IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, WAKI & NAMBUYE, JJ.A)

CRIMINAL APPEAL NO. 200 OF 2010

BETWEEN

JOHN NYAMU MWAURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lessit & Ochieng JJ.A) dated 25th November 2004

in

H.C.CR.A. NO.1251 & 1255 OF 2001)

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JUDGMENT OF THE COURT

John Nyamu Mwaura, the appellant was the 1st accused, among three people who stood charged before the Chief Magistrate's Court, at Thika with two counts of robbery with violence, contrary to **section 296 (2)** of the Penal Code, and one count of rape contrary to **section 140** of the Penal Code. One of the three accused persons, **Simon Muhia Wanjiku**, who was the second accused, died during the pendency of the case before that court and the case against him was, with leave of the court, withdrawn under **section 87** of the Criminal Procedure Code. The appellant and one **Joseph Mwangi Wanyoike**, *alias* **Kamuiru,** whose appeal is notbefore us, were tried, convicted and sentenced to death on each of the two counts of robbery. The trial magistrate, apparently, made no finding on the charge of rape which concerned the appellant and the 3rd accused.

Both the appellant and Joseph Mwangi Wanyoike, were dissatisfied with the decision of the trial magistrate and appealed against that decision to the High Court at Nairobi. That court affirmed the decision of the trial court against the appellant, but allowed the appeal of his co-accused. This is the appellant's second and probably his last appeal.

Four main grounds have been raised in support of the appeals as follows:

"(1) The learned Judges of the High Court failed to subject the entire evidence to a fresh and exhaustive scrutiny as demanded by law.

(2) No offence was disclosed under section 296(2) of the Penal Code.

(3) The High Court disregarded the defence which the appellant put forward.

(4) The charges of robbery were not proved beyond any reasonable doubt."

Mr. A.L. Kariu, advocate, appeared for the appellant in the appeal before us. Although the appellant had raised the four grounds, above, learned counsel, on the main, argued only two. Firstly Mr. Kariu submitted that, on the material before the trial and first appellate courts, no offence of robbery with violence was disclosed. If any offence was committed, he reasoned, it was not the one charged. Mr. Kariu also submitted that the evidence of Michael Chege Ndegwa (PW2), the complainant in the first count, required corroborative evidence which evidence according to learned counsel is lacking. Learned counsel went through the evidence of PW2 and concluded that he was improperly believed.

Miss Nyamosi Principal State Counsel opposed the appellant's appeal on the basis that the two courts below believed and acted on the evidence of both PW2 and M.W.G (PW4), both of whom were at the scene during the robberies. It was their evidence that they were attacked by three people who robbed them of various personal items. In her view therefore an offence under **section 296(2)** of the Penal Code was duly proved.

The alleged offences were committed at night time along a road joining Chania Nursing Home and Majengo, in Thika town. PW2 was escorting PW4 who had visited him when three men accosted them and demanded to know from the two whether they had seen any policemen on patrol and when they got an answer in the negative, the three men held PW2, stabbed him with a knife near one of his eyes, and knocked him to the ground. They then rummaged his pockets and took Kshs.200/= in cash, a wrist watch and some documents. PW2 held one of the three men and as he was struggling with him, the other two got hold of PW4, dragged her into a nearby maize garden, took away her bag which contained Kshs.1000/= in cash, a small tray, a packet of Unga, toilet paper and soap. They then introduced themselves as being members of an outlawed sect known as "*Mungiki*," and after forcing her to recite their creed they ordered her to strip naked, which she did, and announced that they were going to rape her. One of them however, changed his mind, but the other went ahead and raped PW4 several times. It was PW4's evidence that the rape lasted from 10.30 p.m. to 3 a.m. The person she identified as the rapist was the one who died while in custody. Two other people raped her, but she was not able to identify them. It was her evidence that the two joined the first man after 3 a.m and they too raped her in turns.

Both PW2 and PW4 testified that they were able to identify their attackers using moonlight which they said was bright. The detailed evidence concerning those three is not essential for purposes of this judgment as none of them is before us. It is however, noteworthy, that the circumstances of the appellant were different. He did not have a chance to escape. PW2 testified that he caught hold of him and screamed for help. Members of the public responded to his screams, and they helped him to sub-due the appellant. He was escorted to Thika police station where he was charged as earlier on stated.

The appellant denied the charges. In his unsworn statement, the appellant stated that, he was going to Kiandutu on 7th February, 2001 at about 9 a.m. when a group of youth held him and said that he was one of the people who had robbed some unidentified people of their properties. They beat him up until he lost consciousness after which they took him to the police station where he was charged.

This is a straight forward case. There can be no issue here regarding the appellant's identification. He was caught in the course of the first robbery and did not have a chance of escaping. Mr. Kariu, submitted that if one were to carefully consider the sequence of events it would become clearer that the offence of robbery with violence is not disclosed. With due respect to learned counsel, the

sequence of events place the appellant in a group of three people who stopped PW2 and PW4. They wanted to rob the duo. The first thing they did was to immobilize PW2 by knocking him down. They took his property. They also took PW4's personal effects. No matter that some of them raped PW4 before making away with her property. The sequence of events did not matter. It was when PW4 was already subjugated that her property was stolen. Violence was used to cause her to submit to their will. Clearly, there were two incidents of robbery, one when PW4 was with PW2; and the second when PW4 was alone. It is immaterial that the appellant was not present when PW4 was raped and robbed. He was in the company of those who robbed and raped PW4. He was party to the events leading to the attack of both PW2 and PW4. It was a continuous transaction. They split into two groups, the appellant remained behind because he was held by PW2. The others continued with their common purpose of robbing the two victims. It did not matter that the appellant was not present when PW4 was robbed. It was a probable consequence of their agreed venture – robbery.

Section 21 of the Penal Code provides thus:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

The above section has been the subject of judicial interpretation in **Gitau v. R.** [1967] EA 449, it was held that:

"Before both appellants could be jointly convicted under s.21 of the Penal Code it had to be shown that the wounding was a probable consequence of the prosecution of their purpose to fire in the air but it was never shown that the appellants agreed on the manner of firing."

The important factor is whether the accused persons shared in the common design (see **Solomon Mungai & Others v. R**.[1965] EA 782). We are satisfied that the appellant and the 2nd accused shared in the common design to rob. It did not matter whether the person robbed was not the one who was originally intended to be robbed. It was the probable consequence of the common purpose. They set out to rob, but not a particular individual, but whoever they would find. They found PW2 and PW4. Those were probable victims of their common design.

We have said enough to show that the appellant's appeal is for dismissal. Appellant's defence was displaced by the fact that he was arrested after he had manifested the intention of attacking both PW2 and PW4. Accordingly the appeal is dismissed. It is so ordered.

Dated and delivered at Nairobi this 16th day of March 2012.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE
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JUDGE OF APPEAL