



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 331 OF 2011

JEREMIAH NYAGA WARUE.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 2957 of 2009 in the Chief Magistrate's Court at Makadara - Ms. T. Mwangi (SRM) on 11/11/2011)

JUDGMENT

Introduction

1. **Jeremiah Nyaga Warue** the appellant herein was convicted in two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, in **CM Cr. C. No. 2957 of 2009** at **Makadara law court**.
2. It had been alleged that on 7th July 2009 at Mwihoko in Nairobi, jointly with others not before court, while armed with dangerous weapons namely pieces of wood, they robbed Japheth Mutuku Kimathi and Monicah Kimala of one mobile phone make Smapl, cash Kshs.800/= a wallet and ATM card all valued at Kshs.5,200/= and at or immediately before or immediately after the time of such robbery – threatened to use personal violence to the said victims.

Summary of the Case

3. The prosecution's case was that **PW1** was asleep with his family in his home at about 1 a.m. on 7th July 2009 at Mwihoko, when robbers attacked him. He opened the door for them when they sprinkled petrol on his bed through the bedroom window and threatened to set his house on fire. They took his mobile phones and wallet containing Kshs.800/= and they also took two mobile phones belonging to his wife. He however fought back and caused them to flee. Two days later he arrested the appellant whom he had identified during the robbery and handed him to the police.

4. The appellant gave sworn testimony in which he denied any involvement in the robbery. He told the court that when he met **PW1** on the day that he was arrested, **PW1** wanted him to point out the people who had robbed him. Suddenly **PW1** screamed and members of the public arrested the appellant instead. That the police recovered nothing connected to the robbery when they searched his house.

Grounds of Appeal

5. Upon conviction the appellant was sentenced to suffer death, where upon he filed an appeal in which he raised four grounds. In sum, he contended that the evidence of identification was not supported by a prompt and cogent first report; that the evidence as a whole was not credible and that his defence statement was not effectively analysed or considered.
6. Learned state counsel, Miss Njuguna opposed the appeal on behalf of the state and submitted that in the first report made a day after the attack, the complainant did inform the police that he had identified one of the attackers as someone he had engaged at his construction site.
7. We have perused the evidence on record and note that the appellant was not arrested at the scene of the robbery, neither were there any recoveries made at the time of arrest which might link him to the said robbery. The case therefore rests entirely on the evidence of visual identification. We are cognisant of the fact that it is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification therefore, that evidence should be watertight to justify a conviction. See - **Kiarie v Republic [1984] KLR pg 739**. We therefore scrutinised the evidence afresh with this in mind.
8. The circumstances of the identification were that the offence occurred at about 1 a.m. The witnesses had already retired to bed and were therefore awakened from sleep. Further, it is also in evidence that when the robbers arrived they disconnected the electricity from the metre box outside the house leaving the house in darkness. These being the circumstances of identification we evaluated the evidence of the three identifying witnesses afresh to rule out the possibility of error.
9. **PW1** testified that the robbers first jumped over the perimeter fence into his compound. They then forced the window to his bedroom open and demanded that he opens the door for them. He switched on the light on his phone which he said was bright and the robber who was communicating with him at the window immediately demanded for the phone. He gave it to him and opened the door when they sprinkled petrol into the room through the window and threatened to set the house ablaze if he did not comply. They entered the house and demanded for Kshs.100,000/= or they would have his head.
10. **PW1** testified that he recognised the appellant out of the three intruders who entered the house as one of the people he had engaged as a worker during the construction of the house. He said he was able to identify him by the light from the appellant's own torch, which brightened the whole room because of the plastered walls. We note from the evidence that in his report to the police the following day he said he had identified one of the robbers as a man who did some construction work for him. Further that he himself arrested the appellant two days after the robbery.
11. According to **PW2**, the wife to **PW1**, three men entered the house with torches and each had a stick. They demanded for Kshs.100,000/= or else they would behead **PW1**. One man escorted **PW1** into the bedroom while another dragged **PW2** from the bedroom to the sitting room, and ordered her to sit on the sofa. When she sat down he ordered her to undress. She shouted "Jesus" where upon the robber hit her on the head and thigh with a stick.
12. Her husband forced his way to where they were and began to fight the would be rapist giving her a chance to escape. She found one more robber outside but she jumped over the wall and ran to the neighbours screaming for help. The neighbours came after the robbers had fled. **PW2** testified that she too identified one of the three men who entered the house.

13. **PW3**, a sister-in-law to **PW1** was able to see and recognise one of the robbers when he directed the torch at himself. **PW3** said that the man was holding the torch in his left hand and a stick in his right hand which he used to strike **PW2**. **PW3** identified the man, when at one point he held the torch in a manner which made it shine upon his own face.
14. All the three witnesses were in agreement that the man they recognised was the appellant now in court. That they recognised him because he was well known to them, being one of the labourers on **PW1**'s premises into which they had just moved. **PW2** said that on one occasion she had served the appellant food to eat with her husband. All three witnesses stated that the robbers were not masked. **PW1** knew him well enough to know his home to which he went a day after the robbery to search for him. **PW1** also told the court that he identified him by the scar below his left eye which the court noted.
15. He also observed the appellant's demeanour after the robbery. The three witnesses testified that when **PW1** saw him and called out to him, two days after the robbery the appellant fled. **PW1** chased and arrested him with the help of members of the public. This demeanour was not consistent with his innocence as a man who was being called by someone who had hitherto given him opportunity to work as a labourer on his construction site to earn a living. It was the demeanour of a man with a guilty mind.
16. The appellant too admitted that he and the witnesses were well known to each other and that they had known each other for a period of four months before this incident. The trial court did consider the appellant's defence that he had never entered inside **PW1**'s house prior to the attack and discarded it as unfounded, in light of the fact that he worked on **PW1**'s construction site and did in fact construct the septic tank.
17. We carefully directed ourselves regarding the conditions prevailing at the time of identification and the length of time the witness had the appellant under observation, to exclude the possibility of error. See **-JOSEPH NGUMBAU NZALO VS. REPUBLIC (1991) 2KAR Pg 212**. We are satisfied that it is the prosecution witnesses who stated the facts as they occurred, and that although the appellant was under no obligation to explain his innocence, his defence was untenable as the evidence placed him squarely at the scene of the robbery.
18. On the sentence, the trial court reasoned that the Constitution of Kenya now bestows life sentence on capital offenders and sentenced the appellant to life imprisonment. The Constitution provides in **Article 26(3)** that:

“A person shall not be deprived of life intentionally except to the extent authorized by this Constitution or other written law.”

Article 25 of the **Constitution** does not include the right to life among illimitable rights. The legislative intent is therefore clear on the legality of the death penalty, since it is provided for in the Constitution and in statutes.

19. **Section 296(2)** of the **Penal Code** under which the appellant was convicted provides that:

“If the offender is armed with any dangerous or offensive weapons 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.”

In this case the appellant was in a group of four men who carried sticks and petrol and threatened to set the complainants' house ablaze if they did not comply with their demands. They also hit and injured **PW2** as evinced by the evidence of the witnesses including **PW7** the doctor, before they stole the property. Three ingredients of **Section 296(2)** of the **Penal Code** were satisfied in both counts even though proof of one ingredient only would have sufficed.

20. The sentence applicable upon conviction under **Section 296(2)** of the **Penal Code** therefore is death. The State having not, however, served the appellant with notice to enhance sentence, we find that it would be prejudicial to the appellant for the court to substitute the sentence at this point.

For the reasons set out above, we find that the appeal is lacking in merit and dismiss it in its entirety.

SIGNED DATED and DELIVERED in open court this 6th day of May 2014.

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A.MBOGHOLI MSAGHA

L. A. ACHODE

JUDGE

JUDGE