REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 382 of 2003

(From original conviction and sentence in Criminal Case No. 2635 of 2001 of the Principal Magistrate's Court at Nyahururu– D.K. Ngomo, PM)

STEPHEN MAUNDA NGASINI ..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

JUDGMENT

Stephen Maunda Ngasini, jointly with three others, were charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. Stephen Maunda Ngasini and one other were convicted and sentenced to death. Aggrieved by that conviction and sentence, the appellant, Maunda filed this appeal. The grounds of appeal are found in the petition of appeal and further grounds were adduced in the oral submissions made by the appellant. The grounds of appeal can be summarized as follows:-

1. That the learned magistrate erred in law and fact in convicting the appellant when the elements of the charge and facts were not proved to the required standard;

2. That the learned magistrate erred in fact and in law in convicting the appellant when the prosecution evidence did not prove that the appellant was adequately identified.

Based on the above grounds, the appellant urged this court to quash the conviction, set aside the sentence and set him at liberty.

In opposing the appeal, Mr. Marete, Learned State Counsel, argued that the appellant was identified by the complainants; that there was sufficient light and the 2 hour duration that the robbery took, gave the complainants sufficient time for identification of the robbers. He also argued that when PW1 reported the incident to Ndaragwa Police Station, he described his attackers to PW7; that the description fits the appellant. Mr. Marete therefore submitted there was sufficient evidence to convict the appellant for the offence of robbery with violence.

The brief facts of the case are that on 6th November 2001, David Gitahi Mureithi (PW1), his wife, Jane Wambui Gitahi (PW6) and their two children, Joseph Mureithi Gitahi (PW2) and Martin Ndwiga Gitahi (PW3) were at their home at Muthiga village. At about 11:30pm, while the family was asleep, PW1 heard dogs barking and people walking outside and touching the windows to his house. He got up and walked to PW2 and 3's bedroom. They screamed in order to raise alarm. The gang outside the house ordered PW1 to

open the door and threatened to kill the family if they continued screaming. PW1 who had his torch with him opened the door. As he opened, he had a four battery torch with which he was able to see the robbers as he opened the grill door. On opening he was immediately struck with a rungu and ordered to sit down. According to PW1, he saw one member of the gang with an A.K. 47 gun and another with a G3 rifle and a rungu (the appellant). The gang demanded money. PW1 testified that the appellant went to the bedroom where PW2, 3 and 6 sought refuge and started beating them. At that time, he was with the appellant's accomplice in PW1's bedroom. They also robbed them of money, items such as mobile phones, camera and wristwatch. PW1 was also ordered to give up the keys to his car. He obliged and escorted the gang outside. They attempted several times to start the motor vehicle but failed. They pushed the motor vehicle at least 8 times in order to jump start it manually but failed. One member of the gang returned to the house together with PW1, he took an umbrella from the bedroom, buttered two slices of bread and fled together with his accomplices.

The investigating officer, Police Constable Chris Manda (PW7) who is attached to Ndaragwa Police Station was on duty on 7/11/2001. He testified that PW1 reported that he was robbed by a gang of about six people; that PW1 described two of the assailants; the first was tall man, light in complexion and had a gap in the upper teeth; the other man was dark and slightly built, and that he could identify them. Later that day, Leison Lekakio was arrested by members of the public and taken to Ndaragwa Police Station. He was the 2nd accused in the lower court. PW7 interrogated the 2nd accused, who led him to the appellant’s house where he was arrested. No items stolen from the complainant were recovered.

On 9/11/2009, IP Joseph Kandagoi (PW4) of Nyandarua CID, conducted an identification parade at Ndaragwa Police Station in respect of Leshon Lekakio who was accused 2. No parade was conducted in respect of the appellant at Ndaragwa.

On 9/11/2001, John Njuguna Ngachu (PW8) who was then attached to Criminal Investigation Department at Nyandarua conducted an identification parade in respect of the appellant. PW1, 2, 3 and 6 positively identified the appellant from that parade.

When called upon to enter his defence, the appellant denied committing the offence and said that he was arrested on 7/11/2001 at his house and taken to Ndaragwa Police Station. On 9/11/2001, the District Officer Ndaragwa called a meeting where people were called to identify their clothes which they did, but they did not relate to this case. Later on, an identification parade was held at Nyahururu Police Station yet the people saw him at District Officer’s meeting. The appellant therefore contends that the identification parade which was carried out the same day at the Nyahururu Police Station was compromised and not credible.

In deciding this appeal, we are guided by the principles set out by the Court of Appeal in **Gabriel Njoroge Vs Republic (1982-1988) 1 KAR 1134** where the Court of Appeal said:

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect. (see Pandya v Republic (1957) EA 336)”.

This being the first appeal, this court is required to evaluate and analyse the evidence afresh and make its own findings always bearing in mind that this court did not have the opportunity to see the witnesses and assess their demeanor.

The first ground of the appeal is that the elements of the charge and facts were not proved to the required standards. The elements constituting the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** are now settled. They are as follows:-

The accused must:-

1. be armed with a dangerous or offensive weapon or instrument; or

2. be in company of one or more other person or persons; or

3. at or immediately before or immediately after the time of the robbery, wound, beat, strike or cause any other personal violence on any person.

PW1 testified that they were attacked by the appellant and at least five other people. He was only able to see two, whom he identified during the identification parade. He described one of the assailants to have been carrying an AK47 gun and the other had a G3 rifle and a rungu. Immediately they got into the house, the robber with the rungu hit PW1 on his hand which got fractured. They also attacked PW2, 3 and 6. It is clear, there was more than one person involved in the attack and immediately before the robbery, the attackers beat up the complainants. We do find that the elements of the charge of robbery with violence were satisfied and an offence of robbery with violence was committed.

The second issue is whether the appellant was one of the robbers and whether he was properly identified. The robbery occurred at night. PW1, PW2, PW3 and PW6 testified that it was about 11.30 pm. The trial court needed to warn itself of the dangers of basing a conviction on identification in unfavourable circumstances. The learned magistrate did rightly look into the circumstances surrounding the night of the attack. Firstly, he noted that the assailants had not concealed their identity nor did they attempt to conceal. Secondly, the robbery took about 2 hours and PW1 who was with the assailants through out this time was able to identify them. On the intensity of light, the magistrate found that;

“ if there was enough light from the torch of the accused to allow them to see enough to do small household chores like smearing margarine on two slices of bread, then there must have been enough light to enable PW1 to see and identify the accused whom he stayed with for 2 hours”.

On our part, we have looked at the circumstances prevailing at the time of the attack and whether they were favourable for positive identification. In **Rep v Eria Sebwato (1966) EA** the court said:-

“where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction.”

See also **Mohamed Rama Aljain Vs Republic (mombasa Criminal Appeal 223/02** and **Maitanyi V Republic (1986) KLR 198.**

The circumstances under which the complainants were robbed were not favourable for identification as it was about 1130 pm and the source of light was from a torch. However, the description by PW1 of the sequence of events in that there was light from a torch which had four new batteries and which was placed on the table at one time and the fact that the robbery took over 2 hours; the fact that the appellant did not conceal his face, was in close proximity with the witnesses. PW2 and PW3 also said that there was also some electric lights from outside meaning that apart from the torch it was not dark. PW3 and PW6 also confirmed that at one time the appellant put the torch on the table. The role played by the appellant during the attack made it possible for the witnesses to see the appellant well. We find the evidence against the appellant is watertight. The evidence is corroborated by positive identification by all complainants on a parade.

As to whether the appellant had been paraded to the public by the District Officer, we do find it to be untrue and an afterthought meant to discredit the identification parade. This is because the appellant did not raise that allegation when cross examining the investigating officer PW7 or PW8, who conducted the identification parade. The appellant did not also raise the issue with PW8 that there had been another parade at Ndaragwa.

After evaluating the prosecution and defence evidence afresh, we come to the conclusion that the lower court properly found that the appellant was properly identified by PW1, PW2, PW3 and PW6. We are satisfied that the magistrate correctly came to the conclusion that it is the appellant with others who

robbed PW1. The conviction is safe and we confirm it.

On sentence, we are of the view that since the complainant was not so seriously injured during the robbery, we exercise our discretion, set aside the death sentence and substitute it with life imprisonment. To that extent, the appeal succeeds. It is so ordered.

DATED and DELIVERED this 10th day of May, 2013.

R. P. V. WENDOH

JUDGE

M. J. ANYARA EMUKULE

JUDGE
PRESENT:

The appellant present in person

Mr. Chirchirl for the State

Kennedy – Court Clerk