



REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 489 OF 2007

EMILIO KINYUA NJERU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, J)

dated 4th October, 2007

in

H. C. Cr. A. No. 310 of 2004)

JUDGMENT OF THE COURT

The appellant, ***Emilio Kinyua Njeru***, was charged with one count of robbery with violence contrary to ***section 296 (2)*** of the Penal Code; and one count of assault causing actual bodily harm contrary to ***section 251*** of the Penal Code. The particulars of the robbery charge were that on the 3rd day of April, 2004 at Karindi village in Nyeri District within Central Province jointly with others not before court while being armed with a simi and a rungu they robbed MWENDA KAKULE of cash 28,666/= and at or immediately before or after such a robbery used actual violence to the said MWENDA KAKULE.

The evidence adduced before the Senior Resident Magistrate's Court at Karatina (Mr. J. N. Nyagah) was that at about 11.00 am on the material day Mwendwa Kakule (complainant) (PW 1), a salesman with Mastermind Tobacco Company, was headed to Karatina, on his employer's motor bike, with Danson Mwangi Njagi (Danson) (PW 2), also a salesman, as his passenger. They were carrying cigarettes for sale at Karatina. As they were going up-hill towards Unjiru, the complainant saw two people, one of whom was coming towards him, holding his hands at the back. He assumed this person was drunk. Suddenly, however, on approaching him, the man pulled a rungu from the back and attacked him, causing him to lose control of the motor bike, and falling down, with the motor bike falling on top of him and his passenger. The assailant, who, by then was accompanied by two other men, then pointed a knife at them and removed money from his pocket, and started running with the money, and the cigarettes, towards the coffee plantation. At this time, a young man and woman, who were nearby started screaming, attracting the attention of members of the public, who all joined in the chase to apprehend the assailants. Richard Machira Wamuyu (PW 3) (Richard), a 14 year old school boy, who was in *the shamba* with his grandmother saw the entire incident, and narrated the same to the Court. His testimony showed that he had seen the assailant sitting by the road side for at least one hour before the incident. He too joined the crowd in chase of the assailants, apprehending two people, and handing them over to the police at

Karatina. Danson picked up the rungu and the sheath of the knife which the assailant had dropped, while a member of the public picked up the knife which the assailant had dropped during the incident. Eventually, on reaching the police station, the complainant, Danson and Richard identified the appellant as the assailant, and as the person who robbed them of money and cigarettes.

After a full trial, in which six witnesses testified for the prosecution, the appellant was convicted of the offences charged, and sentenced to one year imprisonment on the charge of assault, and sentenced to death on the charge of robbery with violence. The appellant appealed to the High Court against both conviction and sentence, and the first appellate court allowed the appeal in respect of the lesser charge of assault causing actual bodily harm, while dismissing the appeal in respect of the charge of robbery with violence. He has now preferred this second, and possibly final appeal before this Court, citing nine grounds of appeal, in a supplementary memorandum of appeal filed by his learned counsel, Mr. J. Macharia. The grounds are as follows:

- “1. The learned Judges erred in law and in fact in failing to fully or adequately re-evaluate the case in the trial Court’s case.***
- 2. The learned Judges erred by failing to fully or adequately re-evaluate the trial case came to the wrong conclusion.***
- 3. The learned Judges erred in law in failing to fully or adequately address the issue of identification and for that reason came to the wrong conclusion.***
- 4. The learned Judges erred in law in failing to fully or adequately consider the necessary prerequisites before concluding that PW 3, who was of tender age, was fit to give sworn evidence.***
- 5. The learned Judges erred in law and in fact in finding that the evidence of PW 3 was fit to corroborate PW 1 and PW 2’s evidence when in fact and in law it was evidence which required corroboration in the first place.***
- 6. The learned Judges erred in law and in fact in fairing (sic) to consider material contradictions and/or inconsistencies in the Prosecution’s evidence which contradictions and/or inconsistencies if considered would have led to a different conclusion.***
- 7. The learned Judges erred in failing to find that the Appellant’s rights had not been fully addressed and as a consequence thereof the Appellant was prejudiced.***
- 8. The learned Judges erred in law and in fact in failing to consider that in lumping together a capital and a non capital offence was inappropriate.***
- 9. The learned Judges erred in law and in fact in failing to find that the prosecution’s case had been proved beyond all reasonable doubt.”***

As this is a second appeal, by dint of the provisions of **section 361** of the Criminal Procedure Code, we are enjoined to consider only matters of law, and not matters of fact.

At the hearing before us, Mr. Macharia, for the appellant, submitted that the High Court failed to re-evaluate fully the evidence before the trial court, and failed to notice glaring contradictions in evidence relating to whether there were three or two assailants, and the colour of the clothing worn by the appellant. He argued that the appellant had not been properly identified as the assailant; that the trial court had erred in relying heavily on Richard, a 14-year old boy’s testimony without conducting a proper *voir dire* examination; that the court was wrong in allowing two charges – one for capital offence to be combined with the one in respect of a non-capital offence; and finally that the case against the appellant had not been proved beyond reasonable doubt.

Mr. J. Kaigai, learned Principal State Counsel, opposed the appeal, arguing that the offence having been

committed in broad day light, the evidence against the appellant was water-tight. Admitting that the *voir dire* examination of Richard could have been more exhaustive, Mr. Kaigai argued that Richard turned out to be a strong, intelligent and reliable witness, and asked us to uphold the conviction and sentence.

There are concurrent findings of facts by the two courts below, both of whom were acutely aware that the prosecution case rested on the credibility and proper identification of the appellant. On such credibility, the best judge was the trial Magistrate who had the advantage of seeing and hearing the witnesses. The learned Magistrate had this to say:

“From the evidence before the Court I have no doubt that the accused was one of the people who robbed the first complainant and in the course of doing so they assaulted the second complainant. The accused was chased from the scene by Richard PW 3 upto the place where he was arrested. Richard had seen the accused and another sitted beside the road before they attacked the cyclist. I belief (sic) that Richard is telling the truth.

The accused threw away some money before he was caught. He also threw a knife at Benjamin Karuiru PW 5. Richard PW 3 witnessed it. Why would the accused have thrown away the money if it was his own? I have no doubt that the money was part of what they had stolen from the first complainant. There is no truth that Karuiru PW 5 was given the knife and the money by a person when they were on the way to the police station. I believe the evidence that PW 5 had collected them where the accused had thrown them.

The complainants identified the accused at the police station. They had seen the accused properly during the robbery. I find that the accused was positively identified. The witnesses had enough time to see him during the robbery.

The accused was armed with a knife at the time he robbed the complainant. His colleague who was beaten to death by members of the public was found with 8 packets of cigarettes. They must be those that had been stolen from the first complainant.”

The High Court, on its part, stated as follows:

“That is the summary of the evidence and as it is to be noted the incident occurred in the morning. The appellant was positively identified by PW 1, 2, 3 and 5. The evidence of PW 3 corroborated the evidence of PW 1 and 2. PW 3 was a 14 year old school going child who gave clear evidence of the incident. We reject the argument of the appellant that this witness was a child of tender years. Even if he was, the magistrate examined him at length and found no reason why this witness should not give sworn testimony and indeed he gave evidence on oath. His evidence was corroborated by the evidence of PW 5. Further the knife which the appellant threw at PW 5 fitted into the sheath recovered by PW 1 at the scene.”

We are of the view, based on our own assessment, that the issue of identification was resolved by the two courts below on sound basis and we have no reason to depart from those findings. The contradictions in evidence alluded to by Mr. Macharia are minor, and certainly not material enough for us to interfere. And, finally, with regard to the *voir dire* examination conducted by the trial magistrate with respect to Richard, we are of the view that the Magistrate took adequate steps to satisfy himself that Richard understood the meaning of the oath, and the need to tell the truth. As is clearly evident from his cross-examination, Richard answered the questions intelligently and coherently, and we agree with the High Court that his testimony was credible and reliable.

Accordingly, and for the reasons outlined, we find no merit in this appeal, and dismiss the same. We so order.

Dated and delivered at Nyeri this 5th day of July, 2012.

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

M. K. KOOME

.....
JUDGE OF APPEAL

D. K. MARAGA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR