



REPUBLIC OF KENYA

High Court at Nyeri

Criminal Appeal 212 of 2010

BONIFACE WANGAI WANJIRU.....APPELLANT

versus

REPUBLICRESPONDENT

(arising from the judgment of Hon. S. Muketi Chief Magistrate

at Nyeri in Criminal Case No. 1233 of 2009)

JUDGMENT

The appellant was charged with the two counts of robbery with violence contrary to section 296(2) of the Penal Code.

Count 1 the particulars of which was that on 5th of November 2009 at Kamwenje village while armed with dangerous weapon namely a walking stick robbed Elizabeth Wangui Gachuri one mobile phone make Nokia 1100 one handbag containing personal effects and cash Ksh. 1350 all valued at Ksh. 5000/- and at or immediately before or immediately after the time of robbery threatened to use actual violence to the said Elizabeth Wangui Gachuri.

Count II on the 18th day of November 2009 at Kamwenje village Municipality Division of Nyeri District within Central Province with others not before court while armed with dangerous weapons namely a rough stone robbed ROSE WAIGUMO CHIIRA one mobile phone make Samsung, one hand bag containing personal effects and cash Ksh. 2000/- all valued at Ksh. 8000/= and at or immediately before or immediately after the time of robbery used actual violence on the said ROSE WAIGUMO CHIIRA.

He pleaded not guilty and was tried convicted and sentenced to suffer death.

Being dissatisfied with both conviction and sentence the appellant filed this appeal.

when this appeal came up for hearing before us, the appellant who was unrepresented submitted an amended grounds of appeal and written submissions which he relied upon.

We must at this stage point out that Miss Maundu for the state conceded to this appeal on the ground that the elements of robbery with violence was not proved and urged us to substitute the same with simple robbery. She submitted that there was no offensive weapon used and that the case for simple robbery was proved.

It should be pointed out that in law we are not under any obligation to allow the appeal on the ground that it is conceded to by the state but we are required to reevaluate all the evidence tendered

before the trial court and to come to our own conclusion based upon the said evidence.

Before looking at the appellant's submissions and grounds of appeal we need to look at the evidence that was tendered before the trial court first.

P.W.1 ELIZABETH GACHIYIRI testified that on 5th November 2009 she was coming from Kamwenja Teachers College and saw a man from a distance. She realized that he had a walking stick and as they passed each other he turned and hit her on the right ear causing her to fall down. The alleged attacker got hold of her bag and ran to the bush. She thereafter went to Nyeri and made a telephone call and was told that her bag had been recovered.

After three weeks the principal of the college called and informed her that a suspect had been arrested. She was able to identify the appellant since he had the same T-shirt.

P.W.2 ROSE WAIGUMO CHIIRA testified that on 18th November 2009 at 12.20 p.m. she met a boy from the opposite direction and as they were by passing each other he slapped her on the right side causing her to fall down. The attacker took her bag and ran into the bush. After about 10 minutes the college security officers went into the bush and came back with her bag.

After 1½ month she was told that the appellant had been arrested and was requested to attend the identification parade where she was able to identify the appellant.

P.W.3 NICASIO GICHUHI WANGONDU testified that on 24th November 2009 at 8 p.m the appellant gave him a phone to give to one Gichuhi to take to the charger. He did not thereafter come for the said phone and subsequently gave the same to a nephew of the appellant.

P.W.4 p.c. ANTONY MURIUKI NYAMU stated how he managed to get the bag of the first complainant and that on 25th of November 2009 they were informed by members of the public that a person had been seen at the incident they laid an ambush and caught the appellant. Acting on a tip off they managed to get the phone which was stolen from one Wanjau and were subsequently able to get the second phone.

P.W.6 JAMES WANJAU confirmed that the appellant gave him a phone nokia 1100 for charging.

P.W.7 KELVIN KARIUKI confirmed that he was given a phone by P.W.3 to take to the appellant which he subsequently handed over to the police.

P.W.8 Ip DANIEL KADEI testified on how he conducted an identification parade and that the appellant was positively identified

P.W.9 DR. DINDI KEITA produced a medical report in respect of the second complainant where her injury were classified as harm.

When put on his defence the appellant stated that he stays with P.W.7 and that he used to work in town until 6 p.m. That on 2th November 2009 when he got home he was arrested by two police officers.

It is against this evidence that we now look at the appellant's submissions. The appellant has raised a very fundamental issue on the charge sheet herein. He has submitted that the offence he is charged with were committed on two different dates and therefore he ought to have faced two different charges and not two count as was the case before the trial court. He has therefore submitted that he was prejudiced.

We have however noted that under section 135 of the Criminal Procedure code there can be joinder of counts and the case before the appellant formed part of a series of offences of the same or similar character

The appellant in his ground two of appeal has submitted that the elements of robbery with violence

was not proved and Miss Maundu for the state has rightly conceded that the elements of the offence of robbery with violence was not proved to the degree required. We would therefore allow the appellant's appeal on this issue.

We have looked at the record and find no fault with the trial court's finding on the identification of the appellant. The offences occurred during day time and the complainant had opportunity to recognize the appellant. He was positively identified by the 2nd complainant at an identification parade and therefore finds no merit on the appellants ground four of appeal.

in the final analysis we find that the evidence tendered before the trial court was sufficient to convict the appellant for the offence of robbery under section 295 and 296(1) of the Penal Code and dismiss the appeal on conviction but quash and set aside the courts finding on sentence and substitute the same with a term of ten years on both counts to run concurrently.

Dated and delivered at Nyeri this 1st day of November 2012.

J.K. SERGON
JUDGE

J. WAKIAGA
JUDGE

1/11/12

Before J. Wakiaga - judge

court clerk - Wanjohi

Boniface Wangari Wanjiru – appellant

Miss Maundu for the state

Court: the judgment is read in open court in the presence of the above.

J. WAKIAGA
JUDGE