IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 71 of 2008

KENNEDY MAINA MUCHIRI …….. APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 7th May, 2008

in

H.C.CR.A. NO. 55 OF 2005)

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JUDGMENT OF THE COURT

Kennedy Maina Macharia, the appellant herein was jointly charged with **John Mwangi Wambugu** in the Senior Resident Magistrate's Court at Karatina with the offence of robbery with violence contrary to **Section 296 (2)** of the Penal Code. The particulars of the offence were that on 11th day of July, 2004 at Karatina Township in Nyeri District of Central Province, jointly with others not in court and while armed with knives and sticks they robbed **John Gakombi Mutahi** (PW1) of cash Kshs.18,000/= and a mobile phone make Samsung A800 both valued at Kshs.26,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said John Gakombi Mutahi. The evidence adduced before the Senior Resident Magistrate (J. N. Nyaga) was that on 10th July, 2004 at 7.30 p.m. PW1 had closed his mobile phone shop at the township and gone to his house. He then went to Star Buck Hotel where he took some beers. Later, he left the hotel with a girl friend to go to Celebration Hotel where they were to take a taxi home; but when they reached Co-operative Bank they met three men who attacked them, with one of them holding PW1 with a stick on the neck while the other held him by the legs. The third man searched the pockets of PW1 and removed therefrom Kshs.19,000/= and a mobile phone. The girl friend ran away while screaming for help. PW1 attempted to hold the person who had held him by the legs but was threatened with a knife by the one who had held him by the neck. He pointed him out as the appellant herein. The robbers then ran away. PW1 screamed and attracted the attention of **Cpl. David Kamonde** (PW2) and **PC. William Kangogo** (PW4) who were on mobile patrol in the township in motor vehicle registration No. KAA 999E. They went to the aid of PW1 who told them how he had been robbed by three men, one of whom had run and entered a nearby corridor. The officers went to the corridor where they found one person hiding in darkness whom they arrested and brought back to the scene. PW1 identified him as one of his attackers. That person was the appellant herein. As they moved around the town they met another person near Sagana stage/Mathira Petrol Station whom PW1 pointed out as one of his attackers. The two were taken to Karatina Police Station where they were charged with this offence.

They denied the offence before the Senior Resident Magistrate. The appellant in his defence gave a statement to the effect that on 10th July, 2004 he had left his house to go to the place where he normally waits to buy cabbages for sale when police came and arrested him. They took him to Karatina Police Station where he was charged with an offence he knew nothing about.

As regards John Mwangi Wambugu he also denied the offence. In a sworn statement in his defence he stated that on 10th July, 2004 he went to work at BP Petrol Station where he normally washes motor vehicles. On the way from Star Buck Hotel where he had gone to buy some cigarettes, he met 3 policemen who arrested him and placed him in their motor vehicle and took him to Karatina Police Station where he was also charged with an offence which he knew nothing about. The Senior Resident Magistrate who heard the case found the appellant guilty as charged and convicted him. He however acquitted his co-accused. In his judgment he rendered himself, in part, as follows:

"**Upon considering all the evidence adduced in court I have no doubt that the complainant had an opportunity of seeing the people properly. There was electricity security lights emanating from the nearby Co-operative Bank. The first accused was arrested a few minutes after the complainant was robbed. The complainant was with the police when they arrested him. He identified him by the physical appearance and the clothes that he was wearing at the time of the robbery. I have no doubt that the 1st accused was one of the thieves. He was arrested in the darkness in a corridor behind the Celebration Hotel and not at Blue Star Hotel as he claimed. I therefore do not believe that the accused was on the way to the market when he was arrested.**

……

The complainant was injured during the robbery. He was robbed of money and mobile phone. The P3 form produced in court confirms that the complainant had indeed been injured. The prosecution has proved beyond all reasonable doubt that the 1st accused was in the gang that robbed the complainant. They wounded the complainant in the course of the robbery. They were armed with a knife. The charge against the 1st accused has been proved beyond all reasonable doubt. He is found guilty of the offence as charged and convicted accordingly."

The appellant was subsequently sentenced to death as provided by law. He was aggrieved by the conviction and sentence and he appealed to the superior court which appeal was dismissed. He was not satisfied with the superior court's decision either and hence this appeal. This appeal is based on a home made memorandum of appeal by the appellant in person which was incorporated in the supplementary grounds of appeal, filed by his advocates, Messrs Gathiga Mwangi & Company. It has 11 grounds of appeal as follows:

"**1. The learned Judges ignored and failed to find that the accused was not provided with the intended prosecution witness copies of statement contrary to the provision of S.77 of the Constitution of Kenya. Therefore this Defence was highly prejudiced.**

2. The learned Judges erred in law in ignoring not finding that the records of the subordinate court at Karatina do not show any interpretation and language used by the accused person during cross-examination.

3. The learned Judges erred in law in ignoring and failing to find that the contradictions in the prosecution case cast doubt adequate to warrant the setting aside the conviction.

4. The learned Judge erred in law in ignoring the fact that in visual identification, even close relatives are mistaken and that there was a possibility of error in the circumstances of the alleged identification.

5. The learned Judges did not discharge their statutory duties in evaluating the evidence on record and arriving at the decision they did contrary to the law and the principles set down in the

authority of Okeno vs. R. [1972] EA page 32.

6. The learned Judges erred in law in ignoring the fact that PW1 stated that appellant was arrested in some garage while PW2 stated it was inside a corridor and PW4 stated it was on a street.

7. The learned Judges erred in law in ignoring the fact that complaint (sic) on oath he was robbed cash Khs.19,000/= while the charge sheet stated it was Kshs.18,000/=.

8. The learned Judges erred in law in ignoring the fact that complainant stated on oath he was robbed by three men whereas PW2 said there were six assailants.

9. The learned Judge erred in law in ignoring the fact that PW1 claimed he ran after 1st Accused and could see his back, whereas PW2 & PW4 stated they found him screaming and did not see accused running away.

10. The learned Judges erred in law in ignoring the fact that PW1 was drinking beer from 7.30 p.m. to 3 a.m.

11. The learned Judge erred in law in ignoring the fact that the appellant's evidence which was on oath was not challenged by cross-examination".

The appeal was heard by this Court on 3rd November, 2009 when Mr. Gathiga appeared for the appellant and Mr. C. O. Orinda, Senior Principal State Counsel, appeared for the State. Mr. Gathiga submitted mainly on two issues, namely identification and evaluation of the evidence by the superior court. He submitted that if the evidence as a whole was re-evaluated exhaustively, the appellant could have been acquitted. He submitted further that as the complainant had been consuming beer from 7.30 p.m. to 3.00 a.m. on the night of the alleged robbery, he was probably not capable of identifying his assailants due to drunkenness. Counsel also submitted on the contradictions in the prosecution case, the fact that the sworn evidence of the appellant on how he was arrested was not challenged; his concern about the evidence of the prosecution case regarding the number of the complainant's attackers and the amount of money PW1 was robbed of.

Mr. Orinda, on the other hand, opposed the appeal and submitted that the superior court exhaustively re-evaluated the evidence adduced at the trial and that issues of fact were dealt with by the two courts below and this Court was only supposed to deal with points of law. On identification, he stated that the two courts below adequately dealt with this issue and were satisfied the appellant was properly identified and that conditions at the scene were conducive for a proper identification. He stated that the issue of the complainant's consumption of beer was brought out at the trial and dealt with adequately. Counsel was also of the view that at this stage the issue of credibility of witnesses cannot feature in this appeal as this was dealt with by the two courts below.

On the first ground of appeal relating to the prosecution's failure to favour the appellant with witness statements, the learned Senior Principal State Counsel stated that the appellant only raised the issue once before the trial magistrate but when the case was called on for hearing later he had probably changed his mind as he did not raise the issue again.

As to the failure of the prosecution to call the lady who was with the complainant at the time of the robbery as a witness, the Senior Principal Sate Counsel stated that it depended on whether her evidence was essential to the case.

This is a second appeal and by virtue of **section 361** of the Criminal Procedure Code, only matters of law fall for consideration by this Court. The superior court Judges (Kasango and Makhandia, JJ.) in its judgment, stated clearly that they were guided by the principles enunciated by this Court in the case of **Gabriel Njoroge vs. Republic [1982 – 88]** 1 KAR 1134 at p. 1136 thus:-

"**As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself fro the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and made due allowance in this respect** (see **Pandya v. R.** [1957] EA 336, **Ruwala v. R.** [1957] EA 570)"**.**

The Judges then went on to review and evaluate the evidence adduced by the prosecution witnesses and also that of the appellant in defence and then stated:

"**The evidence against the appellant is one of identification. The law relating to identification was set out in the case of Cleophus Otieno Wamunga v Republic** [1989] KLR 429"**.**

and after quoting the relevant passage therein they continued:

"**We are aware that in the case where identification is under unfavourable circumstances there is need before we can rely on such evidence to treat it with great care. Such evidence should (sic) absolutely watertight. …… In our case the prosecution led the complainant to give evidence in respect of circumstances surrounding his identification of the appellant. The complainant described the scene as having light which was coming from the Co-operative Bank. It was sufficient light to enable him to clearly see the faces of the robbers. The complainant was also in close contact with the appellant. As a result of that he was able to see his face clearly and his clothing. The moment the appellant was apprehended the complainant identified him as one of the robbers."**

The Judges also considered the appellant's written submissions but they could not fault the learned magistrate's rejection of his defence.

On our part, we agree with the learned Judge's findings that, identification was the only issue of law which implicated the appellant with the commission of the offence the subject of this appeal. He struggled with the complainant during the robbery in an area well lit by electricity lights from the Co-operative Bank and after the robbery he ran to some dark alley pointed out by the complainant and from where PW2 and PW4 arrested him a few minutes after the robbery. The complainant clearly saw one of his attackers enter a dark alley behind Celebration Hotel. The appellant was arrested from that alley immediately after the robbery. The offence committed was clearly one of robbery with violence where the complainant was held by the neck by a stick in order to disable him and was also threatened with a knife when trying to hold onto one of the robbers. Though the evidence of identification was from one identifying witness, the prevailing circumstances at the scene were conducive to a positive identification and it was safe for the trial court to base a conviction thereon.

In the case of **Gachuru vs. Republic** [2005] KLR 688, this Court held as follows:

"**As a second appeal, only points of law may be raised since the Court will not disturb concurrent findings of fact made by the two courts below unless those findings are shown to be based on no evidence".**

(See also **Njoroge vs. R.** [1982] KLR 388).

In view of the forgoing, we find no merit in this appeal and we order that it be and is hereby dismissed.

Dated and delivered at Nyeri this 6th day of November, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

…….……

JUDGE OF APPEAL

D.K.S. AGANYANYA

…….……..……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR