REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU
Criminal Appeal157 & 158 of 2002

ABDI CHEGE ALI ……..…..… 1ST APPELLANT

JESSE NYARASHU GICHUKI …….....…... 2ND APPELLANT

VERSUS

REPUBLIC ……..…….....…….RESPONDENT

JUDGEMENT OF THE COURT

During the hearing of this appeal, appeals Nos. 157 of 2002 and 158 of 2002 were consolidated under and the holding file became Criminal appeal No. 157 of 2002.

The 1st and 2nd appellants, Abdi Chege Ali and Jesee Ngarashu Gichuki respectively were charged with the offence of robbery with violence contrary to **Section 296 (2) of the Penal code**. After a full trial before the Senior Principal Magistrate Naivasha both appellants were found guilty, convicted and sentenced to suffer death as authorized by law.

The appellants being dissatisfied with both the conviction and sentence have appealed before this court and raised the following grounds of appeal.

Ø **That the evidence of identification was unsatisfactory as there was a likelihood of mistaken identity.**

Ø **That there was inconsistency in the prosecution evidence and reliance on evidence that was not corroborated.**

Ø **That their defences were ignored.**

The facts of the case may be briefly stated:

(*It was the prosecution's case that*) on 12th day of June 2001 at Gilgil Ammunition Site, 2nd Brigade in Nakuru District of the Rift Valley Province, the Appellants jointly with another who was not before the court and while armed with a toy pistol robbed Patrick Mwaura Karanja of Kshs.8,000/- and at the time and immediately after the robbery used personal violence on the said Patrick Mwaura Karanja.

The evidence that led to the conviction can be summarized as follows.

On the 12th day of June 2001 at Gilgil Ammunition Site of 2nd Brigade in Nakuru at around 9.30 a.m. the

complainant, Patrick Mwaura Karanja who is hereinafter referred to as PW 1 was walking headed towards Gilgil from his home. While on the way he was accosted by three men, the two appellants and another one who ran away. They attacked him and robbed him of Kshs.8,000/. The robbery took place in broad day light and the appellants were armed with a toy pistol which they used to threaten him when they held him, struggled him and stole Kshs.8,000/-. They threatened him and ordered him to walk backwards and not to raise any alarm or look at their direction.

When PW 1 allowed the appellants a safe distance of about 100 metres, he raised an alarm. Moken Ole Kishambili (PW 2) and Stephen Ole Koibony (PW 3) who were in the vicinity gave chase to the attackers and when PW 3, a butcher at the local shopping centre was almost catching up with the 2nd appellant, the 1st appellant pointed a pistol at him and PW 3 temporary stopped, other members of the public joined the chase which had taken them to Nyama Choma Trading centre. At that moment, there was a police vehicle that had stopped on the road and PW 4, a police officer attached to the Anti-Stock Theft Unit Gilgil had noticed a commotion and somebody being chased by members of the public. When he drew out a pistol that is when the 1st appellant dropped the toy pistol and entered the police vehicle. The pistol was picked and handed to Elijah Kuria (PW 4) who arrested the 1st appellant and took him to Gilgil police station.

P.C Otieno (PW 5) also saw the 1st appellant dropping the gun. However, they confirmed the gun was an imitation, it could not fire any ammunition.

As regards the arrest of the 2nd Appellant, the evidence of PW 3 states that he and other members of public arrested him near the Elementaita Lodge and was taken to the police station where he was booked in by PW6, but he was not found in possession of anything.

We have carefully reconsidered and re-evaluated the entire evidence as indeed it is the duty of this court as the first appellate court. We have also considered the judgment by the learned trial Magistrate especially the concluding remarks where he stated;

"***I find there was no likelihood of mistaken identity. The men who were arrested were the ones who had attacked the complainant. They were chased and arrested after the robbery. The complainant did not lose sight of them during the chase. One of them was found with a toy pistol. I am satisfied that while armed with a toy pistol they threatened to use violence on the complainant and indeed wrestled him down while strangling him. The ingredients of robbery with violence have been proved beyond reasonable doubt. I find the two accused guilty as charged on the 1st count of robbery with violence contrary to*** *Section 296 (2) of the Penal Code* ***and convict them accordingly under*** *Section 215 of the C.P.C.* ***The second count forms part of the 1st count and therefore is a duplication. I acquit them of the 2nd count under*** *Section 215 of the C.P.C."*

When this appeal came up for hearing Mr Koech, the learned Senior State Counsel supported the conviction and sentence on the ground that the appellants were positively identified by the complainant as the attack took place in broad day light, the complainant followed the chase to the road where the 2nd appellant was arrested by members of the public and was placed in the vehicle of the local Councilor at Nyama Choma Shopping centre.

The evidence was corroborated by PW 2, PW 3, PW 4 and PW 5.

We have considered the evidence upon which the appellants were convicted, the evidence recorded shows that the chase against the 1st appellant from the time the complainant raised an alarm was continuous, it was joined by PW 2, PW 3 and the 1st appellant was apprehended by PW 4 and PW 5 who saw him drop the toy pistol. The scenario presents to us a continuous sequence of events and there is no moment that the chase was broken to give room for a mistaken identity. In this regard we are satisfied that there was no mistake as to the identity of the 1st appellant who was seen clearly by PW 3, PW 4 and PW 5 dropping the gun, he was properly found guilty of the offence on which he was convicted.

As regards the 2nd appellant, he argued that there could have been a likelihood of mistaken identity because between the chase it is only PW 3 who states that after the 1st appellant surrendered to PW 4,

" ***We chased the other accused who we arrested at Elementaita lodge. He did not have anything with him at the time. He was also beaten but the area Councilor said that he should not be killed. The accused was taken to Gilgil police station. The 2nd accused is the man we had arrested near Elementaita Lodge. I did not know the accused person before. The third suspect disappeared in the confusion. The complainant later come and said that he had been robbed of Kshs.8,000/-. The area we were chasing the accused persons is pasture land with small bushes****."*

PW 2 also states in his evidence that he paused when the 1st appellant threatened him with a pistol, he went to the market and announced that there were thugs who were armed with pistol, but the 1st appellant had been chased towards the middle of the road and the police van had intercepted him then he says;

"***We later chased the second accused whom we also arrested. He surrendered after he was tired. He would have been lynched****."*

We asked ourselves whether during the chase there could have been a case of mistaken identity, it is clear from the evidence that between the period when the offence was committed and when the 2nd appellant was apprehended, the chase continued for a distance of about three kilometres. If the 2nd appellant was not a principal in the commission of the crime, what caused him to run? The chase took place on a pastureland, and PW 2 or PW 3 stated that they continued with the chase of the 2nd appellant up to the time of apprehension and the complainant immediately identified the 2nd appellant when he was apprehended and put in a vehicle of the local Councilor as the person who had robbed him of his money a few minutes earlier.

In view of that identification by the complainant immediately after the robbery we are satisfied that the conviction and sentence of the 2nd appellant was safe from any mistake.

In view of the foregoing, we are satisfied that the 2nd appellant's guilt was also proved beyond any reasonable doubt.

Accordingly we find no merit in this appeal and the same is dismissed.

Judgment read and signed on 3rd March 2006.

MARTHA KOOME

JUDGE

D. K. MUSINGA

JUDGE