REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL AT NYERI
Criminal Appeal 237 of 2002

ROBERT MBURUGU GITUMA……..…..……..APPELLANT

AND

REPUBLIC……..…….……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Juma, Mulwa, JJ) dated 11th July, 2002

in

H.C.CR.A. NO. 286 OF 2001)

****

JUDGMENT OF THE COURT

ROBERT MBURUGU GITUMA alias *KABUITU*, the appellant herein, was arraigned before the Chief Magistrate, Meru, *Mr. Muchelule*, on a charge of robbery with violence contrary to *section 296(2)* of the Penal Code the particulars of the charge being that on 25.10.00 at Kiige village near Nkubu Township in Meru Central District within Eastern Province jointly with others not before Court and while armed with dangerous weapons namely, pistol and rungus, robbed *SAMUEL CHOKERA* of Kshs.65,585/- and used personal violence against him. The appellant was after trial convicted as charged and sentenced to death. His appeal to the High Court of Kenya at Meru *(Juma and Mulwa, JJ)* was dismissed on 11th July, 2002, hence, he comes before us by way of second and final appeal.

The evidence before the trial court is indeed brief and may be stated as follows. *Samuel Chokera (PW1)* and *Jackson Nderitu (PW2)* were at the material time the employees of Mafuko Industries in Meru Town. PW2 was the driver while PW1 was the salesman. They were tasked to sell bread in many market centres from Meru to Chogoria. On 25th October, 2000 they left Meru at about 5 a.m. and dropped bread at various points along the way up to Chogoria. The bread was being left with agents. They got to Chogoria at about 10 a.m. and after a brief stay they returned collecting empty crates and money at each point. They estimated the time of return to be about 1.00pm. The total collection was about Shs.69,585/-. At a place called Kiige along Chuka/Meru Road they stopped and found empty crates but their agent was not there. PW1 was left loading them at the back of the truck as PW2 went to check on the agent.

PW2 testified that while looking for the agent he heard a gunshot. He rushed back to the road and saw their vehicle being driven away. In his testimony PW1 narrated how while loading crates at the back of the truck he heard the accelerator of the vehicle being pressed. He dashed to check and found someone he did not know sitting at the driver's seat. PW1 demanded to know what the person was doing but there

was no response. Instead PW1 was held from behind by some other two persons who demanded money. One of the two persons produced a pistol from his trousers and shot in the air. PW1 was then pushed into the cabin of the truck and was sandwiched between the driver on the right and the two persons on the left. The vehicle was then driven at a high speed through the Nkubu Market and off the road for about 5 Kilometers into the bush. While safely there PW1 was taken out and pushed into the back of the enclosed vehicle and locked from outside where he remained until he was rescued by some passersby. PW1 told the trial court that he gave all the money he had collected to the attackers. He testified that he was able to see the person driving the vehicle before he was pushed inside it when he went to demand the identity of the stranger in the driver's seat; and also, during the period they drove into the bush.

On 19th December, 2000 an identification parade was held at Meru Police Station where PW1 picked out the appellant who had been arrested about a week or so earlier on 9th December, 2000 at his home following an information. PW1 told the court that appellant was the man he found at the steering wheel. At the time, PW1 said, the appellant was clean-shaven. However, during trial the appellant did not have a shaven head. Nevertheless, PW1 said he recalld the appellant well as they were together for about one hour, up to the time he was abandoned.

There is evidence by *PC Jason Kamathi (PW4)* and *Cpl. Jamlick Nyaga (PW6),* both of Meru Central CID, that on 10th December, 2000 they interrogated the appellant who led them back to his home and thus showed them a pistol which had 3 live ammunitions. They were recovered in an incomplete building in the home. The pistol and the ammunitions were however the subject of Meru *Criminal Case NO. 2470/00* which was pending before another trial court. The record of the trial court shows that the appellant had applied that the file be produced as part of his defence.

In his defence the appellant who was represented by counsel, *Mr. Githinji*, denied committing the offence. He testified that he was arrested for nothing.

The learned trial magistrate considered the evidence before him and believed the prosecution witnesses. After analyzing the evidence and bearing in mind that the case against the appellant was based on evidence of identification by a single witness, the learned trial magistrate in his judgment cautioned himself thus:-

"*The case will consequently turn on the alleged identification by PW1. It is evidence of a single identifying witness. I caution myself that it is usually unsafe to commit safety (sic) on such evidence unless it is materially corroborated by other independent evidence. There is no evidence connecting the accused with the robbery than that of PW1".*

Having so expressed himself, the learned trial magistrate then appears to have clinically evaluated the evidence tendered by all the witnesses and that of the appellant and his witness. Inevitably, he convicted the appellant and sentenced him accordingly.

The appellant being dissatisfied by the decision of the trial court filed an appeal to the High Court. His appeal was considered and rejected. In its judgment, the superior court *(Juma & Mulwa, JJ)* said:-

"*The evidence being that of one witness which depended on the identification of the accused by PW1 the trial magistrate warned himself against the danger of relying on such evidence. He then proceeded to examine how the identification parade was carried out and observed that the accused did not raise any complaint on the manner it was carried out."*

The attack was during the day and the witness, PW1, was with the attackers for a considerable length of time even if not a full hour. The witness was able to see the attackers and that he was able to identify the appellant is confirmed by the fact that he was able to pick him out on the parade.

The first appellate court without hesitation upheld the conviction and sentence and dismissed the appeal.

Being dissatisfied by the foregoing, the appellant now comes to this court by way of second appeal. The appellant has through his counsel, *Mr. Mbaya* canvassed the main ground of appeal which was to the effect that the identification of the appellant by PW1 was not positive in that as the witness was caught from behind he was not able to properly observe the person who had attacked him.

Mr. Mbaya further faulted the identification parade for being improper it having been held 55 days after the event arguing that there was a possibility of memory having faded.

Mr. Mbaya also submitted that it was prejudicial and indeed wrong in law for the trial court to take into account the existence of a pending criminal case against the appellant in another court. We have anxiously considered this ground of appeal. However, it is manifestly clear that the learned trial magistrate did not consider nor did he take into account the fact that the appellant was facing a firearms offence. It was the appellant himself who demanded in his defence the production of the file relating to that offence and nothing prejudicial to him was incorporated in the judgment. We reject this ground of appeal.

Indeed it is apparent that the only substantial point of law raised by this appeal is the issue of identification. Both the trial and the first appellate courts were satisfied that the appellant was properly identified as one of the persons who attacked and robbed the complainant of money and the motor vehicle.

Both *Mr. Orinda* for the State, and *Mr. Mbaya* for the appellant, appeared to raise issues relating to the facts of the case in the trial court but we must reiterate that a second appeal (like the present one) must be confined to points of law and this court would not interfere with concurrent findings of fact of the two lower courts unless they are shown to have not been based on evidence – See *KAINGO V. REPUBLIC* [1982] KLR 213.

Having considered the points of law raised in this appeal and the submissions by counsel appearing for the State and the appellant, we are satisfied that the appellant was convicted on very sound evidence. His conviction was inevitable and the superior court was entitled to uphold it. We see no reason to disturb the concurrent findings of the two courts below. Consequently, this appeal is hereby dismissed in its entirety.

DATED and DELIVERED at NYERI this 19th day of May, 2006.

P.K. TUNOI

JUDGE OF APPEAL

E.O. O'KUBASU

…….

JUDGE OF APPEAL

E.M. GITHINJI

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR