REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 343 OF 2001

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 344 OF 2001
(From original conviction and sentence in criminal case No. 332 of 2001 of the Chief Magistrate's Court at Nakuru –J. S. KABURU)

JESSE MWIGA MUNGAI…………..…………………………..1ST APPELLANT

STEPHEN MWAURA WANYOIKE…………………….……2ND APPELLANT

VERSUS

REPUBLIC……………………...…………………..…...……..RESPONDENT

JUDGMENT OF THE COURT

The Appellants, Jesse Mwiga Mungai and Stephen Mwaura Wanyoike were charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal code.** The particulars of the offence were that on the 3rd day of February 2001 at Industrial Area Estate, Njoro, Nakuru District, the Appellants jointly with others not before court being armed with dangerous weapons namely pangas and rungus robbed Godfrey Kinyanjui Maina of Kshs 460 and at or immediately before or immediately after the time of such robbery wounded the said Godfrey Kinyanjui Maina. The Appellants pleaded not guilty to the charge when they were arraigned before the trial magistrate's court. After full trial, the Appellants were found guilty as charged and duly convicted.

They were sentenced to death as mandatorily provided by the law. The Appellants were aggrieved by the said convictions and sentences and have appealed to this court.

At the hearing of the Appeal, the separate appeals filed by the Appellants were consolidated and heard as one. This Court will consequently deliver one judgment in respect of the two appeals filed by the Appellants. The Appellants presented, more or less similar grounds of Appeal in their Petitions of Appeal. They faulted the trial magistrate for convicting them based on the evidence of identification which was made in circumstances that were difficult; they further faulted the trial magistrate for failing to consider the fact that no first report was made to the Police in respect of the description or identification of the robbers by the Complainants; They were aggrieved that the trial magistrate considered the evidence of the identification parade which was conducted by the Police, when the said identification parade had not been conducted in accordance with the set rules; They were further aggrieved that the trial magistrate did not consider the totality of the evidence adduced and therefore convicted them on insufficient and uncorroborated evidence adduced by the prosecution and by further failing to consider the evidence put forward by the Appellants. Finally that the prosecution did not establish its case to the required standard

of beyond reasonable doubt.

At the hearing of the Appeals, the Appellants, who were unrepresented, with the leave of the court, presented their written submissions in support of their Appeal. They urged this court to allow the Appeal, quash the convictions and set aside the sentences imposed. On the other hand, Mr Koech, Learned State Counsel urged this court to dismiss the Appeals as the prosecution had proved its case beyond any reasonable doubt. We shall revert back to the arguments made by the parties to this appeals after briefly setting out the facts of this case.

On the 3rd of January 2001 at about 9.00 pm whilst the complainant, Godfrey Kinyanjui Maina (PW 1) was walking home from Njoro Shopping Centre, he was accosted by two people. He was held by the throat and tackled to the ground. The robbers went through his pockets. They robbed him of the piece of meat that he was carrying and Kshs. 460/=. The complainant while being held by the robbers, managed to raise alarm and called out to PW 2 who was a watchman near the place that he was being robbed. The complainant testified that PW 2 came and cut one of the assailants who was holding him with a panga on the head. At that moment one of the robbers cut the complainant on the head. The complainant fell down. He later woke up and went home. The complainant was not able to identify his assailants during the night of the attack.

The next day, the complainant went to the house of PW 2. He was shown a jacket which PW 2 told him was left behind by one of the robbers when PW 2 held on it in unsuccessful attempt to prevent the robber from escaping. The complainant went to the hospital and was treated and discharged. The complainant took the jacket to the police. The complainant later got information that there was a person who was keeping house nursing a head injury. The complainant went and reported the matter to the Police. The 1st Appellant, Jesse Mwiga Muigai, was arrested and taken to the Police. The complainant testified that the 1st Appellant admitted at the police station that the jacket which PW 2 had recovered during the robbery belonged to him. The complainant denied that he knew the Appellants before the robbery incident. He denied that there existed a grudge between him and the 1st Appellant over an alleged debt. The complainant reiterated that one of his assailants had been cut on the head with a panga by PW 2.

PW 2 Isaac M. Mbuthia testified that he worked as a watchman guarding a scrap yard in industrial area. It was his testimony that on the material night while on duty he heard the voice of the complainant calling his name. PW 2 went out and investigated. He had a torchlight. He could not see him. He called out the name of the complainant. He heard his choked reply. He flashed his torchlight. He saw the 2nd Appellant, Stephen Mwaura Wanyoike. He was standing whilst armed with a panga and a club.

PW 2 testified that he recognised the 2nd Appellant as he had known him prior to the material night. PW 2 asked the 2nd Appellant what he was doing. He saw the complainant being pressed on the ground by the 1st Appellant. He cut the 1st Appellant with a panga on his head and on his right hand. PW 2 testified that he was then hit with a club on his head by the 1st Appellant. The complainant managed to free himself. PW 2 raised alarm by calling for help. The Appellants ran away. As the 1st Appellant was running away, PW 2 testified that he held on his jacket. The 1st Appellant in a bid to escape left the jacket with PW 2. PW 2 testified that the jacket was blood stained. The following day, PW 2 reported the incident to the police. He took the jacket which he had recovered from the robber to the police. He also told the police that he had identified the 2nd Appellant. He identified the 2nd Appellant to the police by name. PW 2 testified that he did not know the 1st Appellant but was able to positively identify the 2nd Appellant as the 2nd Appellant was his neighbour at a place Ubingei. He testified that he had known the 2nd Appellant together with his brother called Simon for about five years. It was his further testimony that after the robbery the 2nd Appellant went into hiding when he learned that the people were looking for him.

PW 3 Police Constable Ndiringa testified that on the 31st of January 2001 the complainant, PW 1 made a report to the police that he had been attacked by three robbers and robbed of Kshs 460 and in the process he was cut by a panga on his head. He further testified that PW 2, the watchman who had rescued the complainant came to the police station with a blood stained jacket which was produced in evidence as

prosecution exhibit no. 1. Later PW 3 learned that there was a person who had been injured who was keeping house. On 9th of February 2001 the 1st Appellant was arrested. The 2nd Appellant was also arrested. He was interrogated and admitted that he was the owner of the blood stained jacket. The 1st Appellant had injuries on his head and right hand. He explained that he had been injured while with the 2nd Appellant at Industrial Area. The 1st Appellant did not give an explanation why he had not reported the assault to the police. PW 3 testified that he was detailed to investigate the case. PW 4 Patrick Ogeto a Clinical Officer then based at Njoro Health Centre testified that he saw PW 1 he examined him and found that PW 1 had a cut wound on the head. The probable weapon which was used was sharp. PW 4 filled the P3 form. He assessed the degree of injury to be harm. The P3 form was produced as an exhibit in the case.

When the Appellants were put on their defence, the 1st Appellant testified that on the 5th of February 2001 he was with two other men working. They were loading maize unto a lorry. They were paid for the work done. A quarrel ensued on how the money was to be divided. The 1st Appellant testified that in the ensuing quarrel, he was hit on the head with a piece of wood. He was injured. It was his testimony that he did not report to the Police due to the injury that he had suffered. After three days, he was arrested and charged with the offence. The 2nd Appellant, other than narrating the circumstances of his arrest, did not give any testimony touching the offence that he was charged with.

This is a first Appeal. In **Thomas Mwaluma Mwimwa versus Republic C.A Cr. Appeal No. 264 of 2003 (Mombasa) (unreported)** it was held by the Court of Appeal at page 4 that:

> ***"It has been stat ed from time to time that it is the duty of the first Appellate court to remember that an accused is entitled to demand of the court of first Appeal a decision on both questions of fact or law, and the court is required to weigh conflicting evidence and dr aw its own inferences and conclusions, but bearing in mind always that it has neither seen nor heard the witnesses and make due allowance for this - See Okeno versus R [1972] E.A. 32 at pg 34."***

The issue for determination in this case is whether the prosecution proved its case to the required standard against the Appellants for the offence which they were charged of robbery with violence contrary to Section 296(2) of the Penal Code. PW 1 the complainant in the case was attacked and robbed of Kshs 460/- together with piece of meat which he was carrying. PW 1 testified that when he was attacked he screamed and sought help from PW 2 who was a watchman in a nearby premises. PW 1 was cut on the head. He was treated and discharged. The degree of injury which he suffered was assessed by PW 4 as harm. PW 1 did not identify the persons who attacked and robbed him. On the other hand, PW 2 testified that when he responded to the cries of help by PW 1, he pointed the spotlight of his torch at the place when PW 1 was held on the ground. PW 2 testified that he was able to identify the 2nd Appellant. He asked the 2nd Appellant what he was doing. The 2nd Appellant was armed with a rungu and a panga. PW 2 saw PW 1 being pressed on the ground. He went to his assistance. He cut the person who was holding PW 2 on the ground with a panga. The person, who later turned out to PW 1, managed to overwhelm PW 2 after hitting him with a club on the head. The Appellants then ran away. In the process of getting away from the scene of the robbery, PW 2 held onto the jacket which was worn by the 1st Appellant. The 1st Appellant, in a bid to make good his escape left the jacket with PW 2. The following day, PW 1 and PW 2 reported the incident with the police. PW 2 surrendered the jacket which was blood stained to the police. A few days later PW 1 was informed by the members of the public that there was a person who was keeping house nursing injuries which he had sustained. He informed the Police. The 1st Appellant was arrested and charged. At the Police station, the 1st Appellant identified the bloodstained jacket as belonging to him. Meanwhile, on the report made by PW 2 identifying the 2nd Appellant, the 2nd Appellant was looked for and arrested. He was charged together with the 1st Appellant for the offence of robbery with violence. On our re-evaluation of the evidence adduced by the prosecution and also the evidence adduced by the Appellants, it is our finding that the evidence that the prosecution relied on to prosecute the 1st Appellant was that of circumstantial evidence. PW 1 and PW 2 did not positively identify the 1st Appellant at the scene of the crime. It was 9.00 p.m. It was at night. PW 2 testified that he used the light from his torch to enable him see PW 1 being pressed on the ground by his assailants. The evidence that connects the 1st Appellant to the robbery is that of PW 2 who testified that in the ensuing

struggle, he managed to get hold of the jacket which the 1st Appellant was wearing. The jacket was blood stained. PW 2 took it to the Police. PW 1 testified that he got information that the 1st Appellant was keeping house even though he had sustained injuries.

The 1st Appellant did not seek medical help neither did he report the incident that he alleged he was hit on the head with a piece of wood to the Police. When the 1st Appellant was arrested, he confirmed to PW 3, the Police officer, that the blood stained jacket belonged to him. To sustain a conviction on circumstantial evidence, it was held by the Court of Appeal in James Mwangi –versus- Republic [1983] KLR 327 at page 331 that:

> ***"In a case depended on circumstantial evidence inorder to justify the inference of guilt the incriminating facts must be incomparable with innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt (<u>Sarkar on Evidence –</u> 10th Edition Pg 31) it was also necessary before drawing the inferen ce of the accused's guilt from circumstantial evidence to be sure that there is no other co - existing circumstances which would weaken or destroy the inference – <u>Teper – versus - The queen [1952] AC 480 at page</u> 489."***

In the present case, the 1st Appellant's jacket which was bloodstained, was recovered from the scene of the robbery. PW 2 testified that he got hold of the jacket as the 1st Appellant was making his bid to escape after being injured by PW 2. PW 2 identified the blood stained jacket as his when he was interrogated by PW 3. After the incident, the 1st Appellant kept house. Although he was injured, he did not seek medical attention. In his defence he testified that he was hit with a piece of wood on his head. The 1st Appellant did not explain how he sustained the injury on his hand. PW 2 testified that he cut the person who was pressing PW 1 on the ground on the head with a panga. The injuries that the 1st Appellant had when he was seen by PW 3 was consistent with the injuries that PW 2 stated that he inflicted on the assailant of PW 1.

PW 2's behaviour after the incident was not consistent with a behaviour of an innocent person. He did not seek medical attention. He did not report the alleged incident when he was assaulted and hit on the head to the Police. He kept house. No explanation was forthcoming from him why his jacket, which was bloodstained, was found at the scene of the robbery. We are aware that it is the duty of the Prosecution to prove its case without reference to the evidence of the Defence. In the instant case, once evidence was adduced that an identifiable piece of clothing belonging to the 1st Appellant was recovered at the scene of the robbery, it was incumbent upon the 1st Appellant, at least, to give an explanation to controvert the prosecution's evidence. Taken in totality, the circumstantial evidence adduced against the 1st Appellant pointed to no other reasonable hypothesis than that of the guilt of the 1st Appellant. The 1st Appellant's conduct was inconsistent with that of an innocent person. Having considered the submissions made by the 1st Appellant and the State, and also having considered the evidence in totality that was adduced in the criminal case facing the 1st Appellant, it is our finding that the Prosecution proved its case for the offence of robbery with violence against the 1st Appellant. The ingredients for the offence of robbery with violence was proved. The 1st Appellant, in company of another, while armed with dangerous weapons, namely a panga and a rungu robbed the complainant in this case in the process injured him. We find no merit in the Appeal filed by the 1st Appellant. We dismiss the same.

As regards the 2nd Appellant, the evidence which connected him to the robbery was evidence of PW 2. PW 2 testified that upon pointing the torchlight at the scene where he had heard his name being called by PW 1, he saw the 2nd Appellant. The 2nd Appellant was armed with a panga and a rungu. PW 2 identified him. PW 2 identification of the 2nd Appellant was that of recognition. PW 2 knew the 2nd Appellant as his neighbour at Ubingei. PW 2 testified that he had known the 2nd Appellant for about five years prior to the robbery incident. He even knew the 2nd Appellant's brother called Simon. When PW 2 saw the 2nd Appellant, he asked him what he was doing. In his evidence in chief PW 2 testified that:

> ***"I flashed my torch and saw one Mwaura still standing with a club and a panga. I knew him before and I recognised him. I asked him what he was doing because I could see (the) other person pressing Kinyanjui on the ground."***

To our mind PW 2's evidence is such that there was no doubt that he had recognised PW 2. We are aware of the injunction that this Court should warn itself of the dangers of convicting and accused person based on the evidence of a single identifying witness especially when the said identification was made in circumstances that can be described as difficult. **(See Maitanyi –versus- Republic [1986] K.L.R. 198 and Roria –versus- Republic [1967] E.A. 583).** In this case we have duly warned ourselves as required by the law.

It is our finding that the evidence of PW 2 of the 2nd Appellant is such that there cannot be any doubt that he recognised him during the robbery incident. PW 2 was certain of the 2nd Appellant's identity that he identified the 2nd Appellant by name when he made the report to the police on the following day. We agree with the finding of the trial magistrate that PW 2 had ample time and opportunity to identify the 2nd Appellant. The 2nd Appellant's conduct after the robbery incident is also a pointer to his guilt. When the 2nd Appellant knew that he was been looked for by the police in connection with the robbery he went into hiding. As was held in the case of **Malowa versus Republic [1980] KLR 110** when an accused person disappears after an offence has been committed, the fact of his disappearance can lead the court to make an inference that the accused disappeared to escape being arrested for committing the said offence. In the circumstances of this case, and after considering the submissions made by the

Appellant and the State Counsel, we find no merit in the Appeal filed by the Appellant. We consequently dismiss it.

In the upshot, the Appeals filed by the Appellants are hereby dismissed. The convictions and the sentences imposed by the trial magistrate are hereby confirmed.

DATED at NAKURU this 3rd day of December 2004.

MUGA APONDI

JUDGE

L. KIMARU

AG. JUDGE