



IN THE COURT OF APPEAL OF KENYA
AT NYERI
CRIMINAL APPEAL 58 OF 2007
BETWEEN

PAUL KIHARA KARIUKIAPPELLANT

AND

REPUBLICRESPONDENT

*(An appeal from a judgment of the High Court of Kenya at Nyeri (Khamoni & Okwengu, JJ.) dated 27th September, 2006
in*

H.C.Cr.A. No. 400 of 2003)

JUDGMENT OF THE COURT

Paul Kihara Kariuki, the appellant herein, was the 1st accused person in a case before a Senior Resident Magistrate at Karatina and in that case, the appellant and his colleague were charged and tried on three counts of robbery with violence contrary to **section 296(2)** of the Penal Code. At the end of the trial the magistrate held that no prima facie case had been made out against the appellant and his co-accused and he acquitted both of them under **section 210** of the Criminal Procedure Code on the first count. But the magistrate placed both of them on their defence on counts two and three. The averments in counts two and three were that on the 30th day of April, 2003 at Kiaruhiu Trading Centre in Nyeri District of the Central Province, the appellant and his co-accused, jointly with others not before the court and while armed with dangerous weapons, namely a pistol, pangas and iron-bars robbed **Nancy Njeri Mubuchi** (count one) and **James Kagwe Gakuya** (count 2) of cash and other items, and that during the robbery they threatened to use actual violence to the victims of the robberies. Nancy was said to have been robbed of a radio cassette, make Sony and Kshs.6,800/=. James Kagwe Gakuya was said to have been robbed of Kshs.170/-.

Nancy Njeri Mubuchi gave evidence as PW2; James Kagwe Gakuya was PW3. Nancy worked at East Super Bar at the trading centre. James was a customer in the bar during the robbery. At around 9.30 p.m. that night a group of persons entered the bar and one of them carried a pistol. The others, apparently two, had other weapons. The one with the pistol fired in the air and the patrons were ordered to lie on the floor. The robbers then ransacked the bar and took away Kshs.6,800/= from within the counter and a radio cassette which was on the counter. James had dithered when the order to lie down was given. He was hit with a metal bar on the head and Kshs.170/= was taken from his pockets. The robbers then left the bar. None of the people in the bar were able to recognize the robbers.

Francis Karanja Karani (PW1) was another bar-keeper at Gatondo Trading Centre. It is not quite clear from the record how far Gatondo is from Kiaruhiu Trading Centre but they appear to be close to each other. Francis's bar had been attacked in a similar manner on the 15th March, 2003 and that attack had formed the subject of count one on which the appellant was acquitted. It was the evidence of

Francis that on 30th April, 2003 at about 10.30 p.m. he heard some commotion outside and he went out to check. He was with other people in his bar. He saw three people being chased towards Gatondo Primary School. He joined the chase and one of the people being chased had a radio. That person entered Gatondo School and according to Francis “hid” there. The person was caught and the radio he had been carrying “was there”. The people with Francis wanted to kill the man but he prevented them from doing so. The person arrested was wearing a black leather jacket and inside the jacket were coins amounting to some Kshs.326/- or Kshs.400/=; the person so arrested was this appellant. The other two people who were being chased with the appellant made good their escape.

Pc. Peter Kinzau (PW6) received communication while on patrol about the robbery at Kiaruhiu Trading Centre. He and his fellow officers proceeded to the bar where the robbery had occurred and according to Constable Kinzau, Nancy told him about the robbery and the items stolen and further told him that one of the robbers had on a black leather jacket and a green cap. Kinzau and his team started looking for the attackers and after about thirty minutes they received communication that one person had been arrested at Gatondo Trading Centre. They proceeded there and found the appellant under arrest. They took him to Karatina Police Station and the following day the radio cassette found with the appellant was positively identified as the one stolen during the robbery at Kiaruhiu.

In his sworn evidence the appellant said that on 30th April, 2003, he left Karatina to go to Kiriki where he was to see his sick grandmother. He alighted from a vehicle at 9.15 p.m. and while walking towards Kiriki he came upon some people who passed him but that the others behind said he was one of them and arrested him. They started beating him and then brought a radio, a jacket and a hat. The police were called and he was arrested and charged.

The trial magistrate found as a fact that a robbery took place at the bar where Nancy and James were and that the two witnesses were robbed of money and various other items stated by Nancy. The magistrate also accepted the evidence of Francis (P.W.1) that he was among a group of people who pursued some three persons and eventually arrested the appellant at Gatondo Primary School and that when arrested the appellant was wearing a black leather jacket, a green hat and had with him a radio cassette subsequently identified as having come from the bar where Nancy had been robbed. The magistrate held: -

“I believe the evidence of Francis Karani that he is one of the people who chased and caught the 1st accused at Gatondo trading centre. The accused was among the three people who were being chased. Karani, P.W.1 saw one of the people carrying a radio and they chased him. One of them hid at Gatondo Primary School and they caught him. He was the accused. Where they caught up with him there was a jacket and a radio. In the jacket they found coins amounting to Kshs.362.

I do not believe the evidence of the 1st accused that the radio cassette, the jacket and the hat were brought when he was being beaten. It is the accused who was running away with the radio cassette. The hat and the jacket were his. I do not believe his defence that he was walking towards Kariki when he was arrested. It is clear from the evidence of Karani, PW1 that they caught the accused inside Gatondo Primary School compound and not on the road. The evidence of the accused that he was an innocent sojourner is far from the truth. He was in the group of the three people who were being chased.”

On the first appeal to them *Khamoni & Okwengu*, JJ held:

“We have carefully considered that defence in the light of evidence from prosecution witnesses. We think that the learned trial magistrate rightly rejected that defence. There was sufficient evidence that the Appellant was one of the three robbers who were chased by members of the public and the Appellant arrested in possession of the radio cassette which had just been robbed. Arrested while still in the clothes and had the hat he had been having. He had some of the robbed (sic) coins. We hold the opinion that the Appellant was properly convicted and sentenced.”

In the light of these very clear conclusions by the two courts below, conclusions which were wholly based on the recorded evidence, we do not accept the appellant’s complaint that the Judges on the first appeal did not address the inconsistencies in the prosecution

evidence. The only inconsistency which **Mr. Macharia**, learned counsel for the appellant, dwelt on was that it was possible to conclude from the evidence of Francis that the appellant was not the one Francis saw running and carrying the radio and that the person who had the radio ran and disappeared. This complaint was based more on the form or manner in which the trial court recorded the evidence of Francis. We have, on our part, looked at the recorded evidence, and the only reasonable conclusion possible from the evidence was that Francis and others chased the appellant who was with two other people who managed to escape but the appellant was caught and found with the radio cassette. The evidence of the prosecution witnesses on these points was so clear that the appellant's conviction was inevitable. We can find no reason at all for interfering with the concurrent findings of facts made by the two courts on the evidence that was before them. The sentence imposed on the appellant and as clarified by the superior court was lawful. The appeal wholly fails and we order that it be and is hereby dismissed.

Dated and delivered at Nyeri this 14th day of May, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR