly charged with robbery with violence contrary to *Section 296(2)* of the Penal Code particulars alleging that on the 12th day of September 1999 at Nanyuki Township of Laikipia District in Rift Valley Province, the two appellants jointly with others not before court and while armed with offensive weapons, namely, rúngus and knives robbed John Peter Mugambi of cash Sh.2,000/= using violence in which they wounded the said John Peter Mugambi.

In the second count the two appellants were charged with malicious damage to property contrary to *Section 339(1)* of the Penal Code, particulars alleging that on the 12th day of September, 1999 at Nanyuki Township of Laikipia District within the Rift valley they, jointly with others not before the court, willfully and unlawfully destroyed one Thermos flask valued Ksh.500/= the property of John Peter Mugambi.

From the evidence on record, the two offences were committed at night about 8.15 p.m. The

Complainant, John Peter Mugambi, who gave evidence as P.W.1, told the court that he was walking home on the 12th September 1999 at about 8.15 p.m. when he found four people waiting for him at Kenya National Assurance Estate hiding along the fence of Nanyuki Primary School. They ordered him to stop and as he stopped, he suddenly felt he had been stabbed on the left front of his head as the attackers went on beating him and took from him Ksh.2000/=. The thermos flask he was carrying was cut when he used it to block a knife thrust at him. He raised alarm and members of the public responded prompting the robbers to run away before they robbed the Ksh.15,000/= the Complainant had in another pocket of his coat. Members of the public included a watchman of the Estate who held the First Appellant as the First Appellant was trying to escape about four metres away from the Complainant but on his arrest the First Appellant denied being involved in the robbery claiming it was those others who had escaped that had been in the robbery.

The Complainant claimed he was able to see and recognize the Appellants at the scene relying on light, which came from the Primary School direction; though he said that light was not bright. He claimed each appellant was armed with a knife adding that the Second Appellant is the one who cut the thermos flask while aiming to stab the Complainant.

The Complainant said that when they took the First Appellant to the Police Station, the First Appellant mentioned the Second Appellant and the Second Appellant was subsequently arrested at a river where he was found and the watchman and the Complainant pointed the Second Appellant out to the two Police Officers who were with the Complainant and the watchman at Ukumbusho Car Wash at the river.

The Complainant said that the First Appellant who was trying to run away, was arrested when he was forced to stop as the watchman threatened to shoot him with an arrow. He claimed that when he was stopped, the First Appellant was the one who approached him first and stabbed him. He explained that the First Appellant was taken to Kenol after the First Appellant was arrested and that that was because it was at Kenol where there was bright electricity light. When arrested, the First Appellant was not found in possession of the knife the Complainant had seen during the attack.

The Complainant told the court he was stabbed on the forehead and was treated before his P3 form was filled by a doctor. He said it was the watchman who arrived at the scene of the robbery first. He said the First Appellant claimed he worked at a hotel called Eden Park Hotel but when they took the First Appellant there, they were told the first Appellant did not work there. He did not accept the First Appellant's claim that the Complainant – came running, passed the First Appellant and started raising alarm while running to Kenol where the Complainant stopped and the First Appellant found him there with others and that it was at that spot that the Complainant told those he was with at Kenol that the First Appellant was a suspect.

During cross-examination, the Complainant claimed that apart from light from Nanyuki Primary School, there was also moonlight and went on to say he could see clearly. He claimed the First Appellant had shouted in Kiswahili "Malizia" as the robbers attacked the Complainant.

Cross-examined by the Second Appellant, the Complainant told the court that he used to see the Second Appellant passing "at the stage" and that therefore he was able to recognize the Second Appellant's face at the robbery. He claimed it was the Second Appellant's knife which cut the thermos flask before the Second Appellant escaped. He claimed he described the Second Appellant to the Police and the watchman and pointed out the Second Appellant to the Police who arrested the Second Appellant. He said the watchman told him he also knew the Second Appellant. He did not accept the Second Appellant's claim that the Complainant was not present when the Second Appellant was arrested.

But further the Complainant said he had been left on the vehicle when the Police went to arrest the Second Appellant. The Complainant claimed he was the one who led the Police to the arrest of the Second Appellant, after which he parted with them as the Police were to pass through other places. They later found him at the Police Station.

