



IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 328 & 323 of 2006

NICODEMUS MWITA

ZACHARY KITHINJI.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Lenaola & Sitati, JJ) dated 23rd November, 2006

in

H.C.C.R.A. NOS. 140 & 148 OF 2001)

JUDGMENT OF THE COURT

NICODEMUS MWITA and *ZACHARY KITHINJI*, the appellants in these consolidated appeals, were convicted by the Senior Resident Magistrate, Meru, on two counts of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. Their first appeals to the High Court of Kenya at Meru (*Lenaola and Sitati, JJ*) were dismissed on 23rd November, 2006 and hence these second and final appeals which are grounded on a total of ten grounds of appeal which were vigorously and persuasively argued on their behalf by *Mrs. Ntarangwi*, their learned counsel.

However, upon our consideration of all the grounds of appeal and the submissions made before us by both *Mrs. Ntarangwi* and *Mr. Orinda*, the learned Principal State Counsel, we think that the sole issue in the appeals is whether the two appellants were positively identified as members of the gang which carried out the twin robberies at Kaongo market in Meru District during the nights of the 5th February, 1999 and 17th April, 1999 and robbed *David Mwenda (PW2)* and his wife *Joyce Mwenda (PW3)* property and seriously injured the latter.

PW2, a businessman from Kaongo Market, testified that on 5.2.1999 at about 2.00 am, he and his wife, PW3, were asleep in their house when he heard a motor vehicle revving noisily. On peeping through the main door he saw a vehicle parked outside the shop. Immediately thereafter between five and six people left the vehicle and headed straight for the door to his shop. He stated that as the people made for the door he shone his torch at them through the ventilation vent. When he asked them to identify themselves, they told him that they were those who “eat free things” and ordered him to open the door or they break in. When he hesitated the robbers hit the door with stones and soon it caved in and the gang entered. Realizing that he had no chance to escape, PW2 handed over the cash till and all the money therein. The gang then ordered both PW2 and PW3 to lie down. As PW2 lay there on the floor, the

robbers took PW3 around the shop asking her to show them where the couple slept and also to show them where they could find more shop goods which they collected and took them to the vehicle. PW2 testified that before the robbery he had seen through the ventilation vent that each of the five or so robbers were armed – some with axes, others with pangas and yet others with knives. The robbery was later reported at Meru Police Station and investigation was commenced.

However, not long after and precisely on the 17.4.1999 at about 1.15 am, a gang of robbers struck once again at the same market against the same couple. PW2 stated that on that night, he was asleep in his house when he heard the dogs barking fiercely. As he opened the interconnecting door between his house and the shop he heard people talking loudly outside, asking themselves how they would exit from the shop. PW2 also heard someone jumping over the gate at the rear of the shop. That person was followed by the dogs. As PW2 went back to his bedroom, he saw some two people, one standing besides the door while the second person stood directly facing the door. He lit the torch and shone it at the two people. He observed that one person, the one facing the door was armed with a mattock while the person standing behind the door had an axe and a torch which he was directing at the side of the door to assist the person armed with a mattock on how to break in. PW2 handed Shs.20,000/= through the door grills to the person who was armed with a mattock so as to persuade them to go. But, being dissatisfied with the cash they had been given the robbers broke the door using the axe and the mallet. On hearing the door being broken, PW2 started screaming. At the same time the other robbers who were outside the house broke the door to the shop. PW2 then armed himself with a bow and arrows and refused to open the door. The commotion attracted the members of the public who also started screaming as some of them shot arrows and threw stones at the robbers. Some of the robbers retreated. As the robbers regrouped to plan their next strategy, PW2 slid out through an opening to the grill door and ran to the market where other members of the public were. PW2 returned to his shop when the robbers had been repulsed and had fled only to find his wife seriously injured.

PW2 testified that during the second robbery he was able to identify the two appellants as the members of the gang which had robbed him in February, 1999. He was able to do so because of their manner of dressing and the weapons each was armed with. Later, PW3 in an identification parade was able to identify the two appellants as having been among her assailants.

In convicting the appellants the trial magistrate held:

“The upshot of all this is that the accused persons therein; the 1st and 2nd accused were identified clearly by the complainant and his wife. This Court has no doubt that the identification of the 1st and 2nd accused was positive and safe in the circumstances of this case. I do find that there is evidence that was light from the torch the complainant and his wife had which supplied the light to enable the complainant and his wife see and identify their assailants.”

The first appellate court upheld these findings and dismissed the appellants’ appeals.

Mr. Orinda is of the view that the convictions in the first count of robbery are unsafe and should not be maintained, but, argues that the identification in respect of the second count of robbery was more of recognition and therefore convictions thereof were generally safe and should be upheld. With respect, we do not agree.

PW2 and PW3 did not give to the police or to anyone a description of any of the robbers. All they said was that if they saw the robbers they would be able to identify them. The failure to elicit a description of the robbers from these witnesses appears to be proof enough that they had not identified any of the robbers in any of the two robberies. Further, since the witnesses had not identified any of them during the first count, there can never be an instance of recognition in the second count of robbery. Simply stated, there is no evidence whatsoever on record that the two appellants took part in the two robberies since they were not identified in any of them by any witness.

The identification parades were conducted on 9.12.1999 – eight months after the second robbery and ten months after the first robbery. There was no explanation for such a long delay. It is doubtful

therefore that the witnesses could retain in their minds clear description of the robbers whom they had not known before for such a long time and in the absence of any special and outstanding features in their bodies.

It is common ground that the robberies were committed at night. The only source of light were torches which were being shone from side to side. Moreover, there is evidence that there was a large number of people crowded around market. These people had been drawn there by the screams from PW2 and PW3.

With great respect to the two learned Judges of the first appellate court with whom we differ, we are of the view that taking all these matters into account the evidence on record cannot sustain safe convictions.

For these reasons, the convictions of the appellants cannot be supported. The appeals are allowed, the convictions quashed, the sentences set aside and the appellants are ordered to be set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED at NYERI this 23rd . day of MAY, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.