REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 178 OF 2002

NYERERE MUTUNGA……..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 179 OF 2002

MUTUNGA KAMUNZYU……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 181 OF 2002

GEDION MUTHOKA……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

J U D G E M E N T

The three appellants Mutunga kamunzyu now 2nd appellant, Nyerere Mutunga 1st appellant and Gedion Muthoka now 3rd appellant were charged with the offence of robbery with violence contrary section 296 (2) of the penal code in Cr.C 806/01. They were convicted of a lesser charge of Robbery contrary to section 296 (1) penal code and sentenced to 6 years imprisonment and police supervision for 5 years after completion of sentence on 21.8.2002. They have filed appeals nos. 178, 179 and 181/02 which were consolidated and heard together as cr. App.178/02. The appellants are dissatisfied with the conviction and sentence.

Each of the appellants filed grounds of appeal which are basically similar. They allege that the trial Magistrate was biased against them, that they were not properly identified as the robbers because there was no identification parade conducted by police. 2nd appellant specifically denies that he was ever found

with the complainants bicycle but one Tito Munyao PW5 was and that his confession to police was obtained through inducement that he would be released.

The 1st and 3rd appellants further contend that they were not properly identified as PW1 claimed to have been attacked from behind by 3rd appellant and could not therefore have seen him. Further that the 2nd appellant is said to have named them but there is no mention of their names in the charge and caution statement Ex.5. PW1 never gave description of the robbers to the police and that PW1 did not know the robbers before. The appeal was opposed on grounds that the incident took place in broad day light and PW1 was able to describe what each of the robbers did in assaulting him and subsequently robbing him of his bicycle, money ID card. That the evidence against 2nd appellant is constructive possession of PW5's bicycle which was recently stolen from PW1 and sold to PW5 who was a bona fide purchaser and 2nd appellant made a confession that was properly admitted in evidence and it is corroborated by evidence of PW2 and 5. It is also submitted that even though no parade was conducted there is strong evidence against accused 2 and the conviction is therefore safe and sentence of 6 years lenient.

It is PW2 who led to the recovery of the bicycle that PW 1 identified as that which he was robbed of on 12.6.2001. PW2 was looking for his own bicycle which had been stolen. PW2 was with PW4 when youth wingers brought in 2nd appellant and the 2nd appellant was said to have been seen riding a bicycle. 2nd appellant then led them to PW5 whom he allegedly sold the bicycle to. PW5 produced an agreement of sale of the bicycle. It is the same bicycle which PW1 identified as his. The 2nd appellant did not give a satisfactory account of how he came by the bicycle and the trial magistrate found that 2nd appellant was constructively in recent possession of the bicycle which PW1 was robbed of. On PW1 being called to the youth office he identified 2nd appellant as one of the robbers and the 2nd appellant later made a confession to PW6 that he stole. The statement was properly admitted in evidence as there was no evidence of threats, force or inducement used to obtain it. I find that the trial magistrate reached the proper decision that 2nd appellant was one of the robbers and was properly convicted.

According to the evidence of PW1, PW2, 3, 4, 5, it is 2nd appellant who named the 1st and 3rd appellants as his accomplices. They were arrested and instead of police keeping these suspects from PW1 so that a parade could be conducted, they took them to PW1 who had accompanied them and remained in a vehicle outside the 1st and 3rd appellants homes. That was improper conduct on the part of the police.

In the charge and caution statement Ex. No. 5, 2nd appellant never named anybody as his accomplice. It is only after his arrest that he allegedly named 1st and 3rd appellants to PW1, 2, 3 and PW8 who then went to arrest 1st and 3rd appellants with police – PW4.

It seems that PW1 never gave the description of his assailants to police.PW6 who received the first report from PW1 said PW1 was in too much pain and bleeding to give the description. Though PW1 says he described how the assailants looked like he did not explain at what stage he did this. The evidence before court is that after their arrest PW1 said they were the robbers who robbed him. In court PW1 described what each of the robbers did to him during the robbery. The robbery took place in broad day light. PW1 was pushing his bicycle uphill and had found his assailants standing by the road side when they attacked him. PW1 said, 3rd appellant attacked him from the rear, 2nd appellant hit him on the arms and 1st appellant cut off his pocket and actually came face to face with him. PW1 did not expect a robbery, he was not frightened on seeing the 3 people who stood by the road side who then attacked him. It being broad daylight I do agree PW1 was able to identify them and he did recognise them after arrest. The mentioning of 1st and 3rd appellants names by 2nd appellant was not a coincidence.Even if there was no description made to police and a parade being conducted I do find that the trial Magistrate did reach a correct finding that the appellants were properly identified and the conviction is safe.The appellants are lucky that the trial magistrate reduced the charge to simple robbery. There was violence used in this case and they should have been convicted of robbery with violence contrary to section 296 (2) of the penal code. The sentences are quite fair under the circumstances and the court will not interfere with them. The appeals conviction and sentence are hereby dismissed.

Right of Appeal.

Dated, read and delivered at Machakos this 2nd day of February , 2003.

R. WENDOH

JUDGE