



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, O’KUBASU & AGANYANYA, JJ.A.)

CRIMINAL APPEAL NO. 273 OF 2005

BETWEEN

VICTOR WAIHARU MWANGI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Mutungi & Ochieng, JJ.) dated 17th May, 2005

in

H.C.CR.A. No. 302 of 2002)

JUDGMENT OF THE COURT

Victor Waiharu Mwangi, the appellant, was charged in the Senior Resident Magistrate’s Court at Limuru with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the charge were that on 5th day of September, 2001 at Ngecha village in Kiambu District of Central Province, with others not before the court being armed with dangerous weapons or offensive weapon, namely, firearm (pistol) robbed **Peter Njunge Wakangu** one mobile phone make Siemen C.35 and cash Kshs.3,700/= all valued at Kshs.19,700/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Peter Njunge Wakangu. He pleaded not guilty to the charge and the case was heard between 7th February, 2002 and 8th February 2002 when evidence was taken from the witnesses.

The evidence adduced in the case was that **Peter Njunge Wakangu** (PW1) was at his house in Ngecha village having supper with members of his family on 5th September, 2001. They included his wife **Rabel Wairimu** (PW4) and his son **Charles Wakangu** (PW2). PW1 heard the dog barking and when he sent PW2 to open the door and check, the appellant entered the house accompanied by the mother of PW1 and two other people. The appellant said to PW4 that he had come for his money and when asked which money, one of the two other people removed a pistol and ordered all those in the house to lie down and he demanded money. It appears PW1 was led to the bedroom in search of the money. Kshs.3,700/= was stolen from him as well as his mobile phone. PW1 then screamed and the appellant and his team left the house locking the door from outside.

On the same night members of the public arrested the appellant on the road and when PW1 went there he identified him as one of the people who had just robbed him of Kshs.3,700/= and a mobile phone. The appellant was then taken to the Chief's Camp at Ngecha and later to Tigoni Police Station. Then after investigations he was taken to Limuru Court where the present charge was laid against him.

When placed to his defence the appellant stated in an unsworn statement that he had gone to the home of PW1 on the material day at 6.00 p.m. to demand his money from PW4 but when she threatened to beat him up he ran away to Nyathuna Market. That after sometime at the market the brother of the complainant asked the appellant to escort him somewhere but along the way villagers apprehended him calling him a thief. They took him to the Chief's Camp where it was alleged he had stolen a wrist watch, a mobile phone and Kshs.3,000/=. He was then taken to Tigoni Police Station and later to the court where he was charged.

The trial court (*Ezra O. Owino, SRM*) wrote and delivered his judgment on 27th February, 2002 in which he stated *inter alia*:-

"I am satisfied with the evidence of the prosecution witnesses that the accused was in company of two others and that they were dangerously armed with a pistol and that the accused person managed to steal money and a mobile phone. I now enter a conviction as charged."

Following the conviction, the appellant was sentenced to suffer death as provided by law. His appeal to the superior court was dismissed, hence the present appeal before this Court. It is based on the Petition of Appeal lodged in Court on 30th May, 2002 and had 6 grounds of appeal (***Mr. Kanyangi***, learned counsel for the appellant abandoned grounds 1, 2 and 6 and consolidated grounds 3, 4 and 5) They were as follows:-

"3. That the learned Judges erred in law by upholding my conviction and failed to note that some of the most important prosecution witnesses, i.e. the members of the public who arrested me were not availed in court to testify which rendered the prosecution evidence inadequate to base a conviction.

4. That the learned judges erred in law by upholding my conviction when relying on the evidence of the prosecution witnesses and failed to note the chances of witnesses to implicate me in the alleged crime where (sic) high they all hailed from the same family.

5. That the learned judges erred in law by upholding my conviction without considering my defence which was plausible enough to outweigh (sic) the prosecution evidence since it clearly showed that there existed a grudge between me and the complainant which was enough for her implicate me in order to evade paying me my salary arrears.

On the hearing of the appeal on 15th February, 2011 ***Mr. Kanyangi***, learned counsel for the appellant submitted that the evidence adduced was insufficient to convict the appellant as there was no independent witness to support the evidence of members of the same family. According to his submissions the superior court did not reevaluate the evidence as required by law to see if it could sustain the conviction and this caused a miscarriage of justice to the appellant. ***Mr. Kanyangi*** submitted further that the appellant was a well-known farmhand of the complainant who had gone to claim the balance of his salary and it was not clear with whom he was accompanied if at all, or if he carried any weapon. In his view the case was not proved against the appellant beyond any reasonable doubt.

Mrs. Murungi, learned Deputy Prosecution Counsel opposed the appeal and stated that the ingredients of the charge under **section 296(2)** of the Penal Code were present as the appellant was in company of two other people one of whom was armed in order to scare the complainant to give him money.

This is a second appeal and as such only points of law fall for the consideration of this Court – see **section 361(1)** Criminal Procedure Code. The appellant was a person known in the area. As such the question of his identification was not in issue. He first met PW3 and asked her to accompany him to the house of PW1. And when he entered PW1's house he was welcomed and given a chair to sit on. Then he

asked PW4 for his money. From evidence adduced all those in the house heard about the demand. PW4 wondered what money was being demanded from her then hell broke loose.

The appellant did not have any weapon with him but it was said one of the people who accompanied him to the house produced a pistol and then ordered all those in the house to lie down. Though money had been demanded from PW4, the man holding the pistol pointed it at PW1 and then escorted him to the bedroom in search of the money. In the circumstances it would be expected that it would be PW4 to be taken round in search of the money since the appellant had specifically asked her for his money. From the evidence adduced, the appellant had gone to that home to collect a debt from PW4 and he knew he was known in that home as he had been working there previously. And apart from the Kshs.3,700/= taken from PW1 and his mobile picked from a chair in the house nothing else was stolen from that house. This gives the impression that the appellant did not go to PW1's house with the intention to commit a robbery therein. If the superior court had considered that it was not the appellant issuing orders or that he was not armed with any weapon or that nothing else was taken from the house it would not have upheld the appellant's conviction by the lower court for the offence of robbery with violence contrary to **section 291(2)** of the Penal Code. In the circumstances of this appeal and in consideration of the evidence adduced, we are of the view that the charge as laid in the trial court was not proved against the appellant beyond reasonable doubt. In the ultimate, we allow this appeal, quash the conviction and set aside the sentence of death. The appellant shall be entitled to his liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 25th day of March, 2011.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR