



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 69 of 2005

1. JESSE MWIGA MUNGAI

2. STEPHEN MWAURA WANYOIKE.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya Nakuru (M. Apondi & Kimaru, JJ) dated 3rd December, 2004 in H.C.C.R.A. NO. 343 OF 2001)

JUDGMENT OF THE COURT

The two appellants *JESSE MWIGA MUNGAI* (1ST Appellant) and *STEPHEN MWAURA WANYOIKE* (2nd appellant) were convicted by the Senior Principal Magistrate Nakuru, of the offence of robbery with violence contrary to *section 296(2)* of the Penal Code and each sentenced to death, the penalty provided by the law. The charge sheet stated that the two appellants jointly with others not before the court while armed with dangerous weapons namely pangas and runqus robbed *Godfrey Kinyanjui Maina* of Shs.460 on 3rd February, 2001 and wounded him at or immediately before or immediately after the tiem of such robbery.

The prosecution called four witnesses at the trial who testified briefly as follows.

On 30th January, 2001, at about 9.00 a.m. *Godfrey Kinyanjui Maina* (complainant) was walking home from Njoro Shopping Centre when he was attacked by about five people. He was knocked down, cut on the head and his pockets were ransacked and Shs.460 stolen. He called out the name of the watchman who was guarding nearby premises. The watchman *Isaac M. Mbutia (PW2)*, went to the rescue of the complainant. When the watchman arrived at the scene he flashed torchlight and saw the 2nd appellant standing by while some people were strangling the complainant. The 2nd appellant was armed with a club and a panga and the watchman claimed to have recognized him. The watchman asked the 2nd appellant what he was doing and the 2nd appellant walked away. Thereupon the watchman cut one of the people strangling the complainant whom he identified as the 1st appellant on the head and on the right hand with a panga. The 1st appellant in turn hit the watchman on the head with a club and they started struggling. The watchman called for help and the robbers started running away, as the 1st appellant was running away the watchman held his jacket which the 1st appellant removed and left with the watchman. On the

following day the complainant went to the home of the watchman. The watchman gave him the blood-stained jacket left behind by the 1st appellant after which the complainant proceeded to Njoro Police Station where he reported the robbery to PC. Joseph Ndiringa (PW3) and handed over the blood stained jacket to him. The watchman reported to the police that he recognized Mwaura (2nd appellant). The watchman with some people went to the house of the 1st appellant but could not find him. Later police got information that the 1st appellant was hiding in a house and had injuries. The 1st appellant was arrested on 9th February, 2001 and taken to the Police Station. The 1st appellant had a deep cut wound on the left side of the head and on the right hand which injuries were about 9 days old.

The 1st appellant explained at the trial that he was hit with a piece of wood on the head on 5th February, 2001 after a disagreement on how to share the money he and other people had worked for and after three days one of the people took him to the Police Station.

On his part the 2nd appellant explained at the trial that on 8th February, he was in a bar with the 1st appellant when one Njoroge informed him that there was work for him of loading timber and was lured to the Police Station where he was locked in.

The superior court appreciated that the conviction of the 1st appellant was dependent on circumstantial evidence. The circumstantial evidence considered and taken into account by the superior court was that the 1st appellant left behind a blood stained jacket at the scene of robbery, that the injuries the 1st appellant sustained were consistent with the injuries that the watchman inflicted on the assailant; that the 1st appellant did not seek medical treatment for the injuries he sustained nor report the assault resulting in the injuries he sustained to the police. After considering the circumstantial evidence the superior court concluded:-

“Taken in totality, the circumstantial evidence adduced against the 1st appellant pointed to no other reasonable hypothesis than that of guilt of the appellant. The 1st appellant’s conduct was inconsistent with that of an innocent person”.

The superior court further appreciated that the conviction of the 2nd appellant was dependent on the evidence of the watchman that he recognized the 2nd appellant at the time of the robbery. The superior court after warning itself of the dangers of convicting an accused person on the evidence of a single identifying witness in difficult circumstances concluded:-

“It is our finding that the evidence of PW2 of the 2nd appellant (sic) is such that there cannot be any doubt that he recognized him during the robbery incident. PW2 was certain of the 2nd appellant’s identity that he identified the 2nd appellant by name when he made the report to the police on the following day. We agree with the finding of the trial magistrate that PW2 had ample time and opportunity to identify the 2nd appellant. The 2nd appellant’s conduct after the robbery incident is also a pointer to his guilt. When the 2nd appellant knew that he was being looked for by police in connection with the robbery he went into hiding. As was held in the case of MALOWA VS. REPUBLIC [1980] KLR 110 when accused person disappears after an offence has been committed, the fact of his disappearance can lead the court to an inference that the accused disappeared to escape being arrested for committing the offence”

Mr. Ombati, learned counsel for the appellants submitted on behalf of the first appellant that the 1st appellant was not recognized by any witness; that the blood on the jacket was not analysed by Government Chemist and that there was no evidence to show that the 1st appellant was the owner of the jacket.

It is true that the complainant testified that he did not identify any of the robbers. It is also true that the conviction of the 1st appellant was dependent on the evidence of the watchman that he identified the 1st appellant and the circumstantial evidence. Although the circumstances were not favourable for positive

identification of the 1st appellant, there was strong circumstantial evidence which connected the 1st appellant with the commission of the offence. Further, although there was no forensic evidence to show that the blood on the jacket belonged either to the 1st appellant or the complainant the 1st appellant did not deny that the jacket belonged to him. There was concurrent finding of fact that the 1st appellant left the jacket as he disentangled himself from the watchman.

We are satisfied that the visual identification of the 1st appellant by the watchman was supported by strong circumstantial evidence and that the superior court directed itself properly on the law and reached the correct decision.

There was strong and credible evidence that the watchman saw the 2nd appellant and recognized him at the time of the robbery. The watchman testified that he had known the 2nd appellant for 5 years; that the 2nd appellant was his neighbour at *Ubingei*; that he knew the 2nd appellant's brother called Simon, that he reported to the police on the following day that he had recognized the 2nd appellant and that he went to the home of the 2nd appellant on the following day but could not find him. The trial magistrate believed the evidence of the watchman that he recognized the 2nd appellant on the material night. The superior court after cautioning itself on the danger of convicting an accused person on the evidence of a single identifying witness in difficult circumstances concurred with the findings of the trial magistrate. There was reliable evidence that the watchman recognized the 2nd appellant at the time of the robbery which evidence was properly accepted by the two courts below.

For those reasons the appeals have no merit and are accordingly dismissed.

DATED and DELIVERED at NAKURU this 22nd day of FEBRUARY, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR