IN THE COURT OF APPEAL
AT NYERI
(CORAM: O'KUBASU, ONYANGO OTIENO & NYAMU, JJ.A)

CRIMINAL APPEAL NO. 317 OF 2010

BETWEEN

SIMON NJIRU KIURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Embu (Okwengu & Lenaola, JJ) dated 17th June, 2005

in

H.C. Cr. A. No. 10 of 2003)
****

JUDGMENT OF THE COURT

The appellant was before the Senior Principal Magistrate's Court at Embu, convicted of the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code and sentenced to death.

His appeal to the High Court was dismissed hence this second and probably the final appeal.

The factual background as presented by the prosecution and accepted by the two lower courts is that, Mr. Duncan Mugendi Gicugu (PW1), the complaint, was on 3rd March, 2002 at Gachengari stream of Rukira Sub-Location, Kithimu Location in Embu District and was in the company of a friend, Anthony Nyaga Thathi (PW2), when he was attacked by a gang of robbers who included the appellant. The gang who were armed with iron bars and knives stole from PW1, a jacket and Kshs.3,000.

Although the gang consisted of about six persons, PW1 and his companion were only able to identify the appellant. He was charged with robbery with violence contrary to ***section 296 (2)*** of the Penal Code.

In the appeal before us, the Appellant was represented by Miss Mwai, learned counsel, while Mr. Kaigai, Acting Senior Principal State Counsel represented the State. Although Miss Mwai had raised four grounds of appeal in the Memorandum of Appeal, in her submissions, she abandoned grounds 1 and 2 and submitted on grounds 3 and 4 which were framed as follows:-

"3. The learned trial Magistrate erred in law and facts by putting reliance on evidence for (sic) recognition of PW1 and PW2 notwithstanding there was no OB for the first report bearing my three names neither PW3, (sic) my arresting officer did not issue any warrant of arrest to the trial court

bearing my three names to prove PW1 and PW2 reported with (sic) my names but PW3 alleged he relied on information of PW1 and that he did not investigate the case whereby there was no independent investigation conducted on (sic) this case and no investigation evidence on record as provision requires.

4. The learned trial Magistrate erred in law and facts by basing (sic) a conviction and sentence of death penalty not withstanding there was no medical evidence of violence to sustain Robbery with Violence contrary to section 296 (2) whereby it ought to have been robbery 291 (sic) on record in this regard the charge sheet is defective as provision requires. Moreover, essential witnesses were not summoned e.g. the Ass. Chief, the rescue person by the name of Muriuki and other persons at my arrest, further there were no documentary evidence of confession that were (sic) brought to court to prove PW1's evidence on cross-examination and evidence in chief. The learned trial Judges rejected my defence. In this regard, my right and fundamental freedom were violated under article 49 and 50 of the new constitution."

Miss Mwai's submissions on the issue of identification were that the identification of the appellant as the attacker was not free from error in that the robbery is alleged to have taken place at 8.30 p.m. and only moonlight was available at the material time and therefore the appellant could have been mistaken for somebody else under those conditions and in particular the intensity of light had not been ascertained; that a Mr. "Muriuki" who is alleged to have called the appellant by name at the scene was never called as a witness; that the evidence was not properly evaluated in that it is far from clear as to why PW2 was not attacked yet he had accompanied PW1 at the material time and although his identification of the appellant was relied on, the identification was not free from error in that the distance between him and the appellant was not specified; that the incident was reported to the investigating officer (PW3), four days after the event; that no investigations were done at all; that the two courts did not administer the usual caution on visual identification and finally that the courts should have made adverse inference based on failure to call Mr. Muriuki.

Mr. Kaigai submitted that the prosecution evidence was overwhelming in that the identification was by recognition of the appellant by the two witnesses namely PW1 and PW2 who had known the appellant for a long time before the incident; that the courts below did address the issue of the quality of light; that the appellant's defence was in the circumstances displaced by the strength of the prosecution's case and finally that the two courts below had made concurrent findings of fact which could not be upset by this Court.

Taking into account the rival submissions as outlined above and the law, we are of the view that both courts below did sufficiently evaluate the evidence and their concurrent findings of fact on the issue of identification cannot be faulted. This conclusion is buttressed by the evidence that although the other members of the gang who attacked PW1 were masked, the appellant was not masked, he was attacked at close range, and that he was held by the neck, and further that notwithstanding the time when the incident happened, PW1 testified that ***"one could see where he (sic) stepped or pick his (sic) item on the ground***". We have also taken into account the evidence that PW1 and PW2 had known the appellant for a long time before the attack and therefore the identification of the appellant in so far as the two were concerned, was by recognition.

Perhaps we should also add that in view of the nature of the evidence given on identification, failure to call "*Mr. Muriuki*" was not fatal to the prosecution's case because it was all the same sufficiently strong and it had no gap which could usefully be filled by Mr. Muriuki's evidence. Indeed, what Mr. Muriuki's evidence could have buttressed is the identification of the appellant, and on this, the prosecution had already called two credible witnesses who had identified the appellant. The two courts below had made concurrent findings of fact on the credibility of the two witnesses. In the circumstances, Mr. Muriuki's evidence, in our view, would have been superfluous and for this reason, failure to call him as a witness could not have attracted an adverse inference. Concerning the delay in taking the appellant to court, it is clear that he was initially held by members of the public who in turn handed him over to inspector James Njiru (PW3) who first took him to Runyenjes police station and thereafter took him to Itabua police station which is the station the area of which the offence was committed. This, in our view, explains the

challenge that no report was made within four (4) days. Finally, on the alleged failure to conduct investigations, Inspector Njiru did testify that other officers did carry out the investigations and his evidence on this was never challenged. On this, our view is that, the chain of evidence from the time of the commission of the offence was unbroken, in that, the reporting of the incident, the apprehension by members of the public, the handing over of the appellant to the police, which in turn led to his formal arrest at the first police station, constituted an unbroken chain. In the event and in the face of what to us was an unbroken chain of evidence, we consider that it was not necessary to undertake any further investigations.

At this point, it is clear that we have been unable to uphold any of the grounds raised on behalf of the appellant. In the result, the appeal is dismissed.

Dated and delivered at Nyeri this 1st day of December, 2011.

E.O. O'KUBASU
.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

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

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

DEPUTY REGISTRAR