REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, VISRAM & NYAMU, JJA)

CRIMINAL APPEAL NO 147 OF 2007

BETWEEN

JAMES MURIGI KARIUKI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

Appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia , JJ) dated 8th December, 2005

in

H.C.CR.A NO. 838 of 2003

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JUDGMENT OF THE COURT

James Murigi Kariuki, the appellant, was on 26th May 2003, charged before the Chief Magistrate Court, at Thika, with the offence of robbery with violence contrary to **section 296(2**) of the Penal Code, particulars being that:-

" On 19th May 2003 at Thika Township in Thika District within the Central Province, while armed with knives, jointly with others not before the Court robbed PAUL NJOROGE NJUGUNA of cash Kshs 200/-, spectacles and a Nokia 3310 mobile phone all valued at Kshs 20,200/- and at or immediately after the time of such robbery used personal violence on the said PAUL NJOROGE NJUGUNA."

At the trial Paul Njoroge Njuguna, the complainant, testified that on 19th May 2003 he was making a telephone call using his mobile telephone, a Nokia 3310 as he walked to his home from Thika. When he reached Mama Ngina Gardens, he was accosted by three people who lifted him up, carried him into the aforesaid gardens and there forcibly took away his telephone, spectacles and Kshs 200/- in cash from him. He caught hold of the person who took away those things from him and held him firmly. The person whom he identified in court as the appellant handed over the money and the telephone to one of the other two people who immediately escaped. The complainant screamed and policemen came to his aid. They arrested the appellant and later charged him as herein first stated. The complainant did not say at what time he was robbed, but one Francis Njoroge Mwiru (PW2) testified that on the material date he was with the complainant and other friends near Brilliant bar at about 7.45p.m. The complainant parted company

with them and walked away. Shortly later he heard the complainant screaming for help. The screams came from the direction of Mama Ngina Gardens. He rushed there. He found the complainant holding the appellant and the former complained that the appellant with other persons who had escaped had robbed him of a mobile telephone, Kshs 200/- in cash and a pair of spectacles. The witness assisted the complainant to apprehend the appellant.

Under cross-examination the complainant testified that he did to see the appellant with any knife. That evidence is at variance with the evidence of P.C. Hezron Kaburu, (PW3) who rearrested the appellant from the complainant and PW2. PW3 testified that the complainant told him that his attackers were armed with knives, but that he did not recover any from the appellant.

In his defence the appellant admitted he was arrested by the complainant, but stated that he was arrested as he walked home by the complainant who was then drunk and was complaining that he had been robbed of his mobile telephone by the appellant. In the course of the arrest a struggle ensued. Many people came including the police. He was then arrested and taken to the Police Station where he was charged.

At the end of the trial the appellant was convicted as charged, and was sentenced to the mandatory death sentence.

In his first appeal to the superior court, the appellant complained that he had not been identified as having been one of the robbers, the evidence the trial court relied upon was hearsay, unbelievable, and insufficient to sustain a conviction. The superior court was not satisfied that there was any basis for interfering with the appellant's conviction and therefore dismissed his appeal.

In this second and last appeal, the appellant has raised, substantially three grounds to challenge his conviction and by extension his sentence of death. The first ground is that he was convicted on a defective charge. Secondly, he complains that the evidence on his identification was insufficient more so because the circumstances under which he was identified were difficult. Thirdly that both courts below did not adequately deal with his defence.

Mrs Rashid appeared for the appellant in the appeal. The major submission she made on the first ground was that there was variance between the particulars of the charge and the evidence in support thereof. As a general rule where the particulars of the charge are at variance with the charge a conviction will not stand. That is what Mrs Rashid urged us to hold in this appeal. However, that presupposes that the evidence on record when taken cumulatively does not prove the offence charged. In the case before us the complainant's evidence and that of the arresting officer differ regarding whether or not the appellant and his alleged accomplices were armed with knives. That contradiction is however, not fundamental. A charge of robbery with violence contrary to **section 296(2)** of the Penal Code may be established in one of three or so ways. Firstly, if the accused is armed with a dangerous or offensive instrument or weapon, and evidence is adduced to prove that aspect. Secondly, if the accused person is in company of one or more persons and evidence is adduced to show that they attacked and stole something from the complainant. Thirdly, it may be committed if it is shown that the accused wounded, beat, struck the complainant or used other personal violence to any person in the course of the robbery. In each case a theft must be proved.

It may be that in any given trial the prosecution may particularize in the charge a combination of all the above elements. Where that is so, if the trial court accepts part of the evidence in proof thereof and rejects the remainder, it will not necessarily follow that the charge would not have been proved. If the evidence so accepted taken as a whole proves the charge of robbery with violence under **section 296(2)** of the Penal Code there would be nothing to preclude the court from acting on that evidence and entering a conviction as appears to have happened in this case. In the case before us the variance relates to the allegation in the particulars of the charge that the appellant and his companions were armed with knives. As stated earlier the complainant denied he saw the appellant with any knife. His evidence was that if the appellant or any of his attackers had a knife, he did not see it. The arresting officer testified that the complainant had told him that his attackers were armed with knives. The trial magistrate, in his judgment dealt with this aspect of the matter and acknowledged the discrepancy. He did not, however,

think that it was fundamental. This is how he rendered himself.

" It is true that whereas P.C. Kaburu talked of the robbers having been armed with knives, the complainant said he saw no knives. That notwithstanding, the offence of robbery with violence is committed when any one of the three ingredients in section 296(2) Penal Code is established. In this case it has been established that there were more than one robbers involved."

That is the position in law moreso when the charge includes the relevant ingredients in the particulars.

The appellant also complained that the particulars of the charge do not describe the knife as a dangerous weapon. In view of what we have stated above that complaint is of no consequence. The two courts below did not rely on the fact of arming to sustain the conviction of the appellant.

On the issue of identification we find no basis for faulting the two courts below. The appellant was held by the complainant in the course of the alleged robbery and the latter did not let go. The appellant was restrained until the police arrived at the scene. The appellant's case was that he was a mere passer-by who was mistaken for the actual robber. The trial magistrate observed and heard the complainant testify. At the end of the complainant's evidence the trial magistrate noted that his demeanor was reliable. Likewise regarding the demeanor of PW2. He never did the same in the case of PC. Kaburu and the appellant. In his judgment, however, the trial magistrate remarked thus on the issue of demeanor:

" The accused and the complainant were strangers to each other and from my observation of complainant's demeanor I found that was a reliable witness and his evidence was for believing. Not so the accused's testimony."

It is clear that the trial magistrate based his decision on the demeanor of witnesses. He believed the complainant with the result that he accepted his story about the robbery and rejected the appellant's defence. The superior court on first appeal likewise believed and acted on the evidence of the prosecution witnesses and itself held as follows:-

"The issue of mistaken identify does not arise. The evidence adduced clearly established that the appellant acted in concert with his two accomplices to carry out the robbery and that while his accomplices fled, he was unable to escape."

We are satisfied that the approach adopted by the two courts below was correct. We have no proper basis for interfering. Besides the main complaint raised herein is not a point of law, but a point of fact disguised as a point of law. Whether or not the appellant was a passerby is a point of fact, and this being a second appeal, by dint of the provisions of **section 361 (1)** of the Criminal Procedure Code only points of law fall for consideration.

The last issue which the appellant raised is clearly a red herring. The appellant's defence was duly considered by both courts below and the two courts rejected it.

For the reasons we have endeavoured to give above we cannot but agree with Mrs Ouya, DPC, that the appellant's appeal lacks any merit. Accordingly we order that it be and it is hereby dismissed.

Dated and delivered at Nairobi this 8th day of April 2011.

S.E.O. BOSIRE

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JUDGE OF APPEAL

ALNASHIR VISRAM

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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