



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CORAM. D. S. MAJANJA J.

CRIMINAL APPEAL NO. 81 OF 2019

BETWEEN

FRED KUNGU WANJIRU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence dated 20th July 2018

in Criminal Case No. 2636 of 2014 at the Magistrates Court in Kiambu

before Hon.J. Kituku, PM)

JUDGMENT

1. The appellant, **FRED KUNGU WANJIRU** together with his co-accused were charged with one count of the offence of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the laws of Kenya)*. The particulars of the charge were that on 3rd July 2014 at about 00200 Hrs, the appellant and his co-accused jointly with others not before the court being armed with a pistol robbed **DANFRED MUIGAI KURIA** of motor vehicle registration number KBA 455W Toyota Hiace Matatu, Kshs. 5,000/- cash, 2 mobile phones all values at Kshs. 810,000/- and immediately before the time of such robbery used actual violence on the said **DANFRED MUIGAI KURIA**.

2. The complainant, Danfred Muigai Kuria (PW 1), was the main witness. He recalled that on 3rd July 2014 he was driving matatu registration number KBA 455W plying route No. 106 from Nairobi to Banana. At about midnight he left Khoja Mosque stage carrying 14 passengers, 4 of whom turned out to be thugs. The one seated next to him switched off the matatu while a passenger was alighting at Ruaka. The assailant slapped him. Another assailant came and commandeered the matatu while he was taken back. The assailants drove around to Karura and Gachie before he and three other passengers were tied and dumped. He lost his phone and Kshs. 500/-. They untied themselves and reported the incident at Karura Police Station. PW 1 further testified that he saw the appellant at Khoja stage, called a police officer from Central Police Station who then arrested him and the co-accused after he pointed them out.

3. The owner of the matatu, John Kinjara Njuguna (PW 2), confirmed that he was the owner although it was registered in the name of his son. He stated that PW 1 was his employee. He told the court since the robbery, the matatu, which was worth Kshs. 1.5 million had not been recovered.

4. Corporal Christopher Muriuki, PW 3, of the Flying Squad testified that DW 1 reported an incident of robbery on 3rd July 2014 at Karuri Police Station. On 27th August 2014, he was called by Nairobi Central Police Station that the appellant and his co-accused had been arrested after being identified by PW 1. He stated that an identification parade was conducted at the station by Inspector Robert Ojwang (PW 4) on 30th August 2013 who testified that PW 1 identified the appellant.

5. When put on his defence, the appellant denied the offence. He testified that on the night of 2nd July 2014 he was home in his mother's house and that he worked at a construction site at Ruaka on 3rd July 2014 until 5.00pm. He denied that he knew the complainant and that he was arrested on 26th August 2014 after he accompanied his friend to town. He alleged that he was framed as he refused to give the police money.

6. Based on the aforesaid evidence, the trial magistrate was satisfied that the prosecution had proved its case and more so that the appellant had been identified by PW 1. The appellant has now appealed against conviction and sentence and the main issue he has raised is that of identification. He contends that the circumstances surrounding his identification were not tested and that his conviction was unsafe in the circumstances.

7. The offence of robbery with violence under **section 296(2)** of the **Penal Code** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see ***Dima Denge Dima & Others v Republic*** NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, ***Oluoch v Republic*** [1985] KLR 549 and ***Ganzi & 2 Others v Republic*** [2005] 1 KLR 52).

8. I am satisfied that the prosecution established all the elements of the offence of robbery as I have set out above. PW 1 narrated how the matatu he was driving was hijacked by several assailants. He was slapped and his mobile phone and money stolen. PW 2 confirmed that the matatu had not been recovered from that date.

9. The question before the court in this appeal is whether PW 1 identified the appellant as one of the assailants. The prosecution case was based on the direct testimony of one witness in difficult circumstances which, as our courts have held, may lead to miscarriage of justice and have hence urged caution in accepting evidence of a single witness in such cases. The Court of Appeal in ***Kiilu and Another v Republic*** [2005] 1 KLR 174 as follows:

Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.

10. Before acting on such evidence, the trial court ought to make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused amongst other facts so as to be able to identify him (see ***Maitanyi v Republic*** [1986] KLR 198 and ***R v Turnbull*** [1967] 3 ALL ER 549). The Court of Appeal was categorical in ***Kiarie v Republic*** [1984] KLR 739, that reliance on such evidence of identification must be “*absolutely watertight*” to justify conviction.

11. The appellant was a stranger to PW 1 and the material night, PW 1 stated that one of the assailants seated next to him is the one who switched off the matatu and slapped him then asked him if he knew who they were. By that time, the matatu had left Nairobi upto Kwa Njoki. From Kwa Njoki, he was put at the back and the vehicle was driven to Karura Forest. Although the evidence is clear that the assailant sat next to the driver for some time, it is not clear what was the source of light and its intensity in relation to where he was seated and whether he was able to see the assailant seated next to him. In cross-examination, PW 1 stated that the area around Khoja Mosque was not well lit.

12. I have evaluated the evidence and I have come to the conclusion that the identification was not safe and free from error. As I stated, the nature and intensity of light at Khoja Stage was not given. Further the same was not done for the environment in the matatu from the time the appellant was taken at the back of the vehicle. Further, the admission by PW 1 that he did not tell the police he had identified the assailant is a matter that undermines the prosecution case. I also note that the appellant raised an alibi defence stating that on the material day he was at work and that he spent home with his mother that evening. The trial magistrate did not consider this line of defence and as long as it was possibly true and was not rebutted by the prosecution, the appellant was entitled to an acquittal.

13. I allow the appeal, quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at KIAMBU this 10th day of JANUARY 2020.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.