



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL APPEAL NO. 58 OF 2014**

**DOMINIC NGARI MWAI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence of the Principal Magistrate's Court (M. Onkoba) at Wanguru, Criminal CaseNo. 627 of 2013 dated 15<sup>th</sup> October, 2014)*

**JUDGMENT**

1. **DOMINIC NGARI MWAI**, the appellant herein was charged with 3 counts of Robbery with violence contrary to **Section 296 (2)** of the **Penal Code** before **Principal Magistrate's Court at Wanguru Criminal Case No. 627 of 2013**. The particulars in count one were that on 31<sup>st</sup> August, 2013 at Ndorome village within Kirinyaga County jointly with others not before court while armed with dangerous weapons namely metal bars, robbed Patrick Murithi Ngai cash of Kshs.5,000/= and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Patrick Murithi Ngai. In count 2 he was charged with others not before court for robbing **DIANA ROSE MUTHONI MURITHI**, the same day of a mobile phone Nokia, a handbag, identity card, cooperative bank plate and cash of Kshs.1,000/= all valued at Kshs.10,000/= while armed with dangerous weapons and immediately before or after the said robbery threatened to use actual violence to the said DIANA ROSE MUTHONI MURITHI. In count 3, the particulars were that on the same date, time and place he jointly with others not before court while armed with dangerous weapons namely metal bars, robbed ELIAS MURIMI MURITHI of cash Kshs.1,000/= and immediately before or immediately after the time of such robbery used actual violence to the said Elias Murimi Murithi.
2. The appellant denied all the charges but after full trial he was found guilty of count 1 and convicted. He was sentenced to death for the offence. Feeling dissatisfied and aggrieved he preferred this appeal.
3. The prosecution at the subordinate court called 7 witnesses to support their case. A summary of the evidence adduced by the said witnesses shows that on 31<sup>st</sup> August, 2013 at around 9 p.m., Patrick Murithi Ngai (P.W.1) and his wife DIANA ROSE MUTHONI (P.W. 2) were returning home in a motor vehicle Registration Number [particulars withheld] Toyota Hilux driven by P.W. 1 and he was parking the car in his compound. They were confronted by two thugs one armed with a panga and the other with a metal bar. It was their evidence that there was sufficient lights in the compound as the security lights were on having been switched on by ELIAS MURIMI

PATRICK (P.W.5) a son to P.W.1 and P.W.2 and who had arrived home shortly ahead of them. Paul Mureithi Ngai (P.W.1) told the trial court that he was in the process of stepping out of his vehicle when the appellant went to his side armed with a panga and ordered him back to his car and threatened him as he robbed him of Kshs.5,000/= as the accomplice brandishing a metal bar threatened his wife (P.W. 2) on the other side of the car before robbing her of Kshs.1,000/= and other valuables. He further also told the trial court that he witnessed his son being robbed of Kshs.1000/= which was all he had. After the robbery, the robbers took off and struck a security light as they jumped on a waiting motor cycle outside the gate. The complainant told the trial court that he quickly entered his car and gave chase as his family members screamed for help. He told the trial court that he caught up with the robbers in no time after the motor bike they were using skidded landing the 3 thugs on the mud before they took off on foot towards rice farms. He left them and went to a nearby police post to report and later at Wanguru Police Station where coincidentally as he was reporting, the appellant came in the company of 2 other people to book a report on theft of a motor bike and that is where the witness told the court that he immediately identified him and alerted the police who arrested him.

4. The complainant (P.W.1) told the trial court that the appellant had mud all over and a wet trouser and he recognized him by the jacket he was wearing which he said was blackish in colour and he identified the jacket in court which was later produced as P Exhibit 2. He told the court that the abandoned motor cycle Registration No. KMCY 0382, was set on fire by irate members of public but the number plate of the said motor cycle was recovered unscathed and later produced as an exhibit during the trial.
5. The evidence of **DIANA ROSE MUTHONI MUREITHI** (P.W.2) the wife to P.W.1 largely corroborated what the husband had told the trial court. She added that one of the robbers threw a metal bar aimed at his son ELIAS (P.W.5) injuring him in the process. She told the trial court that the robber who approached her husband from the other side of the motor vehicle wore a dark blue jacket and that she saw the attackers well owing to the lights emanating from the security lights and that she was able to recognize the appellant when he turned up at Wanguru Police Station later on as they reported the incident. She told the trial court that she was able to recognize the appellant owing to the state of his clothing which were wet and muddy.
6. P.W.5 (**ELIAS MURIMI PATRICK**) a son to P.W.1 and P.W.2 too testified at the trial court and corroborated the evidence of P.W.1 and P.W.2 particularly on clothing the robbers wore at the material time. He further testified that one of the robbers attacked him and injured him a fact that was supported by P.W.6 – Dr. Wekesa who produced a P3 as P. Exhibit 5 to demonstrate the nature of the injuries suffered by the witness during the incident. Police constable **Charles Mutinda** (P.W.4) also testified and confirmed to the trial court that while he was on duty at Wanguru Police Station on 1<sup>st</sup> September, 2013 at around 12.30 a.m. the complainants (P.W.1 and P.W.2) reported that they had been attacked and robbed of cash and valuables and as they narrated the incident 3 other people came to the station among them the appellant who was immediately recognized by the reporters (complainants). The witness told the court that the appellant became very nervous and wanted to run away but was immediately arrested and placed in custody. He confirmed that the appellant wore muddy clothes and shoes which he recovered and he identified them in court. The same were later produced as exhibits by the investigating officer who was called as P.W.7 (Cpl. Christopher Oroko).
7. In his sworn defence the appellant denied his involvement in the robbery. He told the trial court that he was a “boda boda” rider in Mwea region and had leased a motor cycle Registration No. KMCR 262H from one Josphat and that on the material day 2 people had hired him at around 8 p.m. to take them to a place called “S” corner to water their rice fields. However, on reaching there, he told the trial court that he was attacked and robbed and was forced to flee leaving behind his motorcycle. He told the trial court that he passed through rice fields making his clothes wet and muddy in the process. He later called their “boda boda” chairman allegedly in Kutus and informed him of the incident. He also later called his father and together they hired a taxi to take them to Wanguru Police Station where they reported the incident but while reporting the Police accused him of being one of the robbers after which he was locked up together with his father and the person who had ferried them to the station. The defence witness (D.W.2) who was the father to the appellant testified and largely gave the same version with the only difference being the time when he was notified of the theft of the motorcycle. He told the trial court that his son, the

- appellant herein called him on mobile phone at around 6.30 p.m. informing him that his motorcycle had been stolen and it was not until 11.00 p.m. that the appellant was brought by boda boda rider to where he was after which he advised them that they go to Wanguru Police Station to report about the incident. However, on reaching there, he told the trial court that the three of them were arrested and locked up in custody at Wanguru Police Station. Later the appellant alone was arraigned in court and charged as aforesaid.
8. The trial court evaluated the evidence tendered and found the appellant guilty as charged. He was convicted and sentenced to death under **Section 296 (2)** of the **Penal Code**. He was aggrieved and preferred this appeal citing 4 grounds namely:
    - i. ***That the learned trial magistrate erred in both law and fact by relying on visual identification allegations of P.W. 1 and P.W. 5 which were made under hectic prevailing circumstances and in light of no descriptive report.***
    - ii. ***That the learned trial magistrate erred in law and fact by convicting the appellant when the prosecution case was riddled with doubts contrary to section 165(3) of the Evidence Act Cap. 80 Laws of Kenya.***
    - iii. ***That the learned magistrate erred both in law and fact by convicting an innocent person.***
    - iv. ***That the learned magistrate erred in both law and fact by failing to note that the case against him was not proved to the required standard.***
  9. In his oral submissions made through MS Fatuma, learned counsel for the appellant, the appellant summarized the 4 grounds and classified them into 2 main grounds which were;
    - a. Identification
    - b. Sufficient evidence.
  10. On identification, M/S Fatuma submitted that there was no positive identification of the appellants as the eye witnesses did not know the appellant prior to the incident. She pointed out that P.W. 5 in her view told the trial court that he did not see the appellant again after the robbery until when he came to court to testify and no identification parade was carried out although she again submitted that the same was unnecessary as the witness had not given a description of the robber to the Police to justify the need for an identification parade. It was further submitted that P.W. 5 was not sure of how the attacker was dressed as he had told the court at one time that the attacker who attacked his father (P.W.1) wore navy blue jacket and later stated that he wore a black jacket.
  11. The appellant further submitted that P.W. 1 had not given a description of the attacker to the Police before the appellant appeared at the Police station and that the witness said he recognized him because of the blackish jacket he was wearing which was muddy. According to him, had he not gone to the Police Station to report an incident which had happened to him, he could not have been arrested. He urged this Court to take judicial notice of the fact that Mwea region is full of wet fields due to rice farming and therefore it was inconclusive to connect the state of the appellant's clothes to the robbery incident that had occurred and that there was nothing unique about the jacket and the trouser the appellant was wearing when he was arrested. The appellant's counsel urged this court to find that the trial court erred by not realizing that that kind of evidence was unreliable to convict the appellant. It was further argued that P.W.2 could not have identified the Appellant at the Police Station as P.W. 4 did not confirm that she was present at the station when her husband (P.W. 1) made the report at the same place.
  12. On the question of sufficient proof, the Appellant submitted that the prosecution case was full of inconsistencies. He pointed out the evidence of P.W.1 who according to him told the trial court that he was attacked when he wanted to alight from his vehicle while at the same time told the court that he was ordered by the robbers not to alight from the vehicle. It was further submitted that the evidence of P.W.2 was inconsistent with the evidence of P.W.1 in that P.W. 2 stated that they were ordered to lie down. The Appellant further pointed out that P.W. 5 testified that he gave out the Kshs.1,000/= he had to the robbers while P.W. 2 had said that her son had no money at the time and that if it is true they were held hostage together, she should have seen his son giving out the 1,000/= he had.
  13. The Appellant also wondered how P.W. 5 could have become unconscious after the attack and

was rushed to hospital as per the evidence of P.W. 2 yet at the same time came to and shouted ‘thief’ ‘thief’ according to P.W. 5. Furthermore the Appellant pointed out that the doctor did not establish the fact that P.W. 5 had lost consciousness. This in his view showed that the witness was not credible. He further pointed out that the witnesses gave different descriptions on the manner in which the Appellant was dressed and submitted that witnesses gave different colours to the jacket that the Appellant was said to have been wearing. He further wondered how the motorbike used by the robbers was burnt leaving the number plate unscathed. He faulted the prosecution for not calling the Administration Police officers who removed or recovered the number plate at the scene. He further faulted the Police for not booking the report of the Appellant concerning the theft of his motor cycle which in his view was different from the one that was used during the robbery and was later burnt by member of the public.

14. The appellant’s view was that no proper investigation was carried out as the investigating officer never got sufficient time to conduct the investigation and that in his view led to 2 other people being arrested. It was submitted that the evidence gathered was insufficient to convict the appellant in such a serious charge. He relied on the following authorities:

1. **Kisumu Court of Appeal Criminal Appeal No. 208 of 2006 Michael Ochieng Odongo -Vs- Republic.**
2. **Nyeri Court of Appeal Criminal Appeal No. 22 of 2002 David Mutua -Vs- Republic.**
3. **Nyeri Court of Appeal No. 56 of 2014 Francis Muchiri Joseph -Vs- Republic.**
4. **High Court at Meru Criminal Appeal No. 25 of 2004 – Antony Mwenda Andrew -Vs- Republic.**

15. The State through **Mr. Sitati**, learned counsel for the Respondent did not oppose the appeal conceding that identification and recognition of the appellant was not positive. However this being an appellate court, I am obligated to re-evaluate the evidence on record and come to my own conclusions and draw my own inferences in order to determine whether the trial court was correct or right in making the conclusion it did. See the case of **OKENO -VS- REPUBLIC [1972] E.A. 32.**

16. I have considered this appeal and the oral submissions made by the appellant through his learned counsel M/S Fatuma. It is true and correct as stated by appellant’s counsel that the determination of this appeal rests on the 2 issues namely:-

- i. Whether identification and recognition was positive given the circumstances.
- ii. Whether the evidence adduced by prosecution proved their case beyond reasonable doubt.

#### **(i) Identification**

In this case it is not in dispute that the eye witnesses to the incident did not know the assailants prior to the incident. The issue of recognition did not arise and what was left for the trial court to determine was whether the conditions or the circumstances at the time and place made it possible for P.W.1, P.W.2 and P.W.5 to positively identify the appellant herein. It is a well settled principle in law that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. A court must always satisfy itself that in all circumstances it is safe to act on evidence based on identification alone. In the case of **WAMUNGA -VS- REPUBLIC (1989) KLR 424** the Court of Appeal held as follows:

***“.....it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”***

17. In this case P.W.1, P.W.2 and P.W.5 told the trial court that there was sufficient security lights in their compound that fateful night. The said eye witnesses told the court that the robbers spent around 10 minutes in their home and the trial court noted in its judgment that identification of the appellant was positive as they had not covered their faces. P.W. 1 told the trial court that he saw

the appellant clearly and identified him from the jacket he was wearing which he described as dark blue. P.W.2 and P.W.5 were both positive on this aspect of description though the colour of the jacket was variously described by the said witnesses, with P.W.1 describing the colour as 'blackish' while P.W.2 described it as 'dark blue' or black while P.W.5 described it as navy blue but what was consistent among the said 3 (P.W.1, P.W.2 and P.W.5) was that it was the appellant who went to the P.W.1 side while the other accomplice went to P.W.2 and later attacked P.W.5 as he robbed him. I have evaluated the evidence in regard to the colour of the jacket that the appellant was found to be wearing during the incident and note that the discrepancy on the colour is really minor given that there is little difference in colour between a black coat and a navy blue especially at night and for some people even distinguishing the difference even during the day is a challenge. In the case of **DANIEL NJOROGE MBUGUA -VS- REPUBLIC [2014] eKLR** the Court of Appeal held as follows when faced with similar situation;

***“.....From the record we find that the evidence of P.W.1 and P.W.2 was consistent and their testimonies corroborative. Any discrepancies or inconsistencies in the evidence adduced by the prosecution were minor and did not weaken the probative value of the evidence on record.”***

The description by witnesses of the colour of the coat the appellant was said to have been wearing was in my view consistent and positive in identifying the appellant herein. The cited discrepancies or inconsistencies in the prosecution case which I have highlighted above concerning the evidence of P.W.5 to the trial court and what he apparently told the doctor about whether the assailant was a person known to him or not and how the eye witnesses described the colour of the jacket worn by the assailant they later identified as the appellant in my considered view are minor discrepancies or inconsistencies which did not undermine the overall finding or conclusion the trial court made in respect to positive identification of the appellant.

18. I have considered the authorities relied on by the appellant in regard to the issue of identification and find the same distinguishable from this appeal. The first authority on the appellant's list of authorities, which is the case of **MICHAEL OCHIENG ODONGO (SUPRA)**, the Court of Appeal found that the identification made by the prosecution witnesses was not positive as the only source of light at the time was a torch used by the robbers and the direction of the beam of the torch was not indicated to have been directed at the faces of the robbers for positive identification to have taken place. The Court of Appeal in that case held that the identification in such circumstances was unreliable. In this present appeal however, as I have indicated above, the incident took place in a compound that was said to be well lit with the security lights. Though the robbers were said to have smashed one of the security lights as they left, the same was after the event and could not have negated the issue of positive identification. The second case quoted by the appellant of **DAVID MUTUA (SUPRA)** also made similar observations made in the case of **MICHAEL OCHIENG ODONGO** which was that the only light used to identify the appellant emanated from a torch he was using and therefore evidence of identification in the circumstances was not safe and sufficiently positive to sustain the conviction. In the case of **ANTONY MWENDA ANDREW** quoted and relied by the appellant, the court found that the trial court relied on identification of only one witness and from the circumstances obtaining in that case the court found that the identification was not free from error and therefore it was unsafe to base conviction on the same. This is distinguishable from the circumstances in this case as there were 3 witnesses who positively identified the appellant herein coupled with other circumstances which will come out clearly in examination and determination of the 2<sup>nd</sup> issue in this appeal.

19. **(ii) Whether the evidence adduced by the prosecution proved their case beyond reasonable doubt.**

To determine this issue adequately it is important in my view to first consider the necessary ingredients necessary to be established in an offence that faced the appellant herein. The ingredients of the offence of robbery with violence elaborated in the case of **DANIEL NJOROGE MBUGUA -VS- REPUBLIC [2014] eKLR** where the Court of Appeal quoted with approval the case of **OLUOCH -VS- REPUBLIC (1985) KLR** and held that “robbery with violence is committed in any

of the following circumstances:

- a. The offender is armed with any dangerous and offensive weapon or instrument, or
- b. The offender is in company with one or more person or persons; or
- c. At or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.”

The use of the word “or” implies that if any of the three conditions is fulfilled then the offence would be said to have been committed.

In this appeal, the appellant did not fault the finding of the trial magistrate in his judgment that the ingredients of the offence had been established and proved beyond reasonable doubt. P.W. 5 was clearly injured during the robbery as demonstrated by the P3 produced as P. Exhibit 5 by P.W.6 (Dr. Wekesa) who confirmed the nature of injuries suffered by the victim of the robbery. The appellant was said to be armed with a panga while the accomplice was said to be armed with a metal bar which was used to injure the said P.W.5. In my considered view the trial court was correct in its finding that all the necessary ingredients of the offence of robbery with violence was established and proved beyond reasonable doubt.

20. On the question of whether the prosecution case was proved beyond reasonable doubt I will borrow the description assigned to what is reasonable doubt by the decision of **JAMES MURIITHI NJOROG E -VS- REPUBLIC [2016] eKLR** where the Court quoted Denning J., in the case of **MILLIER -VS- MINISTER OF PENSIONS (1947) A.C.** where he stated as follows:

***“It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable” the case is proved beyond reasonable doubt but nothing short of that will suffice.”***

21. Now going back to the evidence adduced at the trial court in this case, I find that the evidence of P.W.4 (P.C. Charles Mutinda) was crucial in the prosecution’s case as it corroborated the evidence of P.W.1, P.W.2, AND p.w.5 on the issue of identification of the appellant. He gave a vivid description of how the appellant appeared at the Police Station as he listened to P.W.1 narrating how the robbery took place. He told the trial court that the appellant became very agitated and nervous when the complainant immediately pointed at him on seeing and identifying the appellant as the one who had robbed them. This prompted the said Police officer to arrest him and the 2 other people who had accompanied him. Considering that the identification of the appellant at the Police Station was done after a few hours (the robbery took place at around 9 pm and the appellant appeared at Wanguru Police Station at around 12.30 a.m.) am persuaded that identification of the appellant was free from error. I find that there was sufficient evidence to infer that one of the robbers who confronted the complainants at the trial was the same person/assailant who escaped on foot to the rice fields (when the getaway motor bike skidded and fell when P.W.1 pursued them) was the same person who turned up at the Police Station with muddy and wet clothes and shoes. That assailant was the appellant herein and I make that conclusion cautious of the fact that Mwea region is a rice growing area and therefore it required much more evidence to safely make that conclusion. I have considered the evidence tendered by the appellant in his defence and find that contrary to one of the grounds in this petition, the trial court considered his defence and gave due weight on the same. In his defence, the appellant told the trial court that the motor bike that was stolen from him which he gave the Registration Number as KMCR 262H, was not his but belonged to one Josphat and when pressed to give the second name under cross examination he could not showing that he barely knew him which was unlikely and incredible but what is baffling

is that the appellant was unsure if the said Josphat reported the theft of his motorcycle at any Police Station. What is certain is that the said Josphat was not called as a defence witness to confirm that what the appellant was telling the court was factual. Attendant to this is that he also did not make any phone call to the said 'Josphat' to report to him that his motorbike had been stolen. This was odd. He told the trial Court that he called the Chairman of "boda" "boda" riders at Kutus and his friends but none of the riders came to court to testify. I also find it highly doubtful that boda boda riders from Ngurubani could have their chairman stationed in Kutus Town which is several kilometres away. The trial court was entitled therefore to treat the defence the way it did and to conclude that motorcycle Registration Number KMCR 262H and a purported owner by the name Josphat never existed.

22. I also find the evidence adduced by D.W. 2 inconsistent with what the appellant had told the court. According to D.W.2, the appellant who he said was his son, reported to him about the theft of the said motorcycle at 6.30 p.m. If that is true one is bound to wonder what prevented the appellant from reporting the incident earlier on. There was no plausible explanation given why it took them more than six hours to report the matter at the Police not far from where the incident occurred. It is of course true that the burden is always on the prosecution to prove its case and not vice versa but the defence case must be credible and add up in order to deflect an inference being made against him.

23. This Court having considered and evaluated the evidence adduced at the trial in its entirety, finds that the prosecution case at the trial was proved to the required standard in law. The inconsistencies or discrepancies pointed out by the appellant through his counsel as highlighted above were not in my view significant enough to create doubts in the mind of the trial court as the same did not weaken in any way the probative value of the evidence adduced by the prosecution. The prosecution case was proved beyond reasonable doubt.

In light of the above I find no merit in this appeal. The same is dismissed and both the conviction and the sentence is upheld.

*Dated and delivered at Kerugoya this 3<sup>rd</sup> day of May, 2016.*

**R. K. LIMO**

**JUDGE**

**3.5.2016**

Before Hon. Justice R. Limo J.,

State Counsel Sitati

Court Assistant Willy Mwangi

Appellant present

Interpretation English

Fatuma for appellant present

Sitati for State present.

**COURT:** Judgment dated, signed and delivered in the open court in the presence of Fatuma (M/S) Advocate for the appellant and Mr. Sitati for State/Respondent.

**R. K. LIMO**

**JUDGE**

**3.5.2016**