



IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 141 of 2006
JOHN NJUGUNA WAINAINA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Koome & Musinga, JJ) dated 3rd March, 2006

In

H.C.Cr.A. No. 339 of 2003)

JUDGMENT OF THE COURT

The charge upon which **Johnson Njuguna Wainaina**, the appellant herein, was tried and convicted by the Senior Resident Magistrate at Molo was one of robbery with violence contrary to **section 296 (2)** of the Penal Code and upon his conviction on that charge he was duly sentenced to death by the Magistrate. The particulars of that charge were that on 13th February, 2003, at Ndenderu Farm in Molo, jointly with another not before the court and while armed with an offensive weapon, namely a knife, the appellant robbed James Wamweya Njoroge of Kshs.5,100/- in cash and that during that robbery the appellant threatened to use actual violence on the said James Wamweya Njoroge. The appellant upon his conviction and sentence appealed to the High Court but by its judgment dated and delivered on 3rd March, 2006, the High Court (Koome and Musinga, JJ) dismissed his appeal and confirmed the sentence of death. The appellant now comes to this Court by way of a second appeal and as Mr. Mongeri, learned counsel for the appellant, correctly appreciated the Court's jurisdiction is limited to dealing only with issues of law.

One point raised by Mr. Mongeri on behalf of the appellant was that at the time of plea, and when the charge was read to the appellant, he is recorded to have answered in Kiswahili:-

“it is not true.”

The Magistrate did not then formally record that the appellant had pleaded not guilty to the charge and Mr. Mongeri appeared to infer from that failure that the Magistrate did not fully explain to the appellant the charge he faced and its implications. There is no merit in that contention. The appellant clearly pleaded not guilty to the charge. The Magistrate then proceeded to hear the prosecution witnesses called in support of the charge and at the end of the prosecution case the Magistrate placed the appellant upon his defence and the appellant did make a defence to the charge. The failure by the Magistrate to formally record that the appellant had pleaded not guilty to the charge did not in any way occasion any failure of justice to him and we reject the contention to that effect.

The evidence in the case as accepted by the Magistrate and the High Court was that the complainant James (PW1) and the appellant were neighbours. In fact James said he had known the appellant since the appellant was a boy. The complainant was a much older man than the appellant. Around the time of the robbery, the complainant had sold potatoes for Ksh.5,600/-; he had used Kshs.500/- to pay his workers

and was left with Kshs.5,100/-. In the morning of 13th February, 2003 at about 7.00 a.m. the complainant opened his door intending to go out. He met the appellant at the entrance. The appellant was armed with a knife and he ordered the complainant to go back into the house. The complainant obliged and inside the house the appellant “strangled” him and forced him back onto his bed. The appellant then covered him with blanket, demanded money and after taking the Kshs.5,100/- the appellant went away, once again threatening the complainant that he (appellant) would come back and strangle him if he (complainant) raised an alarm. The appellant then locked the door from outside and disappeared. Though the complainant said the appellant was armed with a knife, at no stage did the appellant threaten to use the knife. All along the appellant was only threatening to strangle the complainant and indeed at some stage he got hold of the complainant by his throat and “strangled” him. Listen to the complainant saying it himself:-

“On 13th February, 2003 at 7.00 a.m. when I went to open my door, I met the accused waiting for me. He then grabbed me by neck and forced me back into the house. He had a knife and he pushed me back into the house and forced me down. Then he strangled me by the neck injuring me. I asked him why he was attacking me and he demanded the money. I told him it was on the bed. He then removed it, ordered me to go back to bed and covered me with a blanket. He threatened to strangle (sic) me to death if I rose. Then he left and locked me from inside. I could not scream as he strangled (sic) me as he tightly held my throat. When he left I went out through the window and went to inform a neighbour called Chege. The accused is my neighbour. I know him since he was a young boy. I informed Chege and went to report to the police. I informed them I knew the person. The accused disappeared to Eldoret upto 19th February, 2003 when he returned. He was then arrested at his home. The money was not recovered but he dropped his cap, MFI 1.”

Samuel Chege Mwaura (PW2) confirmed the story of the complainant with regard to the report and naming of the appellant. Police Constable John Nganga (PW4) of Molo Police Station confirmed that on 13th February, 2003 the complainant reported the robbery to him at about 11.20 a.m. and that the complainant said he knew the person who had robbed him. The appellant was arrested on 20th February, 2003 by Administration Police Constable Josephat Wanyama (PW3) who said the complainant told him that he had been robbed the previous day. Mr. Mongeri made heavy weather of this contending that the complainant was not a reliable person because the complainant told Wanyama that he had been robbed the previous day, i.e. on 19th February, 2003. It is clear to us from the recorded evidence that it was Constable Wanyama who misunderstood the complainant’s report. The complainant and Samuel Chege said they reported the incident at Molo Police Station on 13th February, 2003 but that the appellant had disappeared to Eldoret and only came back on 19th February, 2003. Constable Nganga confirmed that he received the report on 13th February, 2003. The appellant himself said he took his grand-father to Eldoret, though he said he did so on 15th February, 2003. He returned from Eldoret on 19th February, 2003 and was arrested on 20th February, 2003. The two courts below were satisfied that the robbery took place on 13th February, 2003; that after the robbery the appellant disappeared to Eldoret, and that he returned to his home on 19th and was promptly arrested on 20th February, 2003. These were findings of fact and they were fully supported by the evidence on record. We can have no legitimate reason for interfering with such findings.

What has caused us concern is whether the appellant should have been charged with a capital robbery under **section 296 (2)** of the Penal Code as indeed he was or whether he should have been charged under **section 296 (1)** of the Code. The particulars of the charge of course alleged that the appellant had committed the offence jointly with another person who was not before the court but in his entire evidence, the complainant never said the appellant had been with another person during the robbery. The complainant never told Chege that the appellant had been together with another person. He never told Constable Nganga anything like that. The evidence of Nganga was that:

“---- on 13th February, 2003 at 11.20 a.m. I was in the crime office when the complainant came and reported that the accused had robbed him of K.shs.5,100/- at Ndenderu. He knew him. I booked his report and asked him to inform us if he saw him. ----.”

There was no question of another person apart from the appellant being involved in the robbery. As to whether the appellant was armed with a knife, we have already set out the entire evidence of the

complainant on that aspect. The complainant said the appellant had a knife but that was all. At no stage did the appellant threaten to use the knife. All along the threat was to strangle the complainant and at some stage the complainant said he was actually “strangled.” He did not say where the knife was when he was being “strangled”. Even when the appellant was leaving, his parting shot was that if the complainant rose he (appellant) would strangle him. The complainant did not know where the knife was when he was being strangled. The two courts below simply assumed the appellant was armed with a knife because the complainant had said so but they did not examine in detail the issue surrounding the knife. Had they done so as we have now done the two courts might well have come to the conclusion that while the appellant robbed the complainant the appellant was simply alone and he may not have been armed with anything. For our part, we doubt whether the appellant actually had a knife. Otherwise why would he choose to “strangle” the complainant and not threaten him with the knife? We must give the benefit of this doubt to the appellant. In our view the appellant ought to have been convicted of simple robbery under **section 296 (1)** of the Penal Code, and not with capital robbery under **section 296 (2)** of the Code. We accordingly allow the appeal to the extent that we set aside the conviction under **section 296 (2)** and the sentence of death imposed thereon, and we substitute therefor a conviction under **section 296 (1)** of the Code and sentence the appellant to ten (10) years imprisonment to run from 10th July, 2003 when the appellant was convicted and sentenced by the Magistrate. These shall be our orders in the appeal.

Dated and delivered at Nakuru this 26th day of February, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.