



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 133 & 139 of 2006

MOSES MWANGI KANYERI.....APPELLANT

versus

REPUBLIC.....RESPONDENT

*(Arising from the Chief Magistrate's Court at Nyeri
in Criminal Case No. 4305 of 2006)*

CONSOLIDATED WITH

JOHN KAGONDU MACHARIA.....APPELLANT

versus

REPUBLIC.....RESPONDENT

*(Arising from the Chief Magistrate's Court at Nyeri
in Criminal Case No. 4305 of 2006)*

JUDGMENT

The appellants herein were both charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code.

The particulars of the offence were that on the night of 26th and 27th of September 1999 at Kimathi estate in Nyeri District of Central province Jointly with another not before the court while armed with dangerous weapons namely pangas and simis jointly robbed one LUCY WAIRIMU KAMOTHO of cash Ksh. 150 and at or immediately before or after the time of such robbery injured the said LUCY WAIRIMU KAMOTHO.

In count II they faced the charge of robbery with violence against one JOHN NDERI MACHARIA who is also alleged to have been robbed of Kshs. 150/-.

In count III they both faced the charge of robbery with violence against one MWANGI WAHOME KARUHI at Majengo estate who was robbed of cash 3400/-.

They were tried convicted and sentenced to suffer death.

Being aggrieved by the said conviction and sentence the appellant each filed an appeal which said appeals we consolidated at the hearing herein for purposes of trial and determination.

The appellant who were not represented filed an amended grounds of appeal together with written submission which they relied upon at the trial herein.

The grounds of appeal by the appellant for the purpose of this trial can be summarized as follows:

- a) The identification was faulty.
- b) Some very essential witnesses were never called to testify.
- c) The 2nd appellant's defence of the existence of a grudge with P.W.3 was not taken into account.
- d) The judgment was not delivered contrary to section 169 of Criminal Procedure Code.

Mr. Kaigai for the state opposed the appeal herein on the basis that the trial herein was a retrial and the main issue in dispute was that of identification. He submitted that P.W.1 was able to recognize the appellants through the use of security lights from the nearby secretarial collage. He submitted that there was a positive identification parade and that P.W.2 corroborated the same evidence and stated that he had sufficient time to with the appellants.

He submitted that the defences of the appellants were properly considered by the trial court.

The appellants in their written submissions have submitted that P.W.1 and P.W.2 were attacked between 11 – 11.30 pm at night on the road. It was therefore submitted that it was not possible for the complaints to identify the attackers.

It was submitted by the first appellant that although the case was that of recognition there is a possibility that the same could have been a victim of circumstances or mistaken identity on recognition.

The 1st appellant further submitted that the witnesses who were with P.W.1 were never called to testify.

It was further submitted that the same was not given right to mitigate and therefore urged us to allow the appeal.

the 2nd appellant submitted it was not possible for the complainant to identify the same and that the secretarial college whose security light aided the complaint in seeing the appellant is not identified and that since she was injured the conditions were not favourable for identification.

He further submitted that two vital witnesses were never called to testify and that his defence was rejected by the trial court. He further submitted that the sentence meted out was unconstitutional and in violation of his constitutional right to life under article 26(1) of the Constitution of Kenya.

It should be pointed out that we are required to reassess the evidence tendered before the trial court and to come to our own conclusion this being a first appeal.

The evidence tendered before the trial court was as follows:

P.W.1 LUCY WAIRIMU KAMOTHO stated that she was at the material time a bar attendant working at Gikondi bar. At 11.30 pm she was walking home in the company of one Macharia Nderi when they saw there people who got hold of her, she was left with the 1st appellant while the second appellant chased the said Macharia and she was able to identify him through the electric light at the secretarial area. They demanded money from her and took her Ksh. 150/- while armed with panga and knife respectively.

While they were assaulting her she raised alarm and one John Edede came to her rescue and that the 1st appellant was arrested on the same day under examination the witness testified that she had known the second appellant since 1999.

P.W.2 Mwangi Wahome testified that on the material day at 11.00 p.m. While near his home he met three people who asked for a match box from him. He knew the said people and that as he was going to remove money from his pocket the first appellant hit him on the face with a panga and the 2nd appellant stabbed

him on the chest with a knife. He was later able to identify the 1st appellant at identification parade.

Under cross examination he confirmed that the clothes the 1st appellant had in court are the same he had at the time of the alleged attack. He further testified that he had known the 2nd appellant since 1999 as a lorry turn boy.

P.W.3 p.c THOMAS MURIUKI KORO testified that on the material day he heard screams from a woman and he responded to the scream and on the way met three people who tried to confuse him and that he was able to arrest two of them and that P.W.1 was subsequently able to give him the name of the first appellant and that the 1st appellant gave the name of the 2nd appellant.

Under cross examination he testified that he did not have a grudge with the 1st appellant and that he was able to arrest the 2nd appellant in connection with this case before the trial court in court while in another case.

P.W.4 CIP ABDUL MUHIKA testified that he conducted an identification parade in respect of the 1st appellant where the same was positively identified.

When put on their defence the 1st appellant testified that on the material day at 6.00 p.m. p.c Muriuki came to his barber shop and asked him to accompany him to the police station where he was interrogated on an alleged theft of a vehicle at Pembe Tatu and that p.c. Muriuki had a grudge with him because of a girl he had employed at the saloon with which he had an affair.

The second appellant testified that he did not know the 1st appellant and that he was arrested while he came from a mention of another case and that the case against him was a fabrication by Wahome.

Based upon the said evidence the appellants were convicted and sentenced to death.

The main issue for us to determine in this appeal arising from the submissions of both the appellant and the state is whether the appellants were positively identified by the complaint.

From the evidence tendered before the trial court is clear to our mind that the appellants were properly identified. P.W.1 testified that there was adequate light from the secretarial college and that she was able to properly see the first appellant. She also testified that she was able to properly see the first appellant. She also testified that she was able to see the second appellant whom she had known since 1999 as he used to come to the bar where P.W.1 was working.

P.W.2 Mr. Mwangi Wahome also testified that he met the appellant and that they asked for a match box from him and that he was able to pick the same from an identification parade.

We have also looked at the evidence of P.W.3 p.c Thomas Muriuki Koro who arrested the first appellant immediately after the attack and that it is this first appellant who gave the name of the second appellant. He was also able to recover one cap and a pair of leather saddles. We therefore find no merit on the appellants ground of appeal to the effect that they were not properly identified since we are of the considered opinion that the same were properly identified.

On the issue of the non-availability of two vital witnesses we find that the same did not affect the prosecution's case and further find that no evidence was tendered to prove that there was a grudge between the OCS and the first appellant.

We therefore find no fault with the trial court's holding both in conviction and sentence and therefore dismiss the appellants appeal herein as lacking merit.

Dated and delivered at Nyeri this 4th day of October 2012.

J.K. SERGON
JUDGE

J. WAKIAGA
JUDGE

Ms Kitoto for the State

Moses Mwangi Kanyeri in person.

John Kagundu Macharia in person.

J.K. SERGON
JUDGE

J. WAKIAGA
JUDGE