REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Criminal Appeal 9 of 2006

JAMES MWANGