



IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO 242 OF 2013

(FORMERLY NYERI HC CRIMINAL APPEAL NO 47 OF 2012)

(Appeal from original Conviction and Sentence in Murang'a PM Criminal Case No 2215 of 2010 – E. N. J. Osoro, PM)

SAMUEL KAMAU WAMBUI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

J U D G M E N T

1. The Appellant herein, **Samuel Kamau Wambui**, was convicted after trial of **robbery with violence** contrary to **section 296(2)** of the **Penal Code** and sentenced to death. It was alleged in the charge that on 26/09/2010 at about 08.45 p.m. at Kiandundu Village in Murang'a County, while armed with an offensive weapon, namely a panga, he robbed one **Amos Kihota Kamau** of cash KShs 500/00, and that immediately before the time of the robbery, he used actual violence on the said complainant by cutting him on the head and left arm.

2. The Appellant has appealed against both conviction and sentence. The grounds of appeal appearing in his petition filed on 14/03/2012, appropriately rephrased, are –

(i) That Article 49(1) (f) of the Constitution was violated, and that therefore his conviction was wrong.

(ii) That the first report to the police made by the complainant did not mention any robbery.

(iii) That he was not accorded a fair and just trial in accordance with the Constitution.

(iv) That the trial court wrongly rejected his defence without giving any reasons.

3. At the hearing of the appeal the Appellant presented amended grounds of appeal and written submissions. The further grounds emerging therefrom are –

(v) That the evidence adduced by the prosecution was inconsistent and contradictory, and could therefore not found a safe conviction.

(vi) That the “medical witness” called by the prosecution was not a registered medical practitioner.

(vii) That the charge against the Appellant was not proved beyond reasonable doubt.

4. Learned prosecution counsel supported the conviction and sentence. She submitted that the evidence placed before the trial court established all the ingredients of the offence beyond reasonable doubt.

5. I have read and considered the Appellant's written submissions as well as those of the learned prosecution counsel. This being a first appeal, it is my duty to evaluate the evidence placed before the trial court and arrive at my own conclusions regarding the same. I must however give due allowance for the fact that I neither saw nor heard the witnesses as they testified.

6. The prosecution case was simple and direct enough. The complainant, Amos Kihota Kamau (PW1), was walking home on the evening of 26/09/2010 at about 8.45 p.m. when he saw a man who was wearing only shorts and was armed with a panga and a stick. PW1 stopped and the man then attacked him by cutting him in the middle of his head, the left side of the hand and the left arm. The man then demanded money. PW1 told him that he had KShs 500/00 in his pocket. The man then reached into PW1's pocket and took the money.

7. A motor vehicle then approached and the attacker dived to the ground apparently to hide from the headlights of the vehicle. PW1 took the opportunity to grab the attacker and disarm him of the panga. He held on to the head of the attacker and raised alarm. The vehicle stopped, and he and the driver of the vehicle and his passengers overpowered the attacker and took him to **Murang'a Police Station**, along with the panga used in the attack.
8. PW1 identified in court the panga. He further stated that at the police station the attacker was searched and the KShs 500/00 that he had robbed off of him was recovered from his pocket. He identified the currency note in court.
9. After the report to the police PW1 was escorted to hospital where he was treated overnight. The medical report was subsequently filled. He had not known the attacker before. He identified him in court as the Appellant.
10. In cross-examination by the Appellant PW1 stated that the Appellant had suddenly attacked him. He denied that it was him and three others who had waylaid the Appellant, or that it was PW1 and others who had undressed him.
11. PW1 further said in cross-examination that he did not tell the people who rescued him that the Appellant had robbed him, and that he remembered about the money while at the police station. He explained that at the scene he was only thinking of his life.
12. Towards the end of the prosecution case the Appellant applied for and was granted recall of PW1 for further cross-examination. In his further cross-examination PW1 explained that he had kept his KShs 500/00 in his right-hand-side trouser pocket. He further stated that upon emerging and confronting him, the Appellant ordered him to lie down. He then started to cut him with the panga. While PW1 was down the Appellant reached into his pocket and took the money.
13. PW2 (David Githinji) was apparently a clinical officer. He examined PW1. He had a deep cut at the back of the head and another cut to the right side of his head. He also had two separate cuts on his left hand and a cut in the right index finger and middle finger. When he examined him the injuries were fresh. PW1 was admitted to casualty ward for one night and treated. PW2 filled PW1's medical report on 06/11/2010 and signed it. He produced it in evidence.
14. PW3 (Joseph Gitahi Gathuru) was a taxi driver. On 26/09/2010 at about 8.45 p.m. he was on duty taking his customers to some place within Murang'a town. On the way back he saw in his headlights two men who appeared to be fighting. One of them was wailing for help and holding a panga. When PW3 approached the men, the one wailing and holding a panga told him he had disarmed the other one who had robbed him. PW3 then told the man to put the panga down. He did so and PW3 took it. He then separated the men.
15. The man, whom he identified in court as PW1, then repeated that the other man was a robber who had robbed him. PW3 identified that other man in court as the Appellant. Upon PW1 stating that the Appellant was a robber, further testified PW3, the Appellant ran away. PW3 and his passengers gave chase and arrested him about 600 meters from the scene. They tied him up with a rope and put him in the car. PW3 then took the Appellant and PW1 to Murang'a Police Station and left them there. He noted that PW1 had injuries and that the Appellant was wearing only a trouser without a shirt.
16. PW4 (PC Bildad Mureithi) received PW1 and the Appellant at the police station. Upon PW1's complaint that the Appellant had robbed him of KShs 500/00, he searched the Appellant. He recovered a KShs 500/00 currency note from the Appellant's trouser back pocket. He also received from PW1 a panga which he claimed the Appellant had attacked him with. He thereupon re-arrested the Appellant, placed him in the cells and subsequently charged him.
17. PW5 (PC Vincent Kemboi) was the investigating officer of the case. The KShs 500/00 currency note and the panga were handed over to him and he retained them in his possession. He produced them in court as exhibits.
18. In his own defence the Appellant elected to say nothing and called no witnesses, though he had initially indicated that he would give an unsworn statement and call two witnesses.
19. That was the totality of the evidence placed before the trial court.
20. I have evaluated the evidence placed before the trial court. There cannot be any doubt that PW1 was attacked at night with a panga as he was going home. He sustained serious injuries to his head and hands. These injuries were medically verified by the testimony of PW4 and the medical report that he produced in evidence.
21. PW1 complained to PW3 and to the police soon thereafter that his attacker had stolen from him KShs 500/00 immediately after he attacked him with a panga. His attacker was searched immediately he and PW1 arrived at the police station. A KShs 500/00 currency note was found in the back pocket of his trouser.
22. As for the identity of PW1's attacker there cannot be any doubt. After he had attacked PW1 and stolen from him, a motor vehicle approached. He (the attacker) dived to the ground next to where PW1 was lying, no doubt to try and avoid being seen by the occupants of the motor vehicle in its headlights. PW1 immediately took the opportunity to grab and disarm him while shouting for help. The motor vehicle stopped and its driver (PW3) and passengers got out. PW3 asked PW1 to put the panga he was holding down. He did so. The attacker then took the opportunity to try and escape. PW3 and the others gave chase and got hold of him after about 600 meters. There was moonlight as well as the vehicle's headlights. They tied him up with a rope. PW3 then took both PW1 and his attacker to the police station. That attacker was the Appellant.
23. Robbery is defined in **section 295** of the **Penal Code**. That definition is as follows –

“295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”

The punishment for robbery is prescribed in **section 296(1)** of the Code. That punishment is liability to imprisonment for fourteen (14) years. However, as prescribed under **section 296(2)** of the Code –

“296. (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

24. When he attacked PW1 the Appellant was armed with a panga. There cannot be any doubt that a panga can be an offensive weapon or instrument. It is a metal instrument much larger than a knife with a sharp edge. It can cut through flesh and bone with ease.

25. The Appellant wounded PW1 with the panga immediately before he stole from him the KShs 500/00.

26. I am satisfied that all the ingredients of the offence of robbery under **section 296(2)** of the *Penal Code* were proved beyond reasonable doubt.

27. Upon my own evaluation of the evidence placed before the trial court, I am satisfied that the charge of robbery with violence contrary to section 296(2) of the Penal Code was proved against the Appellant beyond reasonable doubt. The conviction is safe.

28. The Appellant complained in his grounds of appeal that his rights under **Article 49** of the Constitution were violated. He did not demonstrate how.

29. The sentence of death imposed upon the Appellant was the only one provided by the law for the offence he stood convicted of.

30. This appeal is bereft of merit. It is hereby dismissed in its entirety. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 13TH DAY OF JULY 2017

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 14TH DAY OF JULY 2017