P. W. 2 Edward Leishera Mkuthuria seems to be the watchman the Complainant was referring to in

his evidence without mentioning the name of the watchman whom the Complainant said worked for the Kenya National Assurance Estate. Yet P.W.2 told the court that he was a watchman at Kenol Petrol Station and that while on duty, at 8.00 p.m. he left to go and buy some miraa behind Nanyuki Primary School. On his way he found four people, two seated and two standing. Having bought miraa he was on his way back to his place of work when he heard an alarm and thinking it was coming from his Kenol Petrol Station, he ran fast. He said:

“At a distance I saw four people beating one somebody on the ground. I directed the torch at them and then three who had swords rose and came running towards me. I gave way and they passed. As the fourth one rose and came as if to run I threatened to shoot him and he stopped and raised his hands up. Other watchmen came and we took that person where the victim was. We found him bleeding on the face and he told me he had been attacked, robbed and injured. He told us Sh.2,000/= had been stolen. The victim P.W.1 told us the person we had held was among the attackers. That person who is 1st accused denied saying he had also been attacked and that he works at Eden Rock Hotel.”

P.W. 2 continued to say that they went to the hotel and the employees they found at the hotel told them that the First Appellant was not one of the employees at that hotel. The watchmen then telephoned the Police to whom they handed the First Appellant.

P.W.2 added that the scene had electricity light from Nanyuki Primary School and that there was also moonlight. He said that the four people he had seen when going to buy miraa were the same people he later found robbing P.W.1 at the scene where he also found a thermos flask P.W.1 told him had been cut when P.W.1 was using it “to block a thrust.”

This witness went on to say that it was on 14th September 1999 when he led Police to where the Second Appellant was arrested. He added that he did not know the Appellants before but claimed to have seen them well to recognize them.

During cross-examination, by the First Appellant, P.W.2 told the court that the First Appellant had been left behind as three other robbers escaped. When the First Appellant tried to run away, P.W.2 flashed torch light in the First Appellant’s eyes and threatened to shoot the First Appellant with an arrow if he ran and P.W.2 held the First Appellant as the First Appellant raised up his hands. By then the Complainant had run away. P.W.2 thereafter blew his whistle as he led the First Appellant upwards. They searched the First Appellant and found nothing with him except Sh.50/=.

We note that during his evidence in chief this witness talked as if he met the Complainant, the victim, at the scene of the robbery and talked to him while there, but during cross examination by the First Appellant, the witness told the court that the Complainant had run away when the witness went with the First Appellant to where the robbery had taken place. He also said:

“I was the first person to reach the scene well though there may have been other people wearier than me possibly because I was already walking towards that direction.”

During cross-examination by the Second Appellant, P.W.2 claimed to have seen the Second Appellant as early as 7.00 p.m pass by Kenol Petrol Station where the witness was working and had borrowed a cigarette from the witness despite the fact that the Second Appellant had called the witness a fool because the witness was guarding properties of other people instead of selling them to help himself.

Without having said in his evidence in chief that the Second Appellant was one of the four people he (P.W.2) saw behind Nanyuki Primary School when the witness was going to buy miraa and without remembering that he had told the court at the close of his evidence in chief that he did not know both appellants before the robbery, during cross examination by the Second Appellant, P.W.2 talked as a witness who had known the Second Appellant prior to the robbery and had recognized him among the four people he saw when going to buy miraa and the three people he met running and carrying swords when he was coming from buying miraa. P.W.1 does not seem to have seen the swords P.W.2 came to

talk about as P.W.1 talked of knives only. P.W.2 told the court he knew the Second Appellant as a samosa seller during the day and accompanied the Police and P.W.1 to where the Second Appellant was arrested.

P.W.3 was Richard Ateiya who told the court was a Clinical Officer working at Nanyuki District Hospital where he was on 12th September 1999 when he treated the Complainant at about 10.00 p.m. of a fresh injury about 1½ hours old inflicted by a sharp object just above the left eye brow. The degree of injury was harm and he filled the P3 (exh. 2) on 28th October 1999.

The evidence of Police Constable David Kosgei who was P.W.4 introduced further inconsistencies in the Prosecution's case in that instead of telling the court, as P.W.2 had done, that the Police received a telephone call from P.W.2 reporting the robbery and therefore the Police, including P.W.4, responding to that telephone call, went and re-arrested the First Appellant, Constable Kosgei told the court that on 12th September 1999 at 8,00p.m., he was coming from the town going to his Police Station when he heard a person raising alarm. He went on to say:

“I headed there and P.W.1 and another struggling with another who wanted to escape. I went and assisted in holding that person and learnt he had been with another when attacking P.W.1. I handcuffed him and took him to Police Station after learning he and the one who had escaped had robbed P.W.1 of cash and cut him. P.W.1 also showed me a thermos he had which had broken as he blocked a strike from the robbers. This is the broken thermos MF1(1) and produce it as exhibit 1. The person I assisted in holding and arresting is the 1st Accused in the dock. I had found P.W.1, 1st accused and that other whom I learnt to be the watchman and testified as P.W.2 near Esso Petrol Station “(now not Kenol).” -----P.W.2 also told me if he saw the person who escaped he could identify him. Later he did see him and informed P.W.1 who called Police Officers who accompanied them and arrested the second accused who is 2nd accused in the dock. I did not know accuseds before.”

During cross-examination, by the First Appellant, Constable Kosgei's reply suggested he found the First Appellant struggling with P.W.2 only.

P.W.5 was Police Constable Munyi who was on duty at Nanyuki Police Station on Crime stand by during the material night and therefore received the First Appellant from Constable Kosgei who was not on duty that night. He said the Complainant had accompanied Constable Kosgei. On 4th September 1999, the Complainant and P.W.2 led P.W.5 to the arrest of the Second Appellant.

Another notable inconsistency in the Prosecution's case is that throughout his evidence in chief, Constable Munyi talked as if the robbers were only two, namely the two appellants. But when cross-examined by the Second Appellant, the First Appellant having elected not to cross-examine, Constable Munyi talked of the other three robbers apart from the First Appellant.

Those were the only Prosecution witnesses. The First Appellant in his defence told the court that he had been newly employed at Eden Park Hotel. On 12th September 1999 he worked at that hotel until 7.30 p.m. and thereafter he was walking towards his residence when he met three people who stopped him and questioned him. When he showed them his identity card and they saw he came from Nyahururu, they told him to sit down. He told those people where he worked and although they went to the place and the worker they found there told them the truth that he had worked at Eden Park Hotel for three days, the Police said he was to be taken to the Police Station because people did not know him. He had even shown the Police his bus ticket from Nyahururu dated 10th September 1999. The First Appellant denied having committed the offence arguing that his arrest was out of mistaken identity.

The Second Appellant told the court he worked at the Car Wash in Nanyuki Town. On 14th September 1999 he was at the site working when at 11.30 a.m. the Police went and arrested him and took him to the Police Station, where he was subsequently charged with this offence although he denied having committed the offence.

That is the evidence before the trial magistrate who went ahead to convict the two appellants on count one and sentenced each to death. Both appellants were acquitted on count two.

We have carefully considered that evidence in the light of submissions made before us during the hearing of these appeals. The learned Provincial State Counsel, Mr. Orinda, conceded the appeal of the Second Appellant on the ground that the conviction of the Second Appellant was unsafe because P.W.1 contradicted himself with regard to the arrest of the second Appellant, first claiming that it was the First Appellant who gave the name of the Second Appellant to the Police and, during cross-examination, saying that he gave the name of the Second Appellant to the Police. We hold the view that Mr. Orinda rightly conceded that appeal but respectively feel he ought to have conceded both appeals because the position is not better with respect to the First Appellant. Contradictions and inconsistencies are common in the Prosecution's evidence making it difficult to believe that evidence and rely on it to enter a conviction. This is because contradictions, and inconsistencies, are found throughout the Prosecution's case in the evidence of P.W.1, P.W.2, P.W.4 and P.W.5 whether taken together or separately. We have highlighted some of them.

Apart from the aforesaid contradictions and inconsistencies, there is the fact that although the First Appellant is alleged to have been arrested red handed on the spot, at the scene of the crime, Sh.50/= was the only thing recovered from him; yet according to the evidence of P.W.1 and P.W.2, the First Appellant is alleged to have played a leading role and ought to have been found with a knife and the Sh.2000/= robbed from P.W.1, if we go by the evidence of P.W.1, or ought to have been found with a sword and the Sh.2000/= robbed from P.W.1, if we go by the evidence of P.W. 2. The fact that he was found with neither of those items suggests that his defence may be the truth and that creates doubt in the Prosecution's case.

From the foregoing, we hold the view that the conviction of each appellant in the trial before the learned Senior Resident Magistrate was unsafe.

Accordingly, we do hereby allow each appeal. Quash the conviction of each appellant and set aside the sentence imposed upon each appellant.

Each appellant be released forthwith unless lawfully detained in some other cause.

Dated this 6st day of December 2005.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE