



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO 372 OF 2007

PETER MURIITHI WARUI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

CONSOLIDATE WITH

CRIMINAL APPEAL NO 373 OF 2007

DUNCAN MWANGI NGATIA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL NO 376 OF 2007

ELIJA GICHINA GITHINJI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Appeal arising from the judgment of Hon M.K.K. Serem Resident Magistrate in Nyeri Cr. Case No. 1213 of 2007)

JUDGMENT

1. The appellants herein were charged with the offence of robbery with violence contrary to section 296(2) of the Penal code on count I the particulars of which were that on the 8th day of April 2007 at Mathaithi village in Nyeri District within Central Province, jointly with others not before the court being armed with dangerous or offensive weapons namely axes and bows robbed NANCY WANJIRU MWANGI of Ksh. 10,000/- and mobile phone make Nokia 3310 and at or immediately before or immediately after the time of such robbery used or threatened to use actual violence to the said NANCY WANJIRU MWANGI.
2. On count II the appellant faced a further charge of robbery with violence contrary to section 296(2) of the Penal code the particulars of which we re that on 8th day of April 2007 at Mathaithi village in Nyeri District within Central Province, jointly with others not before the court being

- armed with dangerous or offensive weapons namely axes and bows robbed PURITY WAIRIMU MWANGI of Ksh. 13,000/- and at or immediately before or immediately after the time of such robbery used or threatened to use actual violence to the said PURITY WAIRIMU MWANGI.
3. They pleaded not guilty and were tried convicted and sentenced to suffer death. Being aggrieved by the said conviction and sentence they both filed appeals which appeals we consolidated for the purpose of this hearing.
 4. At the hearing herein the 1st Appellant filed amended grounds of appeal and written submissions, the 3rd appellant supplementary grounds of appeal and written submission and the 2nd appellant made oral submissions before us. Mr. Cheboi appeared for the state and opposed the appeals herein.
 5. The 1st appellant in his amended grounds of appeal herein stated that

(a) The trial magistrate violated section 169(2) and section 200 of CPC

(b) His right to fair trial under then section 77(1) of the Constitution were violated.

(c) His identification was not proper.

d. His defence was rejected without reason.

1. While 3rd appellant in his supplementary grounds of appeal stated that the prosecution case was not proved and that his identification was not proper.

SUBMISSIONS

2. It was submitted by the 1st appellant that they were charged on two counts and that the court did not specify which count he had convicted the appellants on contrary to section 169(2) CPC which stipulates that in case of a conviction, the judgment shall specify the offence of which and the section of the Penal Code or other law under which the accused person is convicted and the punishment to which he is sentenced.
3. It was further submitted that plea was taken by Hon. PC. TOREREY on 17th April 2007 when the matter went to Hon. L.GITARI who relocated the same to Hon. K SEREM without complying with section 200 CPC. He further submitted that he was never furnished with a copy of the charge sheet and therefore his right to fair trial were violated. He further submitted that P.W.1 gave evidence half way in his absence.
4. He further submitted his identification parade violated section 6(v) of Cap 46 since the identification parade was not properly conducted neither was his alibi defence taken into account.
5. On behalf of the second appellant he submitted that the charge sheet indicated that P.W.1 was robbed of Kshs. 1300 while P.W.2 was robbed of Ksh. 10,000/= while he was only found with Ksh.600 whereas the prosecution case was that he was arrested at the scene. He further submitted that since the attackers had mask on and spotlights which were never found at the scene there is doubt on the prosecution case.
6. The 3rd appellant submitted that there is a possibility of him having been convicted on a mistaken identity since there was contradiction on the evidence tendered as to where he was found.
7. Mr. Cheboi for the state submitted that that the appellant were arrested at the scene and that it was not necessary to conduct identification parade since the appellant were all arrested at the scene and that both section 169(1) and 200 CPC were complied with and that the fact that the appellant were not given the charge sheet did not amount to violation of their rights to fair trial.

EVIDENCE

8. This being a first appeal we hereby analyse the evidence tendered before the trial court as follows: P.W.1 PURITY WANJIRU MWANGI's evidence that on 8th April 2007 at between 1.30 – 2.00 am their house was broken into by the people who went to her room and robbed Her of Ksh. 1300 and that as they were still in the police came and surrounded the house wherein the appellants were arrested.

9. P.W.2 NANCY WANJIRU MWANGI corroborated P.W.1's evidence and stated that one of the robbers had an axe and attempted to cut her and she gave him Ksh. 10,000/- together with her mobile phone which she identified in court and that by the time when the police came the appellants had hidden on the ceiling where from the police flashed them out using teargas. This evidence was further corroborated by that of P.W.3 PETER MWANGI and P.W.4 CHRISTOPHER NDEGWA the arresting officer together with PW.5 DANIEL NJUGUNA who recovered Ksh. 3600/- from the 1st appellant.
10. When put on their defences 1st appellant gave sworn evidence and stated that he did not know the 2nd and 3rd appellants and that on 5th April 2007 at 12.00 on his way from church he was arrested by the police who removed his wallet and Ksh. 3600/- and that they demanded the said money which he declined to give them and was arrested and booked at Karatina police station until 11th April 2007 and that on 17th April 2007 he was taken to court.
11. 2nd appellant stated that on his way home from a bar at Karatina called Star Point he was arrested at 11.30 pm and that he saw the 2nd appellant for the first time in the court while the 3rd appellant stated that he was framed up.
12. Based upon the said evidence the appellants were all convicted and sentenced and from the submissions and evidence herein we have identified the following issues for determination.

a) whether section 200 CPC was complied with.

b) Whether the appellants were properly identified

c) Whether their conviction was safe.

13. We have noted that when the appellants appeared before Hon. PC TOREREY the court referred this matter to Nyeri since she was handling Cr. Case No. 342/07 wherein the three appellants were charge. On 19th April 2007 the appellant appeared before Hon. L.W GITARI who then allocated their matter to the trial court and therefore the provisions of section 200 CPC were not applicable since the matter was not part heard before either of the said magistrates.
14. From the evidence tendered and as analysed herein we find that the appellants were all arrested at the scene of the robbery as confirmed by the evidence of P.W.1, P.W.2 P.W.3 P.W.4 and P.W.5 in what the trial court had this to say.

“ the three accused persons were therefore arrested red handed at the scene of crime and question of mistaken identity does not arise at all and is not an issue. The three accused persons had not been invited to the complainants house at all...”

15. We therefore agree with Mr. Cheboi that there was no need to conduct identification parade and that the fact that all the money taken from the complainants were never recovered was not fatal to the prosecution case.
16. We therefore find that the prosecution case was proved beyond reasonable doubt and that the appellants defences were taken into account by the trial court in what he stated as follows:

“The defences of the accused persons was therefore an after thought and a cooked up story aimed at misleading the sharp eyes of the law.... the defences of the accused persons which I find to be a mere sham are rejected...”

17. We therefore find no merit on the appeals herein and would therefore dismiss the same and confirm the conviction and sentence of the appellants herein.
18. We would however wish to point out that the appellants were charged on two counts and the trial court should have been specific whether the appellants were convicted on the two counts or one of them and for record purposes we find that the appellants should have been convicted on both counts and hereby convict the same and sentence them to death on the first count and the sentence on the second count shall be kept in the abeyance in view of the sentence on the first count.

Dated signed and delivered at Nyeri this 13th day of February 2014.

J. WAKIAGA

JUDGE

A. OMBWAYO

JUDGE

Court: Judgment read in open court in the presence of Mr. Njue for the Stte and the appellants in person.
The appellants have 14 days right of appeal.

J. WAKIAGA

JUDGE

A. OMBWAYO

JUDGE