



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O’KUBASU, GITHINJI & NYAMU, J.J.A.)

CRIMINAL APPEAL NO. 11 OF 2008

BETWEEN

STEPHEN KARANJAAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Ojwang & Dulu, JJ.) dated 4th March, 2008

in

H.C.CR.A. NO. 591 OF 2005)

JUDGMENT OF THE COURT

The appellant, **STEPHEN KARANJA**, was arraigned before the Chief Magistrate’s Court at Kibera on 14th July, 2004 in *Criminal Case No. 5178 of 2004* charged with robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the offence were as follows:-

“STEPHEN KARANJA

On the 6th day of June, 2004 along Ushirika road Hardy Estate within the Nairobi area (sic) province robbed Mr. Mark Orwa Mwai of Kshs.3,100/= and at or immediately before or immediately after the time of such robbery beat the said Mark Orwa Mwai.”

The appellant denied the charge and his trial commenced on 3rd January, 2005 before Ms. Muchira (Senior Resident Magistrate). The prosecution called the complainant **Mark Orwa Mwai** (PW1) who testified on how he was robbed on the material day, and how he was able to identify the appellant as one of those who violently robbed him. **Dr. Z. Kamau** (PW2) testified on how he examined the complainant who had injuries which Dr. Kamau classified as harm. **Pc. Domisons Onyango** (PW3) was attached to Gataka Police Post when the complainant reported that he (complainant) had been robbed. Pc. Onyango later arrested the appellant.

When put to his defence, the appellant gave unsworn statement in which he denied having been involved

in the commission of the offence. He stated that on 11th July, 2004 he was stopped by a man who demanded to know his names. The man claimed to be a police officer and demanded to see the appellant's hawking licence but the appellant had none. The man demanded Shs.500/= but as the appellant had no money the man arrested him and took him to Gataka police post.

The learned trial magistrate considered the evidence tendered by the prosecution and the defence put forth by the appellant, and in the end came to the conclusion that the prosecution had proved the case against the appellant beyond any reasonable doubt. She convicted him and sentenced him to death as prescribed by the law. In the course of her judgment delivered on 8th December, 2005, the learned trial magistrate said:-

“PW1 said its 8 a.m. in the morning, in broad day light and he recognized accused whom he used to see around as one of his robbers. I do notice PW1 is very certain of what he saw. For immediately after he reported to PW4 he had recognize (sic) accused. I wish to rely on the Court of Appeal decision Joseph Lebo Ole Tovokey Cr. A.204/1987. I wish to warn myself while relying on the evidence of a single witness to find the accused person guilty. I find there's a danger in doing so. But the conditions depicted by the prosecution and PW1 were revocable (sic) for PW1 to clearly identify accused and recognize him. 9 months thereafter as his robber, it is in broad day light again and I find that although PW1 may likely be mistaken and honestly so I believe he was not in this case. He had ample lights from natural light to see, identify and recognize accused thereafter as his assailer. Accused in defence steers clear of the issues raised by the prosecutor on the material day choosing nether (sic) to dwell on the date of arrest.

I find his defence evasive and does not hold much water. After therefore warning myself as above, I find I can believe PW1. Accused with others did violently rob him. I find the accused therefore guilty as charged and convict him.”

Being aggrieved by both conviction and sentence, the appellant filed an appeal to the High Court. The learned Judges of the superior court (Ojwang & Dulu, JJ.) considered the appellant's appeal and having re-evaluated the evidence came to the conclusion that the appellant had been convicted on very sound evidence. They accordingly dismissed the appellant's appeal in its entirety. In the course of their judgment delivered at Nairobi on 4th March, 2008 they stated:-

“Our evaluation of the evidence on record leaves us with no doubt that the appellant was positively identified by the complainant. The evidence of PW1 is clear that he was able to identify one of the robbers. The appellant was the one who got hold of the complainant, while the other two ransacked his pockets. The incident occurred in broad daylight. Therefore, in our view the complainant had the chance and opportunity to recognize the appellant. In addition, PW4 Pc Mwanzia, clearly stated in evidence that the complainant reported on the same morning of 6th June, 2004 that he could recognize one of the robbers.”

The appellant now comes to this Court by way of second and final appeal. That being so only matters of law fall for consideration – see **section 361** of the Criminal Procedure Code (**Cap. 75 Laws of Kenya**).

This is the appeal that came up for hearing before us on 14th February, 2011 when Mr. S.A. Wamwayi, appeared for the appellant, while Mr. V.S. Monda (*Senior State Counsel*), appeared for the respondent. In his submissions, Mr. Wamwayi stated that his main ground of appeal relates to identification. He faulted the trial magistrate for treating the evidence of the complainant as that of recognition. Mr. Wamwayi went on to argue that evidence of identification must be watertight and that a witness might be honest but mistaken.

Mr. Wamwayi further submitted that the defence of the appellant was not considered and that the particulars of the charge did not indicate whether the appellant was in the company of other people.

On his part, Mr. Monda submitted that the learned Judges of the superior court had properly re-evaluated the evidence and came to the correct conclusion.

We have considered the rival submissions in this appeal and we wish to deal with the complaint relating to the charge sheet. It was submitted by Mr. Wamwayi that the charge was defective. Our perusal of the charge shows that the charge was properly laid. The particulars stated that the appellant beat the complainant in the course of the robbery. The fact that there was wounding or striking of the complainant, that was sufficient to constitute the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. This Court dealt with a similar situation in **NGOME PATRICK & ANOTHER V. REPUBLIC** – Criminal Appeal No. 139 of 2005 (unreported) in which it was stated:-

“On the outset we wish to state that charging a person with robbery with violence contrary to section 296(2) of the Penal code is an extremely serious matter. A person charged under that section faces a mandatory death sentence upon conviction. What acts constitute an offence under section 296(2) of the Penal Code? This Court considered that question in JOHANA NDUNGU V. REPUBLIC – Criminal Appeal No. 116 of 1995 (unreported) where it stated:-

“In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the sub-section in conjunction with section 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296(2) which we give below and any one of which if proved will constitute the offence under the sub-section:

- (1) If the offender is armed with any dangerous or offensive weapon or instrument, or***
- (2) If he is in company with one or more other person or persons, or***
- (3) If, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person.***

Analyzing the first set of circumstances the essential ingredient apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence or robbery as defined in section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.

In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly.”

In view of the foregoing, the submissions that the charge was defective cannot stand.

The main ground in this appeal is identification. The two courts below relied on the evidence of the complainant in that he did not only identify the appellant but recognized him being a person he had known prior to the incident in question. The learned trial magistrate was alive to the fact that he was dealing with the evidence of identification by a single witness. We have reproduced the portion of the learned magistrate's judgment on this issue and even the portion of the learned judges of the Superior court. We agree with the submission of Mr. Wamwayi that evidence of identification must be watertight - See **RORIA V. R. [1967] E.A. 583**. There is nevertheless some measure of reassurance when the case rests on recognition as stated in **ANJONONI & OTHERS V. THE REPUBLIC [1980] KLR 59**, thus:-

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

The evidence of the complainant was that the robbery took place at about 8:00 a.m. hence in broad daylight. The appellant was known to the complainant prior to that day. This makes the evidence of identification, although by a single witness, free from any possibility of error as it was, indeed, evidence of recognition.

Having considered the entire record of appeal, the submissions by Mr. Wamwayi and Mr. Monda, we are satisfied that the appellant was convicted on very sound evidence. His conviction was certainly inevitable. We find no merit in this appeal and we order that the same be and is hereby dismissed in its entirety. It is so ordered.

Dated and delivered at NAIROBI this 18th day of March, 2011.

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR