



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO.202 OF 2009

PETER MWANGI GACHIE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgment in the Chief Magistrate's Court at Nyeri in Criminal Case No.1238 of 2008 by D. OLE KEIWUA – SRM)

J U D G M E N T

The appellant Peter Mwangi Gachii was charged with the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge were that on the 17th day of September 2008 at Ngarengiro Trading Centre in Laikipia District within the Rift valley Province, jointly with others not before court, while armed with dangerous weapons namely A.K.47 rifle, robbed Naom Wanjiku Wangeci of cash Kshs.130,000/=, 50 Safaricom credit cards for 20 shillings each, 150 Safaricom credit cards for 50 shillings each, 40 Safaricom credit cards for 50 shillings each, unknown number of cigarettes, and other shop goods all valued at Kshs.190,000/= and at or immediately before or immediately after the time of such robbery shot and wounded the said Naom Wanjiku Wangeci.

The prosecution called 7 witnesses. The 1st witness was PW1 a shopkeeper by profession had had a series of break-ins into her shop. The said shop was broken in three times when the thugs stole stock worth Kshs.43,000/=, 250,000/= and 260,000/= respectively using master keys. This prompted her to change padlocks from solex to viro.

The fourth time, the thugs came when she had partly closed her shop. One posed as a sick person who wanted drugs, she sold him the drugs and immediately he left, four men entered one of them whipped out a pistol and aimed at her head. She ducked hence the bullet got her left hand where it is lodged to date. The thugs took time at the shop before shooting her. She claimed to have been able to identify one person who had been her regular customer. The gun used was long according to the 1st prosecution witness. They took away 50 safaricom cards, 20 safaricom credit cards for Kshs.50 and unknown number of cigarettes and other shop goods.

After the thugs had left, she called out for help and was rushed to hospital where she was admitted with a bullet lodged in her chest. Later, she received threatening calls from mobile phone number 0715086664. She used to get callers from three different voices an issue that made her to be admitted at mt. Kenya Hospital for her security. The calls continued coming from the said number demanding money owed by her mother to the callers. She reported the matter to the police who investigated and tracked the callers as the appellant and one Kinoti Kimiti who was arrested but the latter escaped from the police custody and was shot dead in a shoot out with police. She was called to the mortuary and identified the dead person as one of the people who attacked her. She later attended the identification parade and was

able to identify the appellant as one of the thugs.

During the course of their investigations, the police were told that on 17/10/2008, PW1 was attacked and robbed while at her shop at Ngarengiro in Ngobit. She was alarmed because the robbers were calling her via telephone number 0713086664 and threatening her life while demanding Kshs.500,000/= which was a debt her mother owed them. Her mother was murdered in the year 2000 by unknown people. The police investigation revealed that the number 0715086664 was used in mobile handset serial number 358960011838750 on 28/10/08 and serial number 353106026125140 on 31/10/2008. The investigation further revealed that the handsets were also using mobile phone number 0724545112 and the same had been done on 13/10/2008. The phones were located in Nanyuki town and the appellant was found to be the user of mobile phone number 0724545112 which he had used to threaten PW1 moreover, he was found with a Nokia phone make number 110 and serial number 353266018205799 and Sim card for mobile number 0724545112. the police checked the number and found that the appellant had communicated to 0715086664 on 15/11/2008 at 2.07pm. The appellant led the police to the mobile user of 0715086664, Mr. John Maingi Kinoti who was arrested but escaped from custody and was later shot dead. However, before he died, they had recovered the sim card for 0715086664 which was activated and found to have been used to threaten the PW1.

The appellant led the police to his house at cottage estate in Nanyuki where a search was conducted and a mobile phone serial number 358960011838780 was recovered. On further investigation, it was established that Mr. John Kinoti had used the mobile phone.

An identification parade was done by CIP Mathenge and the appellant was positively identified and charged with the offence.

In his defence the appellant gave a sworn testimony that on the 13/11/2008 he was at his place of work as usual as a livestock trader and at around 3.30pm when on his way home he met three people along prison road, one was a lady who knew him called Esther Njoki and two other men. Esther asked for John Maingi Kinoti and told him that the two men were looking for him. They asked for his number and the appellant gave them. They tried to call him but the phone did not go through. He was searched and arrested and led them to Mr. Kinoti who was also arrested. In his defence, he stated that phone number 0715086664 belonged to Mr. John Maingi Kinoti who used to call him over the weekend to give him work. The mobile was never used to demand any money. He claims that PW1 saw him before she identified him at the police station.

The trial magistrate after analysing the evidence acquitted the appellant of count II and count III but after warning himself convicted him on the charge of robbery with violence. The conviction was based on the evidence of a single identifying witness. He was sentenced to death.

In his amended memorandum of appeal he states that;

1. ***That the trial magistrate erred in law and facts in convicting the appellant on defective charges.***
2. ***That the trial magistrate erred in law and facts in convicting the appellant without noting that the investigations were a shoddy job done which did not prove the charges to the required standard.***
3. ***That the trial magistrate erred in law and facts in relying on the evidence of visual identification as well as the identification parade but failed to note that the same could not hold any water.***
4. ***That the trial magistrate erred in law and facts in failing to check the authentic of the purporting witnesses evidence.***
5. ***That the trial magistrate erred in law and facts in failing to note an irregularity occasioned the***

trial by the prosecution.

On ***ground one*** of appeal, he argues that the charge sheet was defective for indicating that the gun used was AK.47 assault rifle while in the evidence of PW1 she was not categorical that an AK.47 was used. At one time she mentioned a pistol and at the other time she mentioned a long gun. Moreover, that the charge sheet reads that Kshs.130,000 was stolen from the PW1 whilst in her testimony she claims that she had Kshs.150,000. The appellant further argues that the charge sheet indicate 150 safaricom credit cards for 50 as having being stolen but did not prove this. The appellant wonders where the investigating officer got the information on the charge sheet.

This ground of appeal is rejected from the onset. The use of the word A.K.47 instead of pistol or vice versa in the charge sheet was not fatal to the conviction and such use occasioned no prejudice to the appellant in as much as both the implements are weapons whose use is for the same effect. ***In Kingori - VS- Republic***, it was held by the court of appeal that ***“As regards the complaint that the charge sheet was defective all we can say is that the appellant was in the company of another person and they were armed with a sword and iron bar. They inflicted serious injuries to the complainant as can be found in the evidence of James Ndungu Mwangu (PW5) the clinical officer who examined the complainant. The clinical officer classified the degree of injury inflicted to the complainant as harm. The essential ingredient for the offence of robbery with violence contrary to Section 296(2) of the Penal Code, were met. We do not think that the use of the word 'panga' instead of 'sword' in the charge sheet is fatal to the conviction. Such use occasioned no prejudice to the appellant in as much as both are implements or weapons whose use is of the same effect.”***

The next issue we should deal with is identification which is raised in grounds 3 and 4 and 5. The appellant argued the three grounds as one. To deal with this issue properly, we should find out how the appellant was arrested.

PW6 was assigned the duty to investigate the robbery. He wrote a letter to safaricom seeking for information on the mobile numbers 0715086664. He got information that the mobile number had been used in different handsets thus serial number 35890011838750 and serial number 353106026125140. During his investigations, he found out that serial No.353136326125140 was at one time used by mobile phone number 0724545112. This number was used by the appellant. He never knew the appellant but in the company of Sgt. Mureithi, they went to Nanyuki and arrested the appellant and found him with a Nokia 1110 handset serial number 353266018205799 with sim card for mobile No.0724545112. The investigating officer did not explain how he managed to trace the appellant in Nanyuki. He does not explain how he traced him in Nanyuki and where he found him however, the appellant did not deny that the handsets were his and that he was the user of the mobile sim card no 0724545112.

Coming back to the evidence of PW1, she was attacked on the 17/9/2008 at 7.00 pm when she had partly closed. One person posed as a sick customer who wanted drugs. She sold him the drugs and he left then four men entered she looked at them and they did not say anything. When she asked them what they wanted one of them whipped out a pistol and aimed at her head and shot her. The thugs took time at the shop before shooting her and therefore she was able to identify one of the persons who was her regular customer.

On cross-examination by the appellant, the PW1 maintained that she asked the appellant whether he wanted to buy something but he kept quiet and saw him before he shot her and identified his face. This court finds that there was enough time for the PW1 to mark the faces of the persons who attacked her especially when they approached her and did not say anything until she asked them what they wanted and instead they drew a gun and shot her.

On the issue of lighting, there is no dispute as to whether there were lights. The issue raised by the appellant is the contradiction between the testimony of PW1 and PW3 because PW3 says that the electricity lights were on whilst PW3 stated that they were using a battery to light the shop. The issue is whether there was enough light to enable PW1 mark the appearance of the robbers to enable her identify them and not whether the light was electric or battery. The appellant referred to the statement by PW3

that he hid inside the store and heard movements of the people while flashing torches and asked why they would flash torches when there was light. This court evaluates the evidence to mean that the store was dark and separate from the shop and therefore was likely to have been dark and that is why the witness hid there. The court finds that there was enough light to identify the persons who attacked PW1.

The issue as who shot PW1 was also raised by the appellant as the witness appeared to contradict herself when she states that she went to the mortuary and identified the dead person as the person who had shot her but later she appears to say in cross-examination that she was shot by the appellant. After carefully analyzing the evidence of the PW1, the court finds that she stated that the thugs took some time before shooting her and in cross-examination she states that she was shot by the appellant. Though there is contradiction in exactly who shot the PW1, the court finds that the appellant was properly identified as one of the thugs who attacked the PW1.

The contention by the appellant that he could not have been similar to the members of public as he was shaggy and unkempt does not negate the outcome of the identification parade. The accused was placed amongst 9 members of an identification parade drawn from the public who were similar in size, colour and appearance of the accused in compliance with force standing orders on identification parade that requires the accused person to be placed among at least eight persons as far as possible of similar age, height, general appearance and class of life as himself. This court does not find any irregularity with the recall of PW1 to produce the P3 form.

The upshot of the above is that the appeal is dismissed.

Dated, signed and delivered at Nyeri this 7th day of November 2013

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE