



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 6'A' AND 6'B' OF 2016 (CONSOLIDATED)

WAMBUA DOMINIC.....1ST APPELLANT

KITONGA MAITHYA MANGA.....2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Kitui Chief Magistrate's Court Criminal Case No. 65 of 2012 by Hon. A. G. Kibiru Ag. C M on 30/04/14)

J U D G M E N T

1. **Wambua Dominic** (1st Appellant) and **Kitonga Maithya Manga** (2nd Appellant) were jointly charged with the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. Particulars of the offence were that on the **21st day of January, 2012**, at about **2.30 a.m.** at **Nenja Village, Wikililye Sub-location, Mulango Location, in Kitui County** jointly with others not before court, while armed with offensive weapons namely pangas, rungas, knives, torches and metal bars, robbed **Carol Charles** 1 bale of wheat flour, 1 bale of 1kg maize flour, 5kg of sugar and other assorted shop goods, cash **Kshs. 780/=** all valued at **Kshs. 50,000/=** and at or immediately before the time of such robbery used actual violence to the said **Carol Charles**.

2. Facts of the case were that on the **21st January, 2012** at about **2.30 a.m.**, **Carol Charles** (Complainant) was asleep in her house with her two (2) children when she heard a bang on the sitting room window. Her solar powered lights were on. Six (6) people entered through the window. She recognized two (2) of them as the Appellants herein, her neighbours. Further, she recognized **Kinyamasio Kamuti** and the voice of **Kitonga Katee**. The Appellants and **Kinyamasio** entered the bedroom and beat her up. The 1st Appellant hit her with a panga as the 2nd Appellant demanded from her money and shop goods amidst threats to kill her. The 1st Appellant stepped on her leg and injured her. They took away her shop goods that she had kept at home and cash **Kshs. 780/=**. Her neighbours answered her call of distress but they could not catch up with her attackers who had taken off. She reported the matter to the police and sought treatment at the **Kitui District Hospital**. On examination by the Clinical Officer, she had sustained a bone dislocation on the left leg. **PW4 No. 89329 P C David Maina** visited the scene and found the wooden window having been damaged. He confirmed the presence of solar lighting at the house. Having concluded his investigations he arrested the two (2) Appellants.

3. When put on their defence the 1st Appellant stated that he was arrested while assisting his uncle to make bricks.

4. The 2nd Appellant on the other hand stated that on **21st January, 2012** he sold to the Complainant three (3) bags of charcoal. She promised to pay him on the **27th January, 2012**. However he was surprised to be arrested on the material date.

5. The trial court evaluated evidence adduced and found that recognition of the Appellants in the circumstances was watertight. The Appellants had not concealed their faces, they were well known to two (2) witnesses and they knew them by name. The learned Magistrate convicted them and sentenced them to suffer death as provided by law.

6. Being dissatisfied with the decision of the court the Appellants appealed against the conviction and sentence. In amended grounds of appeal they stated that:

- Recognition in the circumstances was not cogent.
- Evidence adduced was contradictory.
- Crucial witnesses who were mentioned were not called to testify and clarify doubts.
- Investigations carried out were shallow.
- The Appellants were not found in possession of any stolen item.
- Evidence adduced was fabricated.

7. The Appellant canvassed the appeal by way of written submissions. In response thereto **Mr. Njogu** learned Counsel for the State submitted orally whereby he stated that recognition in the circumstances was cogent. The Appellants were well known to PW1 and PW2. The robbery lasted for approximately **30 minutes** and there were solar lights that enabled the witnesses to see the Appellants who had not covered their faces. Actual violence was used on the person of the Complainant. The defence put up by the Appellants was a mere denial. Although stolen items were not recovered, ingredients of the offence of robbery were established and the sentence meted out was proper.

8. This being a first appellate court, I am duty bound to subject evidence adduced at trial to a fresh and exhaustive analysis while bearing in mind that I had no opportunity of hearing and seeing witnesses who testified. **(See Okeno vs. Republic (1972) EA 32)**.

