



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: TUNOI, AGANYANYA & NYAMU, J.J.A.

CRIMINAL APPEAL NO. 275 OF 2007

BETWEEN

KENNEDY PETER KUNGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ) dated 6th May, 2006)

in

H.C.CR.A.NO.1139 of 2002)

JUDGMENT OF THE COURT

KENNEDY PETER KUNGU, the appellant, was after trial convicted of robbery with violence contrary to *section 296(2) of the Penal Code*. It was alleged that on 25th June, 2002, at Kiserian, Kajiado District, with others while armed with dangerous weapons namely *simis* and *rungus* robbed Samuel Kamau Mucheru, the complainant, of his watch and cash and at or immediately before or immediately after the time of such robbery used actual violence on the complainant. Upon conviction, the appellant was sentenced to death. His first appeal to the High Court of Kenya (Lesiit & Makhandia, JJ) was dismissed on 6th May, 2006 and hence this appeal. On the material day at about 5.00p.m., the complainant and several other farm workers of Peter Kibinge (PW1) were being ferried home on top of a pick-up. As the pick-up slowed down at the bumpy section of the road, a group of five or so people approached the pick-up and pulled down the complainant. The group then proceeded to assault the complainant with *rungus* and swords. In the process they robbed him of his property aforesaid. PW1 and his other workers, however, managed to rescue the complainant and rushed him to the hospital. As a result of the attack and the robbery, the complainant sustained serious injuries on his back and jaw. After treatment, the complainant and the PW1 went to report the incident at the local police station. The report was made at 5.50p.m. The two gave the name of the assailant and the robber as one Njoroge, whom they said they had known him well before. But, in the trial court, the appellant testified that the person who attacked him was the appellant. PW1 on his part stated that the complainant was assaulted and robbed by four people whom he named. These were the appellant and his co-accused.

In acquitting the appellant's co-accused the trial Magistrate held:

“On accused 2 and 3, I note that only PW2 said he saw them clearly at the scene. PW1 did not see them. PW4 said that though she saw them, she did not see them clearly. She was therefore not sure they were accused 2 and 3. Her evidence cannot therefore be used to corroborate the evidence of PW2. In my considered view, the evidence against the accused 2 and 3 is not sufficient to warrant a conviction.”

It was the prosecution's duty to prove all the allegations against the appellant beyond any reasonable doubt. Regrettably, it did not do so. The evidence against the appellant on identification was at most contradictory and inconsistent. It was indeed unreliable. If the complainant had known the appellant, as he alleges, why did he give his name to the police? This glaring omission leads to the inescapable conclusion that he was not sure of the identity of the person who attacked him. In the circumstances, we are bound to agree with the persuasive submissions made by the learned counsel for the appellant, Mr. Briant, that the conviction of the appellant is utmost unsafe and should not stand. In the result, this appeal is allowed, the conviction is quashed and the sentence of death is set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

Dated and delivered at NAIROBI this 15th day of July, 2011.

P. K. TUNOI
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JUDGE OF APPEAL

D. K. S. AGANYANYA
.....
JUDGE OF APPEAL

J. G. NYAMU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR