IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 228 of 2007

SAMUEL KIMAMA MWANGI ……..……..…..……..APPELLANT

AND

REPUBLIC ……...……..…..……..RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 4th October, 2007

in

H.C.CR.A. NO. 255 OF 2004)

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JUDGMENT OF THE COURT

The appellant ***Samuel Kimama Mwangi*** was on September, 2004 convicted by the Senior Resident Magistrate's Court at Kangema in Muranga of the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code and sentenced to death.

The evidence in the trial court was that ***F M J*** (PW1) attended a disco at Koimbi on 2nd August, 2004. She decided to visit the toilet at around 6.00 a.m. As she left the toilet she met two men and one of them held her by the neck and told her that he wanted to rape her. The other man slapped her and she fell down. She began screaming. One of the two took her jacket which she was wearing. The jacket had her mobile phone, Ksh.500 and her cap. She screamed and her colleagues came out of the disco to help her. She was able to hold on to the appellant but the appellant's companion managed to escape. The appellant tried to free himself by biting her hand but she managed to hold him and continued holding him until her colleagues came to her rescue. In the process she was injured on the knee and the eyes. Her colleagues ***G N N*** (PW4) and ***J I K*** (PW3) managed to apprehend the appellant and thereafter took him to a police post where a report was made to the police. PW3 and 4, the colleagues of F testified that they came to F's rescue after hearing her screams and found her holding the appellant.

Following the conviction of the appellant with the offence of robbery with violence by the trial court, he filed his first appeal in the superior court. On 4th October, 2007, the superior court (Mary Kasango & Makhandia, JJ.) dismissed the appeal after analysing and evaluating the evidence adduced in the trial court, as is required of them as a first appellate court.

The appellant filed an appeal in this Court on 4th October, 2007. The appellant filed a home-made memorandum of appeal to the court, which raises nine (9) grounds. At the hearing of the appeal, the appellant was represented by Mr. Muthui Kimani and the State was represented by a Senior State Counsel Mr. J.M. Makura. The learned counsel for the appellant indicated to the court that he has abandoned

grounds 1, 3, 4 and 8 and that he would rely on grounds 2, 5, 7 and 9. As the appeal proceeded the learned counsel abandoned ground 2 which was based on alleged failure by the trial court to record the appellant's presence. This ground was abandoned when the court upon scrutinizing the record confirmed that the appellant was indeed present. Ground 7 which alleged that the charge sheet had not been signed was not pursued because the trial court record had a signed charge sheet.

The learned counsel for the appellant confined his submissions to grounds 5 and 9 which state as follows: -

Ground (5): -

"**The appeal judges erred in not finding that basic ingredients of section 296 (2) of the Penal Code that, is, wordings like armed with dangerous or offensive weapons or instruments were missing from the charge sheet and also actual violence was not established as the complainant was not attacked with dangerous offensive weapon."**

Ground 9:

"**The appeal judges erred in upholding the death sentence without analysing and evaluating the entire evidence on record adequately and also in not finding that the investigating officer was not called."**

In support of the appeal, Mr. Kimani submitted that although the complainant had mentioned the names of her colleagues only two testified and that the prosecution did call a ***Mr. J K***, PW4 who had not been named by complainant. He contended that ***J K*** (PW2) was a complete stranger. He further submitted that the complainant did not identify the person who took the jacket which had her valuables. He strongly submitted that the evidence on record, pointed to the fact that all the appellant ever did was to express an intention to rape her, and therefore the ingredients of robbery with violence were not present. He reasoned that the more appropriate charge should have been attempted rape. He concluded by inviting the court to quash the conviction and sentence as relates to robbery with violence, and instead impose a conviction on the charge of attempted rape.

On his part, the learned Senior State Counsel Mr. Makura, supported the conviction and sentence as handed down by the trial court and upheld by the superior court. He argued that the prosecution had the discretion to choose the witnesses to call including PW2 and that there is no proof that PW2 was called to testify in order to manufacture the evidence. Moreover the appellant was properly identified by PW1, 3 and 4. As regards the jacket and the stolen items he invited the court to note that the only reasonable inference is that the appellant's companion had taken them. In addition, he stressed that the struggle between the appellant and the complainant, resulted in her jacket being stolen and that it is significant that the appellant was accompanied by one other person. On these facts alone, the ingredients of the offence of robbery as stipulated in ***section 295*** were present, in that the two persons did in the process use violence by holding the complainant by the neck, the appellant's companion slapping her, and at the same time the appellant was accompanied by one other person. ***Mr. Patrick Mwangi*** (PW6) from Muranga District Hospital examined PW1 and noted that the injuries she sustained included an injury on the left eye and bruises on the neck and fingers. In view of this, the learned counsel submitted that the ingredients of the offence of robbery with violence as set out in ***section 296 (2***) were fully satisfied.

We agree with the submissions of the learned State Counsel that the ingredients prescribed in ***section 296 (2)***, of the Penal Code were proved by the prosecution to the standard required. In the case of **JOHANA NDUNGU v R CR. A 116 of 1995** (unreported) this Court held:

"**The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in s. 296(2) which was given below and any one of which if proved will constitute the offence under the sub-section:**

(1) If the offender is armed with any dangerous or offensive weapon or instrument, or

(2) If he is in company with one or more other person or persons; or

(3) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

As the evidence concerning the injuries sustained by the complainant remains unshaken including the act of stealing her jacket and other items, coupled with the fact that the appellant was in the company of one other person, we find that ingredients of the basic pre-supposition under ***section 295*** and the existence of one of the three sets under ***section 296 (2)*** above, the two lower courts findings cannot be faulted.

We are aware that the appeal to this Court is a second appeal and therefore our concern is to deal with points of law. Granted that grounds 5 and 9 do raise both points of law and fact, the points of law raised are in turn dependent on the two lower courts findings of fact. We are satisfied that the offence of robbery with violence was proved beyond reasonable doubt. The trial and the first appellate courts considered the ingredients of the offence and made concurrent findings of fact that all those ingredients were proved. This being the case this Court is bound by the two courts findings of fact and we have no duty of re-evaluating the evidence again.

In this Court's decision on the point in the case of **NJOROGE v REPUBLIC [1982] KLR 388**, the Court held: -

"**On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence."**

We have no basis for faulting the decision of the superior court. That being our view of the matter, we hereby dismiss the appeal. Order accordingly.

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

…….……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR