



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL 125 OF 2016

[From Original Conviction and Sentencing in Criminal Case No: 408 of 2011 of The Chief Magistrate's Court at Gatundu]

KEVIN MUIRURI MWANGI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

1. This is the judgment of a **Criminal Appeal No. 125 of 2016**. The appellant is **KEVIN MUIRURI MWANGI**. He was charged with Robbery with Violence contrary to **Section 296 (1)** of the Penal Code.

The particulars thereof were that on **20th day of February, 2011**, at **Kanjogo** village in **Gatundu North** within **Kiambu County**, jointly with another before court being armed with crude weapon namely: wooden stick robbed **JOHN NJAU NJUHIGA** one jeans trouser, one pair of safari boots shoes, one mobile Nokia 961 and cash Ksh. **1,300/=** all valued at Ksh. **5,300/=** and at time of such robbery used actual violence to the said **JOHN NJAU NJUHIGA**.

2. The accused **KEVIN MUIRURI MWANGI** pleaded not guilty at **Gatundu** Principal Magistrate's Court. Accordingly, the plea of **Not guilty** was duly entered. This case was duly consolidated with Criminal Case No: **135 of 2011, GERALD MUIRURI WATHIKA** on **28/09/2011**.

3. The trial commenced on **23/11/2011**. The prosecution marshalled seven (**7**) witnesses at the end of which the accused was put on his defence. The judgment of court convicted the accused accordingly was sentenced to death as by law established.

4. The appeal

The accused being aggrieved and dissatisfied has now filed an Appeal **No. 59 of 2015**. He is unrepresented. He is the **1st** Appellant.

His **Grounds of Appeal** are summarized as here below:

1. **THAT** the basis for conviction was not sufficiently trustworthy to be acted upon.
2. **THAT** the prosecution did not prove the case beyond reasonable doubt.
3. **His** right to fair trial was denied as per **Article 25 (c)** of the constitution 2010.
4. Identification relied on was flawed.

The **2nd** Appellant's grounds of appeal, **GERALD MUIRURI WAITHIKA**'s grounds of appeal are similar to the **1st** appellant's grounds, save where he says:

5. **THAT** the trial magistrate failed to comply with **Section 169 (1) 200 (3) and 214 (1)** of the Criminal Penal code respectively.

5. SUBMISSIONS

(a) The **1st** appellant **KEVIN MUIRURI MWANGI**, submitted that:

1. The judgment was not dated.
2. The trial magistrate did not comply with **Section 200** of the Criminal Penal Code on the right to recall the witnesses. No warning was made to the accused person.
3. The charge sheet was incurably defective. The total value of property alleged stolen from complainant was Ksh. 5,300/=. However, investigation officer put it at Ksh. 8,300/= and PW2 puts it at Ksh. 7000/=.
4. The identification/recognition evidence was inadequate to convict.
5. The prosecution evidence was contradicting.
6. The prosecution failed to prove the case beyond reasonable doubt.

(b) By the Respondent, MADAM NGALYUKE opposed the appeal.

1. She supported the conviction of the appellant.
2. What is at issue is whether the appellant was properly identified by PW2 – the complainant? We submit that the appellant was indeed properly identified by the complainant. This being a case of recognition, since the appellant was known to the complainant. The complainant testified that there was moonlight, bright security light, he saw his attackers as he knew them before.
3. On cross-examination, PW2 said he knew the appellant for over ten (10) years. It would also be noted that it was not a case of a single identification witness. The complainant was in a company of one FRANCIS who also identified the people who attacked the complainant. The complainant gave the names of the people who attacked him to his father. The complainant made his report to the police, giving the name of the appellant.
4. The complainant was amongst those who arrested the appellant and handed him over to the police. Thus those factors prove that the appellant's identity was not the issue. Therefore the appellant was properly identified for this, I support the trial court on this.
5. The appellant was accorded a fair trial.
6. The appellant's insistence that during the defence trial, he didn't have his advocate, on the contrary the appellant was accorded time and it was his decision to proceed in the absence of his advocate.
7. Therefore, I support the conviction and sentence and apply for appeal to be dismissed.

6. In respect of the 2nd appellant GERALD MUIRURI WAITHIKA, the respondent, Madam Ngalyuke submitted that:

In addition to earlier submission on the 1st appellant – KEVIN MUIRURI MWANGI, the circumstances are similar to the 2nd Appellant.

1. The case is one of **recognition**. Whereas it was at night, the witness was aided by moonlight and bright security light. The witness was able to give the name of GERALD MUIRURI together with KEVIN as the people he identified, the second appellant identification is beyond reproach.
2. **On ground two of his appeal**, the failure to comply with **Section 200**, I submit that the second appellant has not suffered any prejudice. It is a technicality that did not prejudice the case.
3. **On ground three of his appeal**, the variation is not fatal since it would have been amended under **Section 214** of Criminal penal Code (C.P.C)
4. **On grounds five of appeal**, there was no coaching of witnesses
5. **On grounds eight of the appeal**, the court analyzed its judgment and complied with **Section 169** of the Criminal Penal Code (C.P.C)
6. **On grounds nine of appeal**, any contradictions and inconsistencies are not material to effect the trial.
7. We thus urge the court to uphold the conviction and sentence and ask for the dismissal of this appeal.

7. FIRST APPEAL

This being the first appeal this court is enjoined to read the proceedings of the lower court evaluate the evidence and come to its own conclusion bearing in mind that it neither saw nor heard the witnesses when they testified before the lower court which fact is the only allowance this court must make in this consideration. **See generally Okeno Vs Republic [1972] E.A. page 32.**

8. Issues of considerations

1. Were the two appellants well identified?
2. Were the ingredients and elements of the offence of robbery fulfilled as by law established?
3. Was the case proved beyond reasonable doubt as by law established?

9. Proceedings: Analysis

The testimonies of **PW2** and **PW3** as to identification is compelling. They knew the appellants by name. **PW2** had known the 1st appellant for over ten (**10**) years. They went to the same primary school.

Second, **PW2** was assaulted by the two appellants, this is corroborated by **PW3** as well as medical evidence produced by **PW1** and **PW4** confirming the injuries.

Third, **PW1** was robbed of Ksh. **1,300/=** Nokia phone, jeans trousers and shoes. **PW4** and **PW5** corroborates **PW1**'s testimony on this.

10. The legal issue as raised by the second appellant, and to some extent, the first appellant, regarding **Section 214, 164** and **200 (37)** of the Criminal Penal code respectively, were in my view, complied with, even **Section 200 (3)** was complied with as it was very clearly pointed out by the prosecution on **17/03/2014**, compliance of **Section 200** must be done. The raising of this issue, is an afterthought.

11. FINDINGS

For those reasons I find that there is no merit in the appeal. The conviction and the sentence is hereby upheld. And the appeal is hereby dismissed. This order applies mutatis mutandis to the second appellant **GERALD MUIRURI WAITHIKA**.

Right of appeal - **14** days.

JUDGMENT WRITTEN AND SIGNED BY:

C. B. NAGILLAH

JUDGE

JUDGMENT DELIVERED, DATED AND COUNTERSIGNED IN KIAMBU BY:

THIS 10TH DAY OF MAY 2017

JOEL NGUGI

JUDGE

In the Presence of:

.....**the Appellant**

.....**for Respondent**

.....**for Court Assistant**