



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 125 of 2006

STANLEY KAARIA alias KIBOGOYO..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru (Onyancha & Okwengu, JJ) dated 3rd June, 2004

in

H.C. Cr. A. No. 370 of 2001)

JUDGMENT OF THE COURT

Stanley Kaaria alias Kibogoyo, the applicant herein, was charged jointly with others not before court on two counts of robbery with violence, contrary to **section 296(2)** of the Penal Code, and sentenced to death by P. M. Ndung'u, Principal Magistrate, Isiolo. His appeal to the superior court (Onyancha, Okwengu, JJ.) was dismissed on 3rd May 2004. He now appeals to this Court by way of a second appeal and that being the position **section 361(1)** of the **Criminal Procedure Code, Chapter 75** Laws of Kenya, restricts the jurisdiction of the Court to dealing only with matters of law.

The evidence on which the appellant was convicted and sentenced, and which was accepted by both the trial court and the superior court was that Francis Muriungi (PW1) and Francis Kirimi (PW2) of Sokoni Isiolo, were walking home on the evening of 1st March, 2001, at about 8.00 p.m. As they walked past the Mosque called Al-Farah, they met a person whom they both identified as Kibogoyo (appellant). Francis Muriungi greeted him, but the appellant refused to respond, and instead whistled and two people armed with guns emerged and ordered them to surrender and kneel down.

It was the appellant who searched them, and from Francis Muriungi, he took cash Kshs.1,150/= and a wrist watch, make Seiko and from Francis Kirimi he took cash Kshs.1,750/= from his pocket. The appellant then ordered them to run and not look back. They obeyed. They also said that they had known the appellant before that incident, and that evening they saw him with the aid of lights from the Al-Farah Mosque.

Both Francis Muriungi and Francis Kirimi sell roasted maize in Isiolo town; and Francis Muriungi recalled that the appellant used to buy maize from him whilst Francis Kirimi said the appellant used to visit his neighbour and that the (appellant) would come riding a bicycle.

The two witnesses went to the police station the following morning to report the incident as they were scared to go out that night, after the robbery incident. They were surprised to find the appellant at the police station, having been arrested, though they did not know for what reason he had been arrested. They nevertheless made their report and identified him as the person who robbed them the previous night.

Police Constable Peter Mwenda, (PW3) of Isiolo police station was on patrol duties within Isiolo town on 2nd March 2001, when he arrested the appellant from a lodging in Isiolo town on information received that the appellant was causing disturbance at a

lodging. He found the appellant actually beating up a woman in the lodging. The appellant was very drunk. He took him to the police station, booked him in the O.B. and placed him in the cells. Later that morning at about 8.00 a.m. Police Constable James Mwangi (PW4) also of Isiolo police station, perused the O.B. and noted that a report of robbery with violence had been made that morning and a suspect by the name Kibogoyo had been named by the complainants. He also discovered that one Kibogoyo was detained in the cells for another matter. He sent for the complainants in the robbery case. They came and identified the appellant as the person who robbed them the previous night, whilst in the company of two other people. The appellant was thereafter charged with the two counts of robbery with violence, contrary to **section 296(2)** of the Penal Code.

The appellant made an unsworn statement in defence in the trial Magistrate's court and denied the offence of robbery with violence. He said that on 1.3.2001, he went to work as usual and worked until 6.00 p.m., when the driver of the Eastern Bus invited him to repair a bus and thereafter invited him for a drink at the Mid-City bar. That they drank until 9.00 p.m. when he met a woman whom he seduced and the woman agreed to go with him to a lodging where they spent the night, but the following morning, the woman tried to escape and this led to a fight between them. The police were called and he was arrested and locked up at Isiolo police station. That the two complainants were called and they alleged that he had robbed them the previous night, an allegation he denied but was nevertheless charged with the offence.

The learned Magistrate after considering the evidence adduced at the trial said:-

“Upon evaluation of the evidence and having observed the demeanour of the parties, the court find the truth (sic) lies on the prosecution side. The unsworn statement by the accused is hereby rejected as untruthful. Court finds accused was one of the persons who were armed with guns and who robbed PW1 and PW2 while using threats of personal violence. The case is proved and the accused is found guilty as charged and convicted on both counts”.

On identification of the appellant, the trial Magistrate said:-

“Incident took place at 8.00 p.m. They were near a Mosque which had lights and they could see the accused well. They had earlier seen the accused while he was alone. PW1 even greeted the accused but accused did not respond. Accused whistled no doubt signaling his accomplices who emerged and proceeded to rob PW1 and PW2. Both PW1 and PW2 knew the accused before. They knew him by an alias name ‘Kibogoyo’. Accused used to buy maize from PW1. They saw the jacket which accused had been wearing, and which was produced as an exhibit. The factors prevailing were quite favourable for a positive identification. The (sic) had no reason to falsify against the accused.....”

The learned Judges of the superior court after considering the trial Magistrate's conviction of the appellant said:-

“For the above reasons, we come to the conclusion as did the honourable trial Magistrate that the appellant participated in the robbery. Apart from the fact that they used violent threats and force to obtain the stolen money and wrist watch, the robbers were more than one in number, thus properly proving the relevant ingredients of robbery under s.296(2) of the Penal code. The appeal is therefore dismissed as we at the same time confirm and uphold the conviction”.

The appellant had initially filed six **“grounds of appeal”**, but this was abandoned by his counsel Mr. James Mwangi who filed 4 grounds of appeal in the Supplementary Memorandum of Appeal. These are:-

“1.The learned judges erred in law in upholding the findings of the trial court particularly on evidence o (sic) identification of the appellant, which was not satisfactory.

2. The learned judges erred in law in failing to find that the whole trial was conducted in a language that the appellant was nor (sic) conversant with and no interpretation was made and hence a miscarriage of justice was occasioned.

3. The learned judges erred in law in failing to evaluate the whole evidence that was tendered during the trial and therefore failed to make a good conclusion hence an injustice.

4. The learned judges failed to note that the entire proceedings of trial court were a nullity as the prosecution's case was led by two prosecutors one of whom was unqualified or below the rank of an inspector.”

Learned counsel for the appellant, Mr. James Mwangi, submitted that the identification of the appellant was not satisfactory and evidence to that effect should be treated with caution and care. He submitted further that the two witnesses, PW1 and PW2 did not indicate the source of the light which enabled them to identify the appellant.

On ground 2 of the Supplementary Memorandum of Appeal, the learned counsel for the appellant complained that the language used at the trial was not indicated in the coram of the court, and in ground 3, he submitted that the first appellate court failed to evaluate the evidence and come to its own conclusion. That for example, there were no injuries sustained by the complainants, yet the superior court Judges did not point this out, plus the fact that no violence was used during the robbery. He submitted further that the trial was in any event a nullity because there were two prosecutors in court, an inspector of police and a police constable, contrary to the law and that this violated the law and the appellant should have been given the benefit of doubt.

In response to the submissions of the learned counsel for the appellant, Mr. C. O. Orinda, learned Principal State Counsel opposed the appellant's appeal, and submitted that identification of the appellant was by two witnesses, and evidence is clear,

that there were lights from the mosque which enabled them to identify him. He found no error in their identification of the appellant as this was a case of recognition, as the two had known him before.

On the issue of language, Mr. Orinda submitted that the appellant must have understood the proceedings as the record of the trial Magistrate shows that he cross-examined witnesses at length. He submitted further that the provisions of **Section 296(2)** were satisfied.

On the complaint that the 2 prosecutors were in court at the trial, Mr. Orinda submitted that it was the inspector who was prosecuting the case not the constable and the mere presence of a constable in court did not invalidate the proceedings.

Mr. James Mwangi, learned counsel for the applicant submitted in reply to Mr. Orinda's submissions that failure by PW1 and PW2 to give a description of the other two robbers made their evidence doubtful.

We have considered the submissions of the two learned counsel. We have also considered the conviction and sentence of the appellant by the trial Magistrate and the confirmation of the same by the superior court. In our view the main issue in this appeal is the identification of the appellant as we do not consider the defence he raised as an alibi. As was rightly pointed out by Mr. Orinda, identification of the appellant by Francis Muriungi and Francis Kirimi, was by way of recognition because the two said they knew him before that date. In fact Francis Kirimi gave the following answer during cross-examination by the appellant in the trial Magistrates court; *"I know you very well. You have one broken tooth and you (sic) ear has been cut...."*

Francis Muriungi on the other hand said the following in his evidence in chief; *"I was able to identify the accused. There were lights from Al-Farah Mosque. I knew the accused as Kibogoyo. I had known the accused since January this year. The accused used to buy maize from me...."*

The Court has dealt with the matter of identification in many cases, for example, in the case of **FRANCIS KARIUKI NJIRU & OTHERS vs REPUBLIC - CRIMINAL APPEAL NO. 6 OF 2001** (unreported), the Court said:-

"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

In the case of **KARANJA & ANOTHER vs REPUBLIC [2004] 2 KLR 140**, the Court held, inter alia:-

"1."

2."

3. Recognition may be more reliable than identification of a stranger but even when a witness is purporting to recognize someone he knows, it should be borne in mind that mistakes of recognition of close relatives and friends are sometimes made".

In the present case, the two witnesses Francis Muriungi and Francis Kirimi both identified the appellant with the aid of lights from Al-Farah Mosque. They gave his name to the police when they reported the incident, the following morning. This information was entered in the O.B by the arresting officer, P.C Peter Mwenda, and the information was acted upon by P.C James Mwangi, who charged the appellant with the two offences of robbery with violence. We are satisfied that the circumstances of this case were favourable for positive identification of the appellant, in fact recognition as was found by the trial Magistrate and confirmed by the superior court. We find no merit in this ground of appeal and reject it accordingly.

The appellant's complaint about the trial being, *"conducted in a language he was not conversant with"*, falls under section 198 of the Criminal Procedure Code which provides:-

"1. Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language he understands.

2. If he appears by an advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.

3."

4. The language of the High Court shall be English, and the language of the subordinate court shall be English or Swahili."

The records of the trial Magistrate show that one Santura, a court clerk was present on 6.3.2001, the day the appellant's plea was taken. The appellant's second appearance in court was on 20.3.2001. Again Santura the court clerk was present, as well as Faith. The record reads, *"PW1 Christian sworn and states in Kiswahili...."* There were further court appearances by the appellant on 17.4.2001 and 24.4.2001 respectively. The two court clerks Santura and Faith were again present, and on 24.4.2001, the record reads:- *"PW3 Christian sworn states in Kiswahili....."*. Furthermore, the record shows that the

appellant cross examined the witnesses at length, as was submitted by Mr. Orinda. From the above observations, we are satisfied that the appellant understood the language of the court, as was interpreted to him by Santura and/or Faith, who were both present at the trial. We find no merit in this ground of appeal too and reject it.

Finally was the submission by the appellant's counsel that, "*the prosecutor's case was led by two prosecutors, one of whom was unqualified or below the rank of an inspector*", and this rendered the entire proceedings a nullity. With respect to the learned advocate, this complaint is not borne out by the record of the trial Magistrate, which shows that though P.C. Ndung'u was in court on 6.3.2001, 20.3.2001, 3.4.2001, 17.4.2001 and 24.4.2001, he was not the one prosecuting the case. It was Inspector Irungu who was also in court on all those dates who was prosecuting the case. On 3.4.2001, IP Ndung'u told the trial Magistrate that he was ready to proceed, and called two witnesses. Again on 24.4.2001, he addressed the court and said, "*I am ready with two witnesses*", and indeed called the two police officers. We find no merit in this ground of appeal which we hereby reject.

The only other matter that calls for our consideration is the submission by the learned counsel for the appellant, that as the two complainants sustained no injuries during the robbery, and as no violence was used, the offence of robbery with violence was not proved. To this we can say no more than to refer to this Court's judgment in the case of **AJODE vs REPUBLIC [2004] 2 KLR 81** where the Court said:-

"We do repeat here what this Court stated in the case of Johana Ndungu v Republic (Criminal Appeal No 116 of 1995 (unreported). It was stated *inter alia* as follows:-

"In order to appreciate properly as to what acts constitute an offence under section 296(2), one must consider the subsection in conjunction with section 295 of the Penal Code. The essential ingredients of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or after and further in any manner the act of stealing. Thereafter the existence of the afore-described ingredients constituting robbery are presupposed in three sets of circumstances prescribed in section 296(2) which we give below and any one of which if proved will constitute that offence under subsection.

- 1. If the offenders 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 or wounds, beats, strikes or uses any other violence to any person.**

Analysing the fist set of circumstances, the essential ingredients apart from the ingredients including the use or threat to use actual violence constituting the offence e.g. robbery is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in section 205 of the Penal Code, the offender was armed in the manner aforesaid then he is guilty of the offence under subsection (2) and it is mandatory for the Court to so convict him.

It is clear from the above that injury of the victim in itself is not the only ingredient of the offence of robbery under section 296(2) and to reduce the charge to that of simple robbery under section 296(1) because none of the witness was injured is not correct in law. In our mind if what happened in this case were accepted after weighing all the evidence we have pointed out above it would have been a perfect case of robbery with violence under section 296(2) and there would have been no reason whatsoever for reducing the charge as was done in this case."

From the foregoing, we are satisfied that the offence of robbery with violence contrary to **section 296(2)** of the Penal Code, was proved, and the appellant was rightly convicted and sentenced.

In the result we dismiss the appellant's appeal.

Dated and delivered at NYERI this 31st day of October 2008.

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

J. ALUOCH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR