IN THE COURT OF APPEAL OF KENYA
AT NYERI

CRIMINAL APPEAL 26 OF 2002

CHARLES NJAGI ……..……..……...….…….. APPELLANT

AND

REPUBLIC ……..…….…….....…….. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru (Juma & Tuiyot, JJ) dated 13th day of September, 2001

in

H.C.CR.A. NO. 108 OF 2001)

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JUDGMENT OF THE COURT

This is a second appeal by Charles Njagi (hereinafter "the appellant") from the judgment of the superior court (J.V.O. Juma and W.K.Tuyiot JJ). dismissing his appeal from his conviction and sentence to death for robbery with violence contrary to ***section 296 (2)*** of the Penal Code by the Principal Magistrate, P. M. Ndungu in *Criminal Case No. 2631 of 1998* in the Chief Magistrate's Court at Meru. The particulars of the offence charged were as follows:

"Charles Njagi Ironco and Jackson Nyaga Silas: On the night of 3/4/11/98 at about 11.00 pm at Kithino Sub-Location, Tunyai Location of Tharaka Nithi District within Eastern Province, jointly with others not before the Court, robbed Lawrence Mbai of K.shs.400.00 and at or immediately before or immediately after the time of such robbery used actual violence to the said Lawrence Mbae."

The second appellant Jackson Nyaga was successful in his appeal to the superior court which allowed his appeal.

In its judgment the superior court accurately summarised the prosecution's case in the following passage:

"***The prosecution's case was that on the 3rd November 1998 the complainant spent most of the day with the second accused JACKSON NYAGA SILAS. Nyaga was an employee of the complainant and he sent him to call the other employees for payment. After the complainant had paid the other workers, he went with Nyaga for drinks at a local bar. It was while they were drinking that they were joined by the first accused CHARLES NJAGI IRONGO, one Githagu and one Gitonga. The complainant then bought each a drink and gave them 20/= each to go and drink elsewhere as Njagi was becoming rude. The trio left and the complainant was left drinking with Nyaga. After a time Nyaga left and the***

complainant also left. After the complainant had walked about 200 metres he met with four people who robbed him and cut him in the process. His wallet with documents was stolen.

The complainant told people that he had been robbed by the people he had bought drinks for. The appellants were arrested but Githagu and Gitonga were never traced."

The superior court correctly stated in its judgment that the issue for determination was whether the two appellants in the superior court were part of the four who robbed the complainant that night.

Charles Njagi and ***Jackson Nyaga*** were well known to the complainant so that the superior court was right in stating that this was a case of recognition and not identification.

In his submission before us Mr. C. Kariuki, learned counsel for the appellant made the point that there was no evidence as to the intensity and the distance of the light at the place where the robbery took place so that the identification was not safe. He also stressed that there was a contradiction in the evidence relating to the wallet of the complainant alleged to have been taken from him during the robbery.

Teresia Kirema PW4 who was the person who had sold the beer to the complainant and the appellants in the bar that night said that she went to the police after she had heard that the appellant had been arrested. She then went with the Police on the next day to the shamba where the attack had taken place. At that place PW4 found the wallet. It is clear from this sequence that, according to PW4, the wallet was recovered after the arrest of the appellant and yet the wallet was said by PC Linus Mzungu PW6 to have been found on the appellant at the time he was arrested.

The wallet contained Shs.400/= and the complainant's Civil Service identification card which was produced as Exhibit 1.

The evidence relating to the wallet and its contents was of vital importance to the prosecution in proving that there was theft of anything from the complainant.

Counsel for the appellant complained before us that there was no mention in either the inferior or the superior court judgements of the defence put forward by the appellant.

The appellant gave sworn evidence in which he said that on 14th November 1998 he was in his shamba at 5.00 pm when police officers came saying they were looking for him. He was taken to the Police Station where he was beaten and then asked whether he knew any of the people who robbed the complainant. He said that he knew nothing about the robbery. He said that he was not found with anything belonging to the complainant and that the complainant did not produce the exhibits.

We do consider that both the superior court and the inferior court, in their judgments, should allude to whatever defence if any is put forward at the trial even if only to state that the points made in defence do not carry sufficient weight to influence the decision in the appeal.

After taking into consideration all of the above we have come to the conclusion that the prosecution has not proved beyond reasonable doubt that the appellant is guilty of the capital offence with which he was convicted. Mr. Orinda the learned State Counsel, who appeared for the State, rightly in our view, did not support the conviction.

We accordingly quash the conviction and set aside the sentence and order that the appellant be released immediately unless he is otherwise lawfully held.

Dated and delivered at Nyeri this 12th day of May, 2006.

P. K. TUNOI

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JUDGE OF APPEAL

S. E. O. BOSIRE

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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