REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI

(CORAM: TUNOI, AGANYANYA & NYAMU, JJ.A.)
CRIMINAL APPEAL NO. 376 OF 2009

BETWEEN

1. GINARO WACHIRA MURIITHI

2. PAUL GITONGA WAHOME

3. CHARLES GUANDARO

4. ROBERT MWANGI WERU

5. FRANCIS MWANGI WERU…….....……APPELLANTS

AND

REPUBLIC …….RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Sergon & Makhandia, JJ) dated 4th December, 2009

in

H.C.Cr. A. Nos. 5, 6 7, 8 & 13 of 2007)

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JUDGMENT OF THE COURT

This is the second and final appeal, the first having been dismissed by the superior court *(Sergon & Makhandia, JJ.)* on 4th December, 2009. ***Ginaro Wachira Muriithi, Paul Gitonga Wahome, Charles Guandaro Mwihoto, Robert Mwangi Weru*** and ***Francis Mwangi Weru,*** the appellants were all charged in the Chief Magistrate's Court at Nyeri with the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code. The particulars of the offence were that on the 12th day of June, 2004 at Kalundu Village in Nyeri District within Central Province jointly with others not before the court while armed with pangas robbed ***Andrew Wachira Nguthiru*** of one motor vehicle registration number *KAG 615C* Toyota pick-up, two radio cassettes, three jackets, one CD machine, one colour television and a box containing documents, all valued at Kshs.362,600/= and at or immediately before or immediately after the time of such robbery beat the said Andrew Wachira Nguthiru. There was also an alternative count of handling stolen property contrary to the ***section 322(1)*** of the Penal Code involving the 2nd appellant Paul Gitonga Wahome. The particulars of that offence were that on 19th day of July, 2004 at Sikuta Village in Nyeri District within Central Province otherwise than in the course of stealing he dishonestly retained one

jacket knowing it to be stolen property or unlawfully obtained. The prosecution evidence in a nutshell was that ***Andrew Wachira Nguthiru*** (PW1) was, on 12th June, 2004 at 1.00 a.m. asleep in his house with his wife ***Julia Wanjiru Wachira*** (PW2) when robbers struck at the house and cut door grills before entering therein. They beat up PW1 and PW2 demanding money from them. PW2 gave them Kshs.1,000/= but they demanded more. PW1 told them that he does not keep money in his house but that they should try his place of business; and he offered to drive them there. When he reversed his motor vehicle to get out of the gate of his house he was ordered to get out and sit down. But by this time he had managed to see and identify 2nd, 4th and 5th appellants by use of flash brake lights of his said motor vehicle. In the meantime other robbers went into his house and carried away a number of items as enumerated in the charge sheet.

By some luck PW2 escaped and went to alert her brother in-law ***Peter Kariuki Ngunjiri*** (PW3). By then she had identified 1st, 3rd, 4th and 5th appellants by torch light which the thugs flashed around when they were counting the Kshs.1,000/= she had given to them and also when she peeped through the window she saw the people moving outside the house. PW2 informed PW3 what had happened and the two boarded the vehicle of PW3 to rush to the scene to see what was going on. PW2 had identified the five appellants.

On the way back to the scene of the robbery PW2 saw PW1's car being driven out of the gate. They gave chase with PW3's car but PW1's motor vehicle landed in a ditch a few metres from the house, and the robbers ran away and disappeared into nearby coffee farms except for the robber who was driving PW1's motor vehicle who got trapped therein for some time before freeing himself. PW3 identified the driver as the 5th appellant when he flashed the lights of his vehicle at him before he got out and ran off too. PW3 had known this appellant earlier. PW2 and PW3 went to report the matter to Gathatha Police Post from where they collected some Police officers and they all went to the scene. Most of the stolen items were found on PW1's pick-up. They included DVD, video machine, Panasonic video and 2 speakers, Panasonic radio and 1 speaker, and 1 T.V. model Zeg.

The evidence of PW3 was similar to that of PW2 because it was his motor vehicle which he used with PW2 to give chase to PW1's motor vehicle which had been stolen by the robbers; and which soon after landed in a ditch.

Daniel Mathenge Gachara (PW4) was the Assistant Chief of Mbarire Sub-Location. He received a report of this incident from a volunteer informer. The volunteer informer took him to the scene of the robbery where he found many people. PW2 explained to PW4 what had happened and gave to him names of the four suspects she had seen. They were 1st, 3rd, 4th and 5th appellants. PW4 knew all these suspects as three hailed from his sub-location while one came from another sub-location. When two police officers came to the scene PW4 led them in an operation which netted all the four appellants by 10.00 a.m. on 13th June, 2004. These appellants were then escorted to Nyeri Police Station where PW4 made his statement.
C.I. Julius Makupe (PW5) was based at Nyeri Police Station as in-charge at the time of this robbery. He conducted identification parades on 15th June, 2004 in respect of 3rd, 4th and 5th appellants. All of them were identified by PW1. However 4th and 5th appellants claimed that he, PW1, knew them. ***Pc. Paul Wanyonyi*** (PW6) was based at Gachatha Police Post on the night of the incident. He received a phone call from PW1 informing him about the robbery which had occurred in the area; and as he was recording it, PW3 came in to make the same report. They then drove to the scene of the robbery but before reaching there PW6 saw that PW1's motor vehicle had landed in a ditch a few metres from his house. PW4 then volunteered the names of suspects given to him by PW2 and investigations commenced. The 1st, 3rd, 4th and 5th appellants were immediately arrested. The 2nd appellant was arrested later by ***Pc. Munene*** (PW8) when he was found wearing a jacket belonging to PW1, one of the items stolen during the robbery.

Peter Karanja (PW7) was a clinical officer at Nyeri Provincial General Hospital at the time and he examined PW1 for the injuries he sustained in the cause of the robbery. He assessed the degree of injury as harm and signed the P3 form (Exh.1) which had been issued to PW1 by Nyeri Police Station.

In their defences all the appellants denied the offence and each of them explained where he was on the day of the incident, thus raising alibi defences. But, the 2nd appellant stated that on 18th July, 2004 he met

a customer at about 11.00 a.m. to settle an outstanding bill but on the way he and his son found a motor vehicle which had got stuck in a ditch. He, with his son, assisted to push the motor vehicle out of the ditch and in the process his jacket got stained with mud. Then he proceeded to the home of the customer where he exchanged his said jacket with a clean one from the customer. And on 19th July, 2004 PW1 gave him a lift to work when he was wearing this jacket but while at work he saw PW1 looking at it keenly. PW1 asked where he got the jacket. In spite of his explanation as to how he got the jacket, police were called in and he was arrested. He led police to the customer's home but he was not there. The appellants were then all charged as herein before stated. During the trial court *(E. J. Osoro, SRM)* heard and recorded the evidence of the prosecution and the defence. Then he wrote his judgment which he delivered on 19th December, 2006 and concluded thus:

"On 5th accused the court finds that his evidence and that of his son DW 6 was watered down by that of PW9. PW9 was a candid witness and the court has no reason to doubt his evidence. The court finds the defence raised by the 5th accused a story invented purely to mislead the court and it is dismissed as an afterthought. The 5th accused was found wearing the jacket (Pexh. 8) which was positively identified by PW1 and PW2. The jacket was robbed on 12th June, 2004 about one month from 17th July, 2004 when the 5th accused was found with the jacket. His explanation on how he got the jacket did not hold. The court finds the 5th accused was involved in the robbery and the doctrine of recent possession comes to play."

In respect to the 1st, 2nd, 3rd, and 4th accused the learned Magistrate stated as follows:

"I have looked at the defences raised by the 1st, 2nd, 3rd and 4th accused persons. I find that they do not raise any doubt on the evidence adduced by the prosecution witnesses. There is overwhelming evidence against all the 5 accused persons pointing their involvement in the robbery and court cannot make any other finding other than the prosecution has discharged its duty and proved the case against all the accused persons beyond any shadow of doubt. The court finds each of the accused persons guilty as charged in the main count of robbery with violence contrary to section 296(2) of the Penal code and accordingly convict them.
I make no finding on the alternative charge."

On their conviction the appellants were sentenced to death. Their appeals to the superior court were dismissed *(Sergon & Makhandia, JJ.)* who concluded in their judgment delivered on 4th December, 2009 thus:

"It does appear to us for reasons we are unable to fathom that the appellants most of whom were employees and neighbours of PW1 and PW2 mounted the attack without as much as caring to disguise themselves. They knew that they could easily be recognized but nonetheless took no step to disguise themselves. We have not come across any reason that would have pushed PW1, PW2 and PW3 to falsely testify against the appellants and or trump up this charge against them. The appellants knew they were bound to be recognized but did not care.

There may have been contradictions here and there in the prosecution case. However those contradictions if at all were minor and did not go to the root of the prosecution case.

No doubt the learned Magistrate considered the defences advanced by the appellants. However pitted against the strong prosecution evidence those defenses *(sic)* ***dissipated into thin air.***

The upshot of the foregoing is that we find no merit in these appeals. Accordingly they are all dismissed."

The appellants were aggrieved by that decision too and have lodged separate appeals through memoranda of appeal all dated 4th December, 2009 and filed in Court on 23rd December, 2009; save that of the 3rd appellant which was stamped 5th January, 2010. They all disputed their identification and/or involvement

in the commission of the offence and also complained that there were so many contradictions in the evidence of the prosecution witnesses which the learned Judges failed to consider. They also complained about breach of their constitutional rights under ***section 77*** of the Constitution and ***section 198*** of the Criminal Procedure Code and that the superior court did not re-evaluate the evidence adduced before the learned Magistrate and the failure by the learned Judges to consider the defences offered by the appellants. There were also supplementary memoranda of appeal from the 4th and 5th appellants which had almost similar grounds as those in the original memoranda of appeal.

On the date of hearing of the appeals on 16th May, 2011 they were all consolidated and ***Mr. Gathiga Mwangi***, learned counsel for the appellants submitted that the superior court did not re-evaluate or re-examine the evidence as mandated by law and that the evidence was not watertight to sustain a conviction for the appellants. Mr. Mwangi also stated that the superior court failed to consider the issue of the identification of the appellants as well as their defences. Counsel complained about exhibit 14 which formed the basis of the appellants' conviction saying that this was only a document prepared by PW4. Mr. Mwangi submitted further that the superior court did not consider that the trial magistrate did not warn himself of the danger inherent in convicting the appellants on the evidence of one identifying witness.

Mr. Kaigai, learned Senior Litigation Counsel supported the appellants' conviction except as regards the 3rd appellant and submitted that PW1 and PW2 knew them. According to him, their defences which were properly considered were displaced by evidence of prosecution witnesses. In respect to the 3rd appellant Mr. Kaigai submitted that a doubt was raised in regard to him since he was not seen at the scene of the robbery.

Being a second appeal, this Court is, by dint of ***section 361(1)*** of the Criminal Procedure Code, required to consider points of law only. The main points of law all the appellants raised were those of identification and the failure by the superior court to re-evaluate or to re-assess the evidence. The main identifying witnesses in the case were PW1 and PW2. They knew the appellants by virtue of them having worked for the victims at one time or other. For instance the 2nd appellant had assisted PW1 to push his car out of a ditch where it had got stuck and had given him a lift to his place of work which was at his - PW1's home – PW1 saw him wearing his stolen jacket. The other appellants also admitted having worked for PW1 and 2. PW2 saw some of the appellants as they flashed torches in her house when they were counting the money she had given them, which was mainly in coins. We all know how tedious it is counting coins and the length of time it must have taken to count Kshs.1,000/= which she had given to the robbers. In those circumstances, the trial and the first appellate courts were justified to accept the evidence of PW2 when she testified that she identified 5th appellant as amongst those who were counting the money through the flashes of the torches the robbers were using. This witness also stated in her evidence that she had identified the 1st, 2nd 3rd, 4th and 5th appellants when she heard movements outside her house and peeped through the window to see who were outside during the night of the incident. She in fact saw six people but only mentioned the above named whom she identified. She used security lights outside to see and identify them. For people who were neighbours and had also worked for her, it would not have been difficult for PW2 to identify them using security lights near the window outside her house. No wonder then that when she met PW4 at the scene she immediately gave him the names of those she had seen that night. These are the names PW4 in presence of PW2 handed over to PW6 who was investigating the case. It is also important to note that on the same night 1st, 3rd, 4th and 5th appellants were looked for and arrested. This shows the great weight attached to the identification evidence of PW2. In any case the two courts below made concurrent findings on this point and no sufficient submissions have been advanced to persuade us have a contrary view of the issue; see ***M'Riungu v R. [1985] KLR.*** This ground of appeal fails.

The complaint on constitutional breaches was raised by the 1st, 2nd 4th and 5th appellants and in each appeal it read as follows:

"That they erred in law by disregarding the glaring fact that the appellants. Constitutional rights were violated as enshrined under section 77 of the Constitution and 198 CPC that during the chief evidence of PW4, 5, 6 there was no interpretation as other times."

or ***that their evidences were not translated (interpreted).”***

We have perused the trial Magistrate’s record and observe that when plea in the case was taken on 21st June, 2004, the languages indicated for interpretation purposes were ***English/Kikuyu/Kiswahili***. The record also shows that when PW4 testified on 12th July, 2005 a court clerk by the name *Gichuki* was in attendance for interpretation purposes and that these appellants cross-examined him at length. The same clerk was in court on 17th August, 2005 when PW5 testified and his cross-examination by the appellants who took part in the identification parade was brief and to the point. And in respect to the evidence of PW6 on 30th August, 2005 a court clerk called *Wambugu* was in attendance and the language used was indicated as ***Kikuyu***. The cross-examination of this witness by the appellant was relevant to his investigations in the case. In respect to the evidence of PW7, the clinical officer, on 26th September, 2005 when a court clerk called *Waruiru* was in attendance he was not asked any question by the appellants except 5th appellant who put one question to him. None of them complained of lack of interpretation. We have considered this ground but in view of our observation as above we find no merit in it.

As regards the complaint about the failure by the first appellate court to re-evaluate the evidence, we have perused the record and are satisfied that the court did re-evaluate and re-assess the evidence adduced at the trial court by the witnesses and came to its own independent conclusion on it and it is our view that this ground of appeal has no merit also.

And on the failure by the trial court to consider the appellant’s defence, we have reproduced what the trial and the superior courts said in conclusion of their respective judgments in this respect and are of the view that their defences were properly and adequately captured in those concluding remarks.

In our view, the learned Magistrate considered the defences raised by the appellants but rejected them because he found that the evidence of the prosecution witnesses outweighed those defences. And in their re-assessment of the evidence the learned Judges said:

“No doubt the learned Magistrate considered the defences advanced by the appellants. However pitted against the strong prosecution evidence those defences dissipated in thin air.”

In fact what the learned Judges were saying was that these defences did not displace the strong prosecution evidence.

The learned Judges expressed surprise and wondered why in spite of the fact that the appellants were well-known in the area they did not try to disguise themselves. However, despite this they found the identification evidence adequate and upheld the appellants’ conviction. We do not find any reason to differ from this finding. We dismiss these appeals in their entirety. It is so ordered.

Dated and delivered at Nyeri this 7th day of July, 2011

P. K. TUNOI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

J. G. NYAMU

……
JUDGE OF APPEAL

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

DEPUTY REGISTRAR