



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG & DULU, JJ.)

CRIMINAL APPEAL NO. 552 OF 2005

BETWEEN

JOSEPH OTIENO OWINO..... APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate Mrs. Gandani dated 15th November, 2005 in Criminal Case No.26023 of 2003 at the Makadara Law Courts)

JUDGEMENT OF THE COURT

The appellant was charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63). The particulars were that the appellant, on 30th November, 2003 at Garden Estate within Nairobi, jointly with others not before the Court, and while armed with a toy pistol, robbed **Lawrence Ng'ang'a Kamau** of a Nokia 6210 cellphone, an Orient wrist-watch, and cash in the sum of Kshs.3000/= ? all valued at Kshs.14,030/= and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence against the said **Lawrence Ng'ang'a Kamau**.

The appellant faced a second count of the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63). The particulars were that, on 30th November, 2003 at Garden Estate in Nairobi, the appellant, jointly with others not before the Court, and while armed with a toy pistol, robbed **Martin Kiarie Mumbi** of an Alcatel mobile phone valued at Kshs.6000/=, and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence against the said **Martin Kiarie Mumbi**.

PW1, **Lawrence Ng'ang'a Kamau**, gave testimony that, at 12.30 pm on 30th November, 2003 he was going for Bible study at the Jehovah's Witnesses Church, and he took out his Nokia 6210 twin-simcard cellphone, for the purpose of switching it off. He was walking along a quiet footpath, in the company of **Martin Kiarie** (PW2) who had fallen some tens of metres behind as he was talking to somebody. As soon as PW1 put the cellphone into his trouser pocket, he felt somebody pulling up his trousers, from behind; and then a pistol was held against the right side of his head. The intruder demanded the cellphone, and the bag which PW1 was carrying. This intruder was the appellant herein, and he was accompanied by another man, to whom PW1 surrendered the cellphone; and PW1 threw his bag on the ground. The appellant herein put his hand into PW1's back trouser-pocket, and took out Kshs.3,500/=, and he

demanded PW1's wrist watch, which the PW1 surrendered to him. PW1 identified the said watch, Orient by make, which he said, the appellant pulled out of his wrist forcefully. The appellant ordered PW1 to keep quiet, and at that moment, PW2 who was just coming up, noticed the incident, and asked aloud: "*Ni nini Brother Ng'ang'a?*" (Ksw. for "*What's the matter, Brother Ng'ang'a?*").

PW1 saw PW2 coming towards him, still some 30 ft away; and the two intruders rushed towards PW2, threatened him with the said pistol, and PW2 fell down. The intruders, and specifically the appellant herein, grabbed PW2's cellphone. At this point, PW1 started running away, shouting "Don't kill me." Kiosk businessmen were attracted, and came from the front; and PW1 told them he had just been robbed by the two intruders who had now fallen on PW2 who lay on the ground. At that moment, PW2 was defending himself against the attack on him. When they noticed the arrival of members of the public, the appellant and his accomplice took off; but the crowd gave chase; one of them disappeared in the bush; but the appellant herein escaped into a house under construction, and locked himself in there. Policemen later came and pulled the appellant from his hideout. PW1 identified the appellant to the Police officers. The appellant was still wearing the green T-shirt which he had been wearing at the time of the attack on PW1 and PW2. When the appellant was searched, PW1's watch was found in his pocket; and the appellant said PW1's cellphone was in the possession of the escaped accomplice. The toy pistol was found in the appellant's hideout.

On cross-examination, PW1 said he had surrendered his belongings to the appellant because he feared he (PW1) might be killed. The intruders had held PW1 for about two minutes; and they held PW2 for another two minutes. PW1 said he remembered the appellant "very well" because the appellant had talked to him; and he further testified that the appellant had been pulled out of his hideout some 45 minutes following the robbery attack. It was PW2, rather than PW1, who had joined the members of the public who chased the appellant until he sought refuge in the construction-site hide-out. The appellant was caught about one kilometre from the scene of the robbery. The robbery had taken place on a Sunday, on 30th November, 2003, and PW1 had recorded his statement with the Police on the same day. On the issue of identification, PW1 said under cross-examination:

"I identified you positively. I identified you because I talked to you. I saw your face, and I saw your green T-shirt."

PW2, **Martin Kiarie Mumbi**, testified that, at about 12.00 noon on 30th November, 2003 he was trying to catch up with PW1 so they would walk together; and he then saw two men approach PW1. He saw that one of the two men held PW1 by the neck, and pointed a gun at PW1, while the other put his hands in PW1's pockets. PW2 at that moment screamed out: "Thief! Thief!" And the intruder with the gun then turned his gun towards PW2, PW2 then being only some five metres away from the scene of attack on PW1. PW2 knelt down, kept quiet, and prayed not to be shot. At that moment, members of the public got attracted to the goings-on; the one who had invaded PW1's pockets took off; the one holding the gun demanded PW2's cellphone, and PW2 surrendered to this gunman a cellphone, Alcatel 311 valued at Kshs.6,000/=; and the gunman then took off. PW2 started screaming, and, with members of the public, gave chase after the gunman. The gunman disappeared into a building under construction, but the Police were alerted, and Police officers broke a window leading into the hide-out, and arrested the man. It was PW2's testimony that the said gunman, who was arrested at the construction site by Police officers from Kasarani, was the appellant herein. The Police had fished out the appellant together with his pistol, which turned out to have been a toy pistol. PW2's cellphone was not recovered, but its cover was found at the said hide-out of the appellant. PW1's stolen Orient watch was found in the appellant's right-trouser pocket.

PW2 testified that he positively identified the appellant herein; in PW2's words: "from the time he took my phone, I did not lose sight of the [appellant] till the time he went into [hiding in] the building."

On cross-examination, PW2 testified that there had been no need for him to set out a description of the appellant's appearance to anyone, because "we caught you [only] about 10 minutes [after the attack]...I managed to identify you, since I followed you. You were armed with a gun...It was a Sunday, on 30th November, 2003. You attacked [PW1], then came to me...The Police removed the watch from your

pocket. You were not working in the building [where you hid].”

PW3, Police Force No. 76886 **Police Constable Mwinyi Mohamed** from Kasarani Police Station was at the Kasarani Crime Branch office when a robbery case was brought to his attention. He went to the reception, where he found a toy pistol and a wrist watch, and he then checked the Police cells and found the appellant herein, already held. PW3 took the appellant to the GSU hospital, since the appellant had minor injuries. After taking the statements of the witnesses, PW3 formally charged the appellant herein. On cross-examination, PW3 testified that he had taken into account the statements and exhibits, before charging the appellant. The complainants had identified the appellant, and PW1’s watch was recovered from the appellant.

PW4, Police Force No. 74363 **Police Constable Paul Githaiga Nguyo**, attached to GSU Headquarters, Ruaraka was coming from Church on Sunday, 30th November, 2003 at 12.30 pm, and was in the company of his colleague **Andrew Njagi**, when he saw members of the public chasing two young men. PW4 and his colleague joined the chase when they were informed that the two young men in flight were thugs armed with a gun. The chase focused on the young man who was said to be in possession of a gun; and this young man fled into a building under construction, and locked himself in. PW4 and his colleague entered the said building, and arrested the appellant herein; they searched the appellant and found on him a toy pistol, hidden in his waist, and an Orient wrist watch – both exhibited in Court. As members of the public bayed for the appellant’s blood, PW4 and his colleague called for Police help from Kasarani Police Station. The appellant, who at first tried to fight off those coming to arrest him, was held and taken to Kasarani Police Station.

On cross-examination, PW4 in reference to the appellant’s questioning, said:

“I did not witness the robbery. I saw you being chased. I knew you were a thug after you went and locked yourself in an [uncompleted] house. There were no workers at the house...I recovered the gun and watch from you. The watch was in your right trouser-pocket. There are many people who saw me recover the things. A pastor said the watch was his. I saw the gun and I knew it was a toy...”

The appellant gave sworn evidence in which he said he was a carpenter, and had been working on locks for a certain new house, alongside other workers. The appellant said he, at that moment, heard screams emanating from the outside. After he ignored the screams for a while, four people came into the building, with guns at the ready. The four asked what the appellant was doing in the building, and he answered that he was fitting door locks; but the crowd screamed that he was a thief. The appellant was pulled out of the building, and taken to Kasarani Police Station, and he was later charged.

On cross-examination, the appellant testified that he did not know the owner of the uncompleted building in which he had been arrested. He said other workers were present when he was arrested. He testified that he had been given carpentry work in the said building by a foreman, one **Odhiambo**. The appellant did not call any witnesses.

After the learned Senior Resident Magistrate found that the prosecution case was proved beyond reasonable doubt, and convicted the appellant on both counts, the appellant lodged an appeal in which he contended that proof-beyond-reasonable-doubt had not been achieved, because of contradictory testimonies; that the recovered watch was improperly produced as an exhibit; that he had not been properly identified at the *locus in quo*; that the trial Court erred in rejecting the appellant’s alibi defence.

Learned State Counsel **Mr. Makura** opposed this appeal, and urged the Court to uphold conviction and affirm sentence. Counsel submitted that there was overwhelming evidence on record, in support of conviction on both counts: there is evidence of identification, recovery, and arrest – all showing the appellant to have been the offender.

Counsel urged that the robbery had taken place in broad daylight, at about 12.30 pm; PW1 said he clearly saw the appellant, who was in the company of his escaped colleague; arrest of the appellant took place

immediately after the robbery incident; PW1 identified the appellant immediately after the arrest; PW1 positively identified things stolen from him and found in the possession of the appellant at the time of arrest.

Mr. Makura submitted that PW1's testimony was well corroborated by PW2's evidence. PW2 had witnessed the attack on PW1 by the appellant who was in the company of another. In the same robbery incident, PW2's cellphone was also stolen; and PW2 positively identified the appellant as one of the two robbers.

Further corroboration came from the arresting officer, PW4 who arrested the appellant immediately after the robbery. PW4, moreover, recovered items stolen, as well as the very "gun" that had been used to terrorise the victims before robbing them of their effects.

Learned counsel submitted that the Senior Resident Magistrate had considered the defence evidence and had dismissed the same, in the light of the overwhelming evidence adduced by the prosecution.

Mr. Makura submitted that the conditions in which the appellant had been arrested, had been so conducive, that no mistake in identification could possibly have been made. Contrary to the appellant's claim, counsel submitted that no essential witness had been left out, and that all the right witnesses had been called by the prosecution; and since the evidence so called was not threadbare, it could not be said that some particular witness had been left out.

The critical part in the trial Court's judgement thus reads:

"The issue to consider, therefore, is whether the accused person here was properly identified by the complainants...The complainants, PW1 and PW2, said that after the accused had robbed them, they gave chase [up to the point] where the accused hid in an incomplete house, and they properly identified him after he was flushed out, by the Police. Further PW1's watch was found with the accused. I am therefore persuaded that these circumstances favour a fool-proof identification which [is] error-free. The toy pistol the accused had used to threaten the complainants when robbing them was produced in evidence. PW4's evidence shows that the accused here was pulled out of the house while hiding from the mob that was chasing him, and he was, therefore, not working on the locks as he is claiming."

We see no reason at all to doubt the consistency and the veracity in the testimonies of the complainants, PW1 and PW2; their evidence is detailed and bears no element which suggests distortion, or want of truthfulness.

Without doubt, PW1 saw his attackers, and particularly noted the appellant herein who had a gun, and who tormented him the most. Although PW1 did not participate in the hot-pursuit chase of the robber, PW2 did, and PW4 also did; and they saw the appellant go into hiding in the structures at an unmanned construction site; it is from there that PW4 and others forced out the appellant.

The appellant when retrieved from his hide-out, had tell-tale symbols of his having robbed both PW1 and PW2 of their effects: he had PW1's stolen watch; he had the very "gun" which had been the instrument of terror at the *locus* of robbery; he had trappings of PW2's cellphone which had been stolen by the two robbers at the *locus in quo*.

We hold all the signals of effective identification of a criminal, to have been present: the appellant was well and truly visually perceived by witnesses, and particularly by the two complainants; the appellant was caught in one continuous transaction of perception and hot-pursuit, and had no opportunity to get mixed up with other people whose presence might confuse the tracing process; the appellant sought refuge in a secure physical structure, an uncompleted building where he did not get mixed-up with anyone else, and through which he could not escape, and from there, the appellant was retrieved whole, by those who arrested him; the appellant, when arrested and taken into custody, had on his person, or in suspicious proximity to himself, the very same effects which had been stolen at the *locus in quo*, nearly one

kilometre away ? effects which could not have come to the place of arrest except through the appellant's agency. Therefore, the appellant was properly identified as the thief; he was properly arrested; he was rightly charged.

The foregoing elements prove beyond reasonable doubt, and we so hold, that the appellant was the culprit, and the case against him was established by overwhelming evidence, and beyond reasonable doubt. The appellant's evidence made not a single dent on the decisive proof emanating from the prosecution.

Consequently, we hereby dismiss the appellant's case; uphold the conviction on both counts; and affirm sentence on both counts. We order, however, that the sentence of death imposed by the trial Court in respect of the second count shall remain in abeyance, pending the execution of the sentence on the first count

Orders accordingly.

DATED and DELIVERED at Nairobi this 1st day of November, 2007.

J.B. OJWANG

G. A. DULU

JUDGE

JUDGE

Coram: Ojwang & Dulu, JJ.

Court Clerks: Tabitha Wanjiku; Erick

For the Respondent: Mr. Makura

Appellant in person