REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NOS. 204 & 205 BOTH OF 2002

JOEL KABARI KIMANI ……..1ST APPELLANT

JOHN NDUNG'U MUTURI…….2ND APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGEMENT

The Appellant had been charged for the offence of Robbery with violence, contrary to section 296 (2) of the Penal Code.

The facts of the prosecution case as stated in the charge sheet are as follows:

> ***"On the 13 th December, 1998 at Dana General Merchants, Nakuru Township within Nakuru District of the Rift Valley Province, the Accused jointly and while armed with dangerous weapons namely Pistol, and sword s robbed DAVID KAHIGA GITHUI of Cash kshs.1,028,980/= and at or immediately before or immediately after the time of such robbery used personal violence to the said DAVID KAHIGA GITHUI."***

On completion of the trial, the Learned Magistrate Viz. Mr. Harun Bomet, Principal Magistrate, Nakuru found both Appellants "Guilty" and Convicted them.

Consequently, he sentenced both Appellants to suffer death as provided by the law. The Learned Magistrate "Acquitted" the Accused 3 for reasons that he has already indicated in his judgment.

Both Appellants have appealed against both the conviction and sentence. According to the 1st Appellant, the Learned Magistrate erred in law and fact. In addition, the 1st Appellant stated that the Magistrate erred by finding that he was present during the commission of the offence. He also took issue with the finding of the Learned Magistrate that he had been found with Exhibit 7, which is a yellow polythene paper bag.

The 1st Appellant further argued that though the case was based on: Identification, commission of the offence, his arrest from the scene and Exhibit 8 – which was his statement all the above never connected him to the offence. Besides the above, he argued that though the offence took place in broad daylight when there were many people the PW 1 and PW2 never got the opportunity to identify suspects.

Apart from the above, the 1st Appellant further argued that the PW1 and PW2 contradicted each other

when they gave their evidence. He further added that the witnesses were frightened and hence their identification could not be accurate.

The 1st Appellant also took issue with the finding that he was arrested after being followed from the scene. In his fourth ground of appeal, the 1st Appellant argued that the Learned Magistrate erred in law by admitting the www.kenyalawreports.or.ke 3 statement – Exhibit 8 which he claimed that he never gave voluntarily. The 1st Appellant complained that he had been assaulted by the Police and it was on that basis that the Court had ordered for him to be taken to Hospital for treatment.

Lastly, he concluded that the evidence on record had not confirmed his participation in the Robbery. He also lamented that the Court had failed to consider his Defence.

On the other hand, the 2nd Appellant complained that he had been arrested on 9th March, 1999 by police following a tip by an informer. The 2nd Appellant pointed out that PW1, PW2 and PW4 had contradicted themselves on the time that he had delivered the crate.

In Addition, to the above the 2nd Appellant deposed that the PW1, PW2 and PW4 also contradicted themselves on the amount of the time that the robbery took place.

Lastly, he pointed out the contradiction between the Parade officer and the PW8 on the source of the members of the identification parade.

On the other hand, the State though Mr. Mutuku, Senior State Counsel has supported the convictions terming them to be safe. According to Mr. Mutuku, the identification was positive and there ws no possibility of an error since the incident took place at around 4.00p.m.

Secondly, he also submitted that the robbery took about 5 to 10 minutes which gave the witnesses sufficient time to identify the Appellants. Besides the above, he also pointed out that the 2nd Appellant had earlier gone to the depot with an empty crate and was seen by the PW2 and PW4. In addition, he even asked for the price of beer and hence the PW2 and PW4 could not have made a mistake after seeing the 2nd Appellant twice.

Apart from the above, the Senior State Counsel recalled in details how the 1st Appellant was arrested immediately that he ran away from the scene. That apart, the clothes that he ws carrying and the gun were positively identified.

Lastly, the Learned Senior State Counsel submitted that the Appellants were armed with firearms that was capable of being fired and that they were more than one. Further to the above, the Appellants also used violence on the PW2. Since he was of the opinion that the ingredients had been proved beyond any reasonable doubt, he urged that the Court should dismiss the appeal.

We have carefully considered the evidence on record together with the detailed submissions. Having considered the judgment of the Learned Trial Magistrate carefully, we find that he had evaluated the evidence on record correctly and meticulously before reaching the proper decision. We do agree with him that both Appellants had been positively identified by the witnesses during the robbery. There was no doubt that the 1st Appellant had been arrested running away from the scene while carrying the home made gun – Exhibit 13.

In addition, to the above, we also concur with the Learned Magistrate that he was the person who **not** only assaulted the PW2 but also collected the cash box.

Given the fact that the overwhelming evidence has proved all the essential ingredients of Robbery with Violence, contrary to Section 296 (2) of the Penal Code. We hereby dismiss the appeal. The appeal has **no** merits at all.

We hereby uphold the convictions and confirm the Death Sentence as provided by the law.

Right of Appeal Explained

1. HON. JUSTICE MUGA APONDI

JUDGE

2. HON. JUSTICE LADY JESSIE LESIIT

JUDGE

19TH FEBRUARY, 2004