



IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 56 of 2007

GEORGE MUCHIRI RITHO.....APPELLANT

AND

REPUBLICRESPONDENT

(An appeal from the judgment of the High Court of Kenya at

Nyeri (Kasango & Makhandia, JJ.) dated 11th May, 2007

in

H.C.C.R.A. Nos. 175 & 246 OF 2003)

JUDGMENT OF THE COURT

George Muchiri Ritho, the appellant, was the first accused, in a case in which, jointly with four others, he was charged with two counts of robbery with violence contrary to **section 296 (2)** of the Penal Code. After a trial, he and one **Lawrence Wachira Mahinda**, whose appeal before us abated under **rule 68** of the Court of Appeal Rules were each convicted of the lesser charge of robbery contrary to **section 296 (1)** of the Penal Code, and were thereafter sentenced to imprisonment terms of 5 years in each count to run concurrently, together with six strokes of the cane. On first appeal, the superior court was of the view that the two were improperly convicted of the lesser charge as in its view the evidence before the trial court, supported the offence of robbery with violence contrary **section 296(2)** of the Penal Code and accordingly substituted convictions for that offence and the sentence of death prescribed thereof. It was then that they filed appeals to this Court. The appeals being second appeals only issues of law fell for consideration. As we stated earlier **Lawrence Wachira Mahinda**, died during the pendency of his appeal. Consequently, his appeal abated and is therefore not before us.

The appellant before us has raised three grounds in a supplementary memorandum of appeal which, his counsel, Miss. Lucy Mwai, said were the only grounds the appellant would rely on. These are:

“(1) *The learned Judges of the superior court erred in law in relying on the evidence of recognition while circumstances prevailing at the time of the robbery were not favourable. Indeed the complainants were unable to name their attackers at the police station or among the neighbours immediately after the attack.*

(2) *The learned Judges of the superior court erred in law in upholding the conviction of the Appellants for the offence of robbery with violence in count II, which offence was not proved beyond reasonable doubts following the dismissal of the evidence of P.W.2 by the trial magistrate.*

(3) *The learned Judges of the superior court erred in law in their failure to adequately evaluate the evidence by the trial magistrate thus occasioning a miscarriage of justice.*”

The background facts to this matter are short and straightforward. On 29th June, 2002, at about 1 a.m., **F W K** (PW1) was asleep in her house at Nyeri District, when robbers descended upon her after gaining entry by cutting her window open. They entered and found her already awake. She was able to count them and reckoned that they were seven in number. She identified the appellant in their number. It was her evidence that she knew the appellant before although not by name. The appellant pricked her with the tip of a sword he had and warned her of dire consequences if she did not produce money. She stated that she was able to recognise the appellant using strong light from torches the robbers had and which shone brightly in the room. She produced money from a drawer amounting to Kshs.11,500/= and gave it to the appellant. The appellant was not satisfied with it and demanded more whereupon PW1 told him that there was more money inside the ceiling kept in a paper carton. As PW1 could not climb into the ceiling to get this money as demanded by the appellant she asked one **SN** (PW6), PW1's house-help to get the money, which she did. Inside that carton PW1 had kept Kshs.165,000/= which the robbers took, after which the appellant threatened to rape PW1. He was however stopped by his accomplices from doing it. PW6 testified that she was able to identify the appellant, but because she did not take part in an identification parade organized for the appellant, her evidence in that regard is of little probative value.

Apart from PW1 and PW6 there were other ladies in that house at the time of the attack. Among those ladies was **Caroline Wairimu Wanjiku** (PW2), a grand daughter of PW1. She was sleeping in a different bedroom from that of PW1. She testified that she was confronted inside the bedroom where she was by a person whom she identified as **Bernard Gikandi Mahinda**. He was the third accused. She testified that he was the only person out of the seven who attacked them and whom she was able to identify. Unfortunately no identification parade was organised for her to identify him as a suspect in the robbery. Because of this the trial magistrate, J.N. Nyagah, SRM, in his judgment held that her identification of the 3rd accused was not reliable and her evidence “*is thereby dismissed.*” Ground 2 of the grounds of appeal is premised on that holding.

PW2 testified that the 3rd accused stole not only her money, amounting to Kshs.5000/= but also a mobile phone. These are the subject matter of the second count. In her submissions on the appellant's conviction on that count, his counsel, Miss. Lucy Mwai, said PW2 did not pinpoint the appellant as the person who stole her property. Nor did she state that the appellant ever entered the room where she was. Besides, she said, the theft of the property having been committed by an identifiable individual, the appellant could not properly be convicted of that offence, more so, when even the evidence against the 3rd accused was rejected by the trial court as unreliable. Mr. Makura, Senior State Counsel appeared to agree with Miss. Mwai, but we will revert to this issue later in this judgment.

The robbers did not steal only the money from PW1 and PW2 and PW2's mobile phone. They carted away other properties, among them, 2 video machines, a video game, a video camera, 3 mobile phones, 15 blankets, 6 bed sheets, 5 bedcovers, 5 seat covers, one radio cassette, a pocket radio cassette. 3 wrist watches, 5 torches, cloth material and a sewing machine head. Other than the sewing machine head and a “*Jambo Junior*” can, none of the stolen items were recovered. Part of the money stolen was kept in the aforesaid can.

There are other pieces of evidence relevant to this appeal. **Samuel Gichuru Komu** (PW7), a resident of Karogoto village, Kirimukuyu Location testified that, on the morning of 29th June, 2002, at about 8.30 a.m, he saw **Lawrence Wachira Mahinda**, whose appeal abated, with his brother walking along a certain road. The latter was carrying a sack which appeared heavy. Later the same day he met that gentleman and inquired from him what he was carrying. That person whom he referred to as **Waithaka**, told him that he was carrying a gas cooker and video deck and that he was assisting his brother to transport these items to Kerugoya. This witness was however initially held as a suspect but the police later treated him as a prosecution witness.

There is also the evidence of **Sgt. James Wanyonyi** (PW8). He testified on among other things, that the

appellant bought a cow soon after the robbery complained of. He was asked to explain from where and from whom he had bought the cow. The police suspected that the cow was bought with proceeds of the robbery, and on the basis of that seized the cow, and later produced it as an exhibit. The police thought the value of the cow was such that the appellant could not ordinarily afford to buy it. For some reason the appellant did not say anything about the cow. Subsequently, slightly over two months after the appellant was sentenced, the cow was released to the first complainant by order of the trial magistrate on the application of the court prosecutor, one *Inspector Kilonzo*. The appellant was not present when the order was made. The appellant did not raise the issue before the superior court on first appeal. He has however, raised the issue in his home-made memorandum of appeal. His complaint is that the superior court failed to observe that the trial magistrate illegally gave his cow to PW1, and that there was no nexus between the cow and the robberies. Miss. Mwai urged us to set aside the order giving the cow to PW1 and substitute therefor an order returning the cow to him. We agree that the cow was irregularly released to PW1 without affording the appellant a hearing, and on that ground alone we order that the order made on 27th January, 2003 surrendering the cow to PW1 be and is hereby vacated. However, the circumstances of this case do not permit us to order its release to the appellant. He is at liberty to take such steps as he may deem appropriate to get the cow back. We say no more on this aspect of the matter.

The appellant was arrested from the house of one *Jackson Githui Wanjeri*, who was jointly charged with the appellant but who was acquitted at the close of the prosecution case as no witness gave evidence against both him and another accused, one *Joseph Muriuki Kanuthu* (4th accused). The appellant was hiding under a bed. In his defence he gave an alibi. He stated that he was at his home with his wife and children. He denied he knows PW1. The appellant did not however explain why he was hiding.

In her submissions on the first ground of appeal, Miss. Mwai submitted that the circumstances in PW1's house on the material night of the robbery did not favour a correct identification of the appellant. She, in particular, lamented that had PW1 recognised the appellant she would have named the appellant to the neighbours who came to her aid and the police when she first made a report to them. In that regard she cited this Court's decision in the case of *Maitanyi v. Republic [1986] KLR 198* in which the court, as material, stated as follows:

“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters.”

PW1 testified that she told the police that she recognized the appellant during the robbery along with another person. *Stanley Musembi* (PW8), a police constable then attached to the police Flying Squad Unit, Karatina, confirmed this, and acting on that information arrested the appellant with three others. PW1 was however able to mention the appellant and another person whose appeal is not before us in her written statement to the police.

Counsel for the appellant submitted that had PW1 given the description of the appellant, that fact would have been entered in the police Occurrence Book. PW1 was emphatic that she gave the particulars of the appellant and another person to the police when she made a report there, but when the police Occurrence Book was produced in evidence the description of the two people was absent. The description was however included in her statement to the police. Miss. Mwai, however, took issue with that arguing that it was an afterthought. The robbery took place on 29th June, 2002 and the statement was recorded on 1st July, 2002, before the appellant was arrested. The appellant was arrested on 7th July, 2002. In our view nothing turns on that complaint. The police witnesses testified that PW1 gave a description of the appellant and we have no proper basis for holding otherwise.

We have considered the issue of identification and clearly the trial magistrate made an inquiry about the quality of light in PW1's house, contrary to submissions by Miss. Mwai that he did not. The superior

court also dealt with the issue. That court said:

“It would appear that the robbers were armed with bright and powerful torches, which they were beaming in every direction. Indeed according to PW1 all the robbers had torches on and the whole house was properly lit by the torch lights. It would appear from the foregoing therefore that conditions obtaining were favourable for positive recognition.”

From the foregoing, there was a concurrent finding of fact as to the amount of light in PW1’s house and both courts came to the conclusion that the light facilitated a proper identification of the appellant. In those circumstances we are satisfied that the appellant was positively identified by PW1 as one of the people who robbed PW1 and PW2.

Ground 2 of the supplementary memorandum of appeal relates to the appellant’s conviction in the second count. We earlier set out the arguments which were put forward on behalf of the appellant. Mr. Makura, Senior State Counsel, agreed with the appellant’s counsel on the matter. We do not however share their view. The appellant was not charged alone. He was charged jointly with four others of two counts of robbery with violence contrary to **section 296 (2)** of the Penal Code. The essential aspect of the two counts state that the accused acted jointly while armed with dangerous weapons. PW1 testified that the appellant was armed with a sword with which he pricked her on the stomach. The people with him, according to him had gone to the house of PW1 with a view to committing a robbery. The principle of law with regard to joint offenders was succinctly and authoritatively stated by the predecessor of this Court, the Court of Appeal for East Africa, in the following terms, in the case of **Mungai v. R [1965] EA 782**, at p. 787:

“It is clear from the conduct of the first appellant that there was a plan to rob with some degree of violence and that he associated himself with the execution of that plan, and being present as a principal of the second degree was equally responsible for the death of the deceased (see R v. Betts and Ridley (1930) 22 Cr. AP. R. 148).....The intention to kill may be inferred from the nature of the harm which caused the death.”

And later the court went on to state:

“Counsel for the first appellant placed great reliance on the case of King v. R. [1962] 1 ALL ER. 816, and submitted, if we understood his argument, that if two accused persons are convicted on the basis that they acted in concert and one is acquitted then the conviction of the other should not be allowed to stand. We think that that is a sound principle of law. But counsel further submitted that the principle also applies even to a case where the convictions of more than two persons are based on common design. He said that if one is acquitted the other must also be acquitted. With respect to counsel, we think we should have to do considerable violence to the *ratio decidendi* of King v. R. in order to uphold his second contention. In the opinion of this court, where the case against two accused persons proceeds on the basis of their acting in concert then both can be found guilty, if the evidence establishes that they were acting jointly; but if there was no preconceived plan of acting together then a conviction based on common design cannot stand. In this latter case a conviction can be recorded against only one accused, if the offence is proved to have been committed by him independently. But where more than two persons are charged with a joint offence, the acquittal of one accused only does not, in our opinion, affect the convictions of the others, provided these others shared among them a common purpose to commit the offence charged.”

This authority provides a complete answer to submissions made on behalf of the appellant. It is true no witness testified he or she saw the appellant robbing PW2. However, the appellant set out in the company of other persons to commit a robbery. The action of each of them during the execution of that robbery was the action of all the others as it was in pursuance of a common purpose. So whoever robbed PW2 did so in furtherance of that common purpose and his action affected all the other members of the group. It is therefore, immaterial that the evidence of PW2 on identification was rejected by the trial magistrate and the rejection affirmed by the superior court. PW1 recognised the appellant and her evidence was accepted

and acted upon by both courts below. Her evidence placed the appellant at the scene of the robberies and thus connected him to the group that robbed both PW1 and PW2. Consequently, he was properly convicted of the 2nd count.

The last ground argued before us by Miss. Mwai is that the first appellate court failed to re-evaluate the evidence. The learned counsel for the appellant did not indicate the aspects of the case which the superior court failed to reconsider which would have tilted the balance in the appellant's case the other way. The first appellate court re-evaluated the evidence on the essential aspects of the appellant's case and we find no basis for faulting that court on this aspect of the matter.

We have said enough to show that the appellant's appeal has no merit. In the result it is dismissed. It is so ordered.

Dated and delivered at Nyeri this 22nd day of May, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR