



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

CRIMINAL APPEAL 319 OF 2007

SAMWEL KAMAU MUNGAI.....1ST APPELLANT
HEZRON MURIGI KIMANI.....2ND APPELLANT
MICHAEL KAMAU WANGARI.....3RD APPELLANT

AND
REPUBLIC.....RESPONDENT

*(Appeal from a judgment of the High Court of Kenya at Nairobi
(Lesiit & Makhandia, JJ.) dated 11th November, 2005*

in

H. C. CR. A. No. 202, 205 & 207 of 2002)

JUDGMENT OF THE COURT

The appellants, *Samwel Kamau Mungai (Mungai)*, *Hezron Murigi Kimani (Kimani)* and *Michael Kamau Wangari (Wangari)* were tried and convicted by the Chief Magistrate, Thika on the charge of robbery with violence contrary to *section 296 (2)* of the Penal Code. The particulars of the offence were that on the 29th April, 2000 at Nguthuro bus stage along Thika Kenol Highway the appellants with others not before the court while armed with dangerous weapons namely pangas and knives, robbed Peter Mwangi Mburu of cash Kshs.16,200/=, one jacket, one wrist watch make Omax and one leather belt all to the total value of Kshs.25,200/= and at or immediately after the time of such robbery injured the said Peter Mwangi Mburu.

The incident took place at 3 pm in broad day light. The complainant, Peter Mwangi Mburu (Mburu), who is a businessman, had gone to purchase some wooden chairs from a shop called “Mackenzie” along the aforesaid Thika Kenol Highway, where the incident is alleged to have taken

place. He bought the chairs and with the help of the shop owner, James Gakuru Harun (Harun), loaded the same in his motor vehicle, and entered the vehicle to leave. Harun (PW 3) also entered the car on the passenger's side. He was to take a lift to the Kabati Shopping Center. A third person Simon Kamande (PW 2) (Kamande), a student was in the back of the motor vehicle. Just as Mburu (PW 1) turned on the ignition someone put his hand through the window and grabbed the ignition key. He held a panga and knife in his hand. Meanwhile, two other people brandishing knives went to the passenger's side of the motor vehicle and blocked Harun. They demanded money from Mburu. The 3rd appellant searched Mburu's pockets, and took kshs.16,200/=, as well as a belt that Mburu was wearing. Meanwhile, the other two appellants robbed Harun of Kshs.1,100/=. The 1st appellant also stole Mburu's jacket, and thereafter the appellants fled the scene. Mburu and Harun reported the incident to Kabati Police Station. In his report to the police, Harun identified the appellants by their nick names. In his evidence before the trial court he said he knew the three appellants. The first two were from his village, while the sister of the 3rd appellant worked in a local primary school. He had seen the 3rd appellant visit his sister on several occasions. Mburu, on the other hand, identified the 1st and 3rd appellant in an identification parade.

Kimani elected to make an unsworn statement in his defence. He told the trial court that he was with his employer on the material day, and did not remember anything. Mungai, on the other hand, made a sworn statement. He told the trial court that on the material date, he was at work all day in his butchery. Wangari, in his sworn statement, also stated that he was at work all day, selling assorted items at the bus stage. The trial magistrate carefully evaluated the evidence before her, considered and rejected the defences put forward by the appellant, and found them guilty of the offence charged.

The appellants then appealed to the superior court which, in a well considered judgment, dismissed the three appeals. This is the second and last appeal. Being a second appeal, only points of law fall for consideration of this Court – see **section 361 (1) Criminal Procedure Code**.

The first and second appellants drew up what they called "Petition of Appeal", while the 3rd appellant filed a home-made memorandum of appeal raising issues that are almost identical. However, their learned respective counsel filed supplementary memorandums of appeal, raising issues of identification, language of the court, doctrine of recent possession; defective charge and violation of

section 72 (2) of the Constitution. At the hearing before us on 22nd October, 2009, Mr Ondieki, learned counsel, represented the 1st and 2nd appellant, while Ms Kegode, learned counsel, represented the 3rd appellant. In his submissions before us, Mr Ondieki argued that the superior court erred in holding that the identification was positive and without error only because the incident took place “in broad daylight”; that the identification parades were not properly conducted; that the names of the suspects appearing on the charge sheet were not consistent with those given by Harun immediately after the incident; that the language of the court was not stated in the proceedings; and finally that the doctrine of recent possession was incorrectly invoked. Mr Ondieki abandoned his argument relating to **section 72 (2) of the Constitution.**

Ms Kegode, for the 3rd appellant, adopted the submissions of Mr Ondieki. Mr Kaigai, learned Principle State Counsel, on the other hand, opposed the appeals arguing that the conviction was sound and based on the evidence of identification and recognition that had been fully corroborated.

With regard to identification, both courts below were acutely aware that the prosecution case stood or fell on the evidence relating to identification of the appellant. In this case it was not that of a stranger, but of a person previously known and therefore it was identification by recognition. As this Court has stated before in Anjononi vs Republic (1980) KLR 59 at page 60:-

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya vs Republic (unreported).”

In considering that issue, the learned Magistrate stated as follows:

“I have considered all evidence on record and noted that PW 3 was a resident of that area and he identified all the 3 accused persons and the roles they played in the robbery. It was during broad daylight and there cannot be any issue of mistakes (sic) identity. PW 1 also identified 3rd accused who had a knife and demanded for money and PW 1 gave his Kshs.2,700/= but he (3rd accused) searched PW 1 and removed Kshs.17,200/= from PW 1. He (PW 1) identified 1st accused as the one who stood at the drivers car door and 2nd accused at the car door and blocked PW 3 from going out. He (PW 1) noted that 3rd accused person took (motor vehicle) (sic) his belt. PW 1 also testified that 1st accused said “people these days give children money” and they (3rd accused) searched PW 2

and stole his Kshs.1,100/=. PW 1 identified 2nd and 3rd accused persons from identification parade.”

The superior court went through similar analysis of the evidence before stating as follows:

“On the issue of identification it is not in doubt that the complainant was in the company of PW 2 and PW 3 when he was robbed. It was broad daylight. While PW 1 was able to get out of his vehicle, PW 2 and PW 3 remained inside during the robbery. PW 1 said he saw a fourth man behind his vehicle who left together with the three Appellants. Failure of PW 2 and PW 3 to see the fourth man does not render their evidence inconsistent with that of the complainant.

We have considered that the vehicle was a pickup. The three robbers were described as having gone to the front of the vehicle. They all spoke demanding money first from the complainant and later from PW 3. They were not fearful nor did they seem to be concerned about being identified. In fact PW 3’s evidence was, he knew all three Appellants before that he easily recognized them and gave their names to the Police. PW 6 confirmed receiving their names from PW 3 on the same day of the incident. He also later arrested them and recovered the complainant’s belt and jacket exhibit 1 and 2.

The evidence of identification against the Appellants was both that of visual identification and of recognition. PW 1 visually identified them in court and in a parade conducted by PW 4 he identified the 1st and 3rd Appellants. PW 2’s evidence of identification was purely dock identification. It has however received corroboration from the evidence of the complainant and PW 3. PW 3 identified all three by recognition. That identification has not been challenged or controverted. The evidence of identification in our view is watertight having been made in favourable conditions and having been confirmed by identification parades and the evidence of recognition.”

There are, therefore, concurrent findings made by the two courts below that the appellants were properly identified as the robbers. We have re-examined the evidence upon which that conclusion was made and we find that it was well founded. We do not doubt that Harun was familiar with the appellants; that he knew the first and second appellants from his village, and the third appellant whose sister was a school teacher at his local primary school. We have no reason to disturb the finding and we reject that ground of appeal.

As for the complaint regarding the language of the court, we have examined the record of the trial court and are satisfied that the language of the court, in this case “English-Kiswahili-Kikuyu” is properly recorded and that the appellants were given, and did in fact exercise their choice of the language used in court.

With regard to the doctrine of recent possession, Mr Ondieki argued that there was no proof that the items recovered from the 1st and 2nd appellants actually belonged to the complainants, and that these

items such as the belt and jacket were common items and could belong to anyone. This argument has no merit. First, neither of the courts below relied on the doctrine of recent possession as the basis of conviction in this case. Secondly, and in any event, the items were recovered by P C David Karanja (PW 5) and were identified by the complainants as those belonging to them.

Finally, with regard to the argument that the charge was defective because of the inconsistency in the amount of money quoted therein and the evidence in court, we also find no merit in this argument. We concur with the finding of the superior court that the inconsistency was minor, of no effect, and curable under **section 382 of the Criminal Procedure Code**.

In sum, we are of the view that the offence charged was proved beyond reasonable doubt, and the conviction of each appellant was safe in all the circumstances. The appeals have no merit and we order that the same be and are hereby dismissed.

Dated and delivered at Nairobi this 20th day of November, 2009.

R. S. C. OMOLO
.....
JUDGE OF APPEAL

E. M. GITHINJI
.....
JUDGE OF APPEAL

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

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