



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 73 of 2004

JOEL KABARI KIMANI

JOHN NDUNGU MUTURI.....APPELLANTS

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Muga Apondi &

Lesiit, JJ.) dated 19th February, 2004

In

H.C.CR.A. NO. 204 – 205 OF 2002)

JUDGMENT OF THE COURT

This is an appeal by Joel Kabari Kimani (*Joel*); and John Ndungu Muturi (*Muturi*) against the decision, in Criminal Appeal No. 204 of 2002 at Nakuru, of the superior court (Muga Apondi and Lesiit JJ) upholding the convictions of *Joel* and *Muturi* of the offence of robbery with violence contrary to *section 296(2)* of the Penal Code.

Joel and *Muturi* had been the first and second accused respectively in the inferior court (H.K. Bomett P.M.) along with James Maina Wachira (*James*) the 3rd accused.

The critical findings made by the Principal Magistrate in relation to the 1st and 2nd accused were as follows:-

“Having considered the evidence and the circumstances of this case very carefully this court has no doubt in believing that the prosecution witnesses have identified the 1st accused as one of the people who robbed the complainant of his money on the material day and,

For the 2nd accused the court finds that there is evidence from PW2 that the 2nd accused took out a gun and placed it on PW2’s head and told PW2 to seat (sic) down. 2nd accused collected a cash box which did not contain any money. 2nd accused also kicked PW2 and knocked him down. 2nd accused asked PW2 where was the money. 2nd accused told PW2 to wake up quickly and show him where key of the

safe was. When PW2 wanted to stand up, 2nd accused knocked him down and he took out keys. 2nd accused then opened a safe containing Kshs.1,028.090/=, identified the 2nd accused in a parade on 16.3.99 after he was arrested.

PW1, PW2 and PW4 had sufficient time to see the attackers. However, (sic) having considered the evidence produced by the prosecution and the defence very carefully this court has no doubt in believing that the prosecution has proved its case against the 1st and 2nd accused. This court does not see any other way but to find the 1st and 2nd guilty as charged and convict them which I accordingly do.”

The 3rd accused was acquitted by the learned Principal Magistrate who stated in his judgment:-

“The court has a doubt as to the identification of the 3rd accused. This being a Criminal charge the court also does not see any other way but to give the benefit of the doubt to the 3rd accused and acquit him under section 215 of C.P.C which I accordingly do.”

Joel was the first appellant and Muturi was the second appellant in the superior court. They were both convicted of the same offence of robbery with violence contrary to section 296(2) of the Penal code. The Charge Sheet set out the facts of the case sought to be established by the prosecution as follows:-

“On 13th December , 1998 at Dana General Merchants, Nakuru Township in the Nakuru District of the Rift Valley Province, the accused jointly and while armed with dangerous weapons namely pistol, and swords robbed David Kahiga Githui of cash kshs. 1,028,980/= and at or immediately before or immediately after the time of the robbery used personal violence to the said David Kahiga Githui.”

The appeals of both Muturi and Joel were dismissed by the superior court in its judgment delivered on 19th February 2004.

The superior court concluded its judgment in these terms:-

“Having considered the judgment of the learned trial Magistrate carefully we find that he had evaluated the evidence on record correctly and meticulously before reaching the proper decision. We do agree with him that both appellants had been positively identified by the witnesses during the robbery. There was no doubt that the first appellant (Joel) had been arrested running away from the scene while carrying the home made gun. In addition to the above, we also concur with the learned Magistrate that he was the person who not only assaulted PW2 but also collected the cash box.We hereby dismiss the appeal. The appeal has no merits at all. We hereby uphold the convictions and confirm the death sentence as provided by law.”

He was identified in the identification parade by PW4 Angostino Thuo Kimani who testified that “on 13th December 1998 I was working for Dana as a cashier. At 4 p.m. I was doing stock taking with PW2. We were in his office. It was only me and PW2. Three people there. Two entered in PW2’s office. The 2nd and 3rd accused now in court entered in the office. I heard Wambogo shouting. PW2 opened the door to check what was going on. I then saw the 2nd and 3rd accused. They had guns. 2nd accused had a gun. He pointed a gun at me and PW 3 and ordered us to lie down. When we lied (sic) down I heard a cash box pulled. I also heard a safe opened. They searched us and took keys for the safe from PW2. I had kept more than one million shillings in the safe. It was about 1.2 million. After a short period when the robbers had left we all went outside and chased them. I first saw the 2nd accused when he came to buy beer on 13/12/98 at about 3p.m. He had left a crate of beer with Wambogo

Joel was identified at an identification parade at the Nakuru Police Station by PW2 David Kahiga Githui about a week after the robbery and was again identified at another identification parade about three months later.

When cross examined by Muturi, PW2 stated that Muturi had a gun and people were scared. He further

deponed that he saw *Muturi* and the 3rd accused before he lied (sic) down.

An identification parade was held at which three out of the four witnesses at the parade identified *Muturi* by touching him.

This Court cannot interfere with the concurrent findings of fact of the two courts below unless those findings are shown to have been based on no evidence. (See *Karingo v Republic* [1982] KLR 213). We are satisfied that the findings of fact of both courts were fully justified on the evidence. The appellants have failed to displace the rule as to concurrent findings of fact as to the identity of the appellants and the essential ingredients of offences under *section 296(2)* of the Penal Code.

On the basis of the foregoing evidence and the concurrent findings of fact founded on proper evaluation of the evidence by the trial court and the superior court, we are satisfied beyond reasonable doubt that *Joel* and *Muturi* were correctly identified as two of the robbers. We are further satisfied that all the ingredients of the offence with which they were charged have been proved beyond reasonable doubt. There is in our view no good reason for not upholding the conviction and sentence of both the appellants by the inferior and superior courts.

The appeals of *Joel Kabari Kimani* and *John Ndungu Muturi* are accordingly hereby dismissed.

Dated and delivered at Nairobi this 30th day of March, 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR