REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 65 OF 2003

DANIEL MWAI KABUI…….....…….APPELLANT

Versus

REPUBLIC……..……RESPONDENT

(Appeal against judgment by J. N. Nyaga, Senior Resident Magistrate, in the

Senior Resident Magistrate's Court at Karatina,

Criminal Case No. 619 of 2002)

JUDGMENT

The Appellant faced two counts each alleging robbery contrary to Section 296(1) of the Penal Code. In Count I it was alleged that the Appellant jointly with others not before court robbed Nahashon Githae Wamugunda of Ksh.1500/- a radio, a pair of shoes, a torch all to the total value of Ksh.3250/= using violence. That was on 24th April 2002 at about 3.00 a.m. at Itundu Village in Nyeri District.

In Count II it was alleged that on the same date at the same place about the same time, the Appellant robbed Eunice Keru Wamugunda Ksh.350/= using violence.

According to the evidence on record, the robbers were three and broke into the house of Nahashon Githae Wamgunda (P.W.1) who was in the house at about 3.00 a.m., with his wife Grace Nyaguthii Githae P.W.4 and robbed the items mentioned in relation to Count I. From that house, two of the robbers went and broke into the house of Eunice Keru Wamugunda (P.W.2) and robbed the items mentioned in relation to Count II. Thereafter all the three robbers disappeared with the items they had robbed.

P.W.1, P.W.2 and P.W.4 each claims to have identified the Appellant during the robbery. P.W.1 said he identified the Appellant when he flashed his torch on the chest of the Appellant before the torch was snatched by the robbers. He said that torchlight enabled him see the face of the Appellant. P.W.2 did not explain the light she used to see and identify the Appellant as she claims the robbers sat on her bed and stood up asking for money. P.W.4 said she identified the Appellant by means of a bright torchlight from the Appellant's torch. Each claimed to have identified the Appellant because he had been previously farming in the vicinity of the place where the robbery took place. But none seems to have known the Appellant by name. The period during which the Appellant had been farming is not specified. It is only P.W.1 who claims to have told the court that in his report to the Police, he told them that he had identified one person. But he did not mention the name of the person.

After that robbery on 24th April, 2002, the Appellant was arrested on 6th November 2002 by members of the public who alleged he had stolen a dog. As they were beating him, P.W.1, P.W.2 and P.W.4 went to the scene and started claiming he was among the robbers who had robbed them on 24th April 2002. As a result P.W.1 was assisted by members of the public to take the Appellant to the Police who subsequently charged the Appellant with this offence, tried, convicted and sentenced to three and a half years imprisonment plus six strokes of the cane.

Although the learned State Counsel, M/S Ngalyuka, said that she supported the conviction and sentence relying on the evidence of identification of the Appellant by P.W.1, P.W.2 and P.W.4, evidence relating to the arrest of the Appellant raises questions even without scrutinizing the evidence relating to identification at the robbery. The robbery took place in April, 2002. Arrest in November 2002. Witnesses

did not explain to the court why it had taken that long to arrest the Appellant if he had been farming like them in the area. Secondly, those who first arrested the Appellant are said to have arrested him in connection with theft of a dog. When therefore P.W.1, P.W.2 and P.W.4 saw him arrested and started to claim that he had been among the robbers who had robbed them in April 2002, that could simply have been because they had seen a suspected thief arrested and that evidence must be treated with caution especially in the circumstances of this case where evidence from the Police is so thin and from a junior police officer to whom no report of the robberies in question had been made. From his evidence he seemed to have been speaking from what he only thought had happened following the alleged robberies as he had no cogent evidence of the reports he claimed had been made. This was P.W.5 Police Constable Birika whose only useful evidence was that he received the Appellant from members of the Public who had arrested the Appellant. If truly a report of these robberies had been made to the Police, then the only Police evidence from P.W.5 suggests that the police never investigated this case and that was why no investigating officer gave evidence.

On the whole therefore I come to the conclusion that there was no sufficient evidence to sustain the conviction of the Appellant.

Accordingly, I do hereby allow the appeal of the Appellant, quash his conviction on each count and set aside the sentence on each count.

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

Dated this 14th day of December 2004.

J. M. KHAMONI

JUDGE