9. The Appellants were charged with the offence of robbery with violence. Ingredients of the offence of robbery with violence were set out in the case of **Oluoch vs. Republic (1985) KLR** where the court 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 people or persons; or

c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses personal violence to any person.”

10. It was the Prosecution’s case that PW1 and PW2 were the Appellant’s neighbours therefore persons known to them. This was therefore a case of identification by recognition. In the case of **Anjononi & Others vs. Republic (1980) KLR** the case that guided the Lower Court in reaching its decision, it was held that:

“Recognition is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or another.”

11. I am however reminded of the fact of a possibility of errors being made even in the case of recognition. In the case of **Karanja & Another vs. Republic (2004) 2 KLR 240** the court held that:

“Recognition may be more reliable than identification of a stranger, but even when a witness is

purporting to recognize someone he knows, it should be borne in mind that mistakes of recognition of a close relative and friends are sometimes made.”

12. In the celebrated case of **Republic vs. Turnbull and Others (1976) 3 All ER 549** Lord Widgery CJ pointed out that:

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made All these matters go to the quality of identification evidence. If quality is good and remains good at the close of the Accused’s case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger.”

13. In this case, the Appellants were the Complainant’s neighbours. They knew them and could identify them by name. This was not in dispute. The only argument raised by the Appellants was that it was not possible for them to have gone to the house unmasked knowing that they were well known to the witnesses. PW1 was woken up by dogs that were barking and by the time the window was being broken solar lights were on. She was able to see persons who entered as they had not concealed their faces. She not only recognized the Appellants but two (2) of their companions. Similarly, PW2 recognized them. Their evidence was not challenged in any material aspect. There was nothing to suggest that the two (2) witnesses were mistaken as to the Appellants identities. The quality of identification in the circumstances was good. Therefore the learned trial Magistrate made no error in relying on the evidence adduced to reach the conclusion that identification in the circumstances was cogent.

14. It is submitted by the Appellants that the evidence of PW1 that she identified them as her attackers has been contradicted by that of PW4 who stated that she did not identify them by names. A perusal of the record clearly shows that PW4 stated that the Complainant was able to identify two of her attackers by name. Evidence adduced by PW4 cannot be dismissed as having contradicted that of PW1.

15. Some people, namely **Samuel Wambua** and **Mwangangi Mutia** were mentioned by PW1. It was the Complainant’s evidence that she rang the two (2) individuals and told them that they had been attacked then switched off the phone and threw it under the bed. These two (2) persons were later called by her children after the assailants left. On learning of what had transpired they followed the attackers but did not catch up with them.

16. In the case of **Mwangi vs. Republic (1984) KLR 505** the Court of Appeal held that:

“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with the discretion unless it may be shown that the prosecution was influenced by some oblique motive.”

17. Had these persons been called, they may have confirmed that indeed the Complainant and her children were attacked but they could not have been in a position to tell if indeed their attackers were the Appellants. Failure to call them was not fatal to the Prosecution’s case.

18. Failure to recover stolen items from the Appellants cannot be proof that they did not commit the offence.

19. Looking at the defence put up, it was not insinuated that the case was fabricated.

20. Evidence adduced established that persons who attacked the Complainant were six. Each Appellant was therefore in company of more than one person. They were armed with offensive weapons. The 1st Appellant in particular had a panga. According to PW1 and PW2 they took away **Kshs. 780/=** proceeds of sale for the day; and at the time of the robbery one of them beat up PW1 while the other one stepped on her leg. She was examined by PW3 **Peter Muthengi**, a Clinical Officer, who confirmed that indeed she

was assaulted and suffered grievous harm. The Complainant sought treatment on the **21st January, 2012**. At the point of being seen at the hospital her leg was swollen such that she could not walk.

21. Having re-evaluated evidence adduced, I find that indeed the charge of robbery with violence was proved against the Appellants to the required standard. Consequently the appeals filed by the Appellants are unmeritorious and are hereby dismissed in their entirety.

22. It is so ordered.

Dated, Signed and Delivered at Kitui this 6th day of September, 2016.

L. N. MUTENDE

JUDGE