

Mwangi v Republic

Court of Appeal, at Nakuru September 25, 1985

Hancox, Nyarangi JJA & Platt Ag JA

Criminal Appeal No. 130 of 1984

(Appeal from the High Court at Nakuru, Masime J)

September 25, 1985, Hancox, Nyarangi JJA & Platt Ag JA delivered the following Judgment.

The appellant, Peter Kamau Mwangi, was arraigned of Robbery contrary to section 296(1) of the penal code, the allegation being that he on October 29, 1983,

“At about 7.15 pm at Maili Kumi, Bahati in Nakuru District of the Rift Valley Province jointly with others not before the court, robbed Mr Elam Nyangara of his cash Kshs 3,150.00, two leave cheques of Kshs 1,660.00, one long trouser all to the total of Kshs. 4,930.00 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ELAM NYANGARA.”

He was convicted and sentenced to 4 years imprisonment and 5 strokes corporal punishment and he was ordered to be subjected to be under Police supervision for 5 years on release. His appeal to the High Court (Masime, J) was summarily rejected.

The circumstances in which the robbery took place were such as to confer exceptional significance on identification. According to the complainant the appellant was wearing a red shirt at the time he and two others robbed the complainant. Alice Mwangi (PW2) who said she was selling beer at the Kihere beer shop when the appellant entered the beer shop and sat close to the wall added,

“when I saw the accused, he was wearing some black polo-neck sweater.”

P Francis (PW3) who carried out the identification parade said the members of the parade were all in sweaters and trousers; four of them had red sweaters and the rest had sweaters of different colours and the appellant was identified by the red sweater he was wearing. If the members of the parade were dressed as I P Francis said they were, quire clearly their general appearance was not similar to that of the appellant as suspect.

In his petition of appeal to the High Court, the appellant’s grounds of appeal included a complaint that he was suspected “because of the type of clothes he was wearing.” Thus, the appellant specifically raised the issue of identification as one of the grounds in his appeal in his supplementary petition, the appellant referred, yet again, to identification and stated.

“If the officer who was conducting the parade was fair why did he not bring some other people who had sweaters.?”

Identification is an issue of law and the same having been raised as a ground of appeal, the judge could not summarily reject the appeal under section 352(2) of the criminal procedure code without hearing the appellant, as the appeal could not be said to have been brought on the ground that the conviction is against the weight of the evidence or that the sentence is excessive.

The ground of appeal on identification took the appeal our of section 352(2) of the criminal procedure code and so the appeal could not be summarily rejected: David Kingori Gitahi v R Criminal Appeal no 2 of 1985 (unreported).

We respectfully agree with the Principal State counsel that the just course to adopt is for the appeal to be heard by the High Court. We therefore set aside the summary rejection and order that this appeal shall be remitted to the High Court for hearing according to law.

Those are the orders of this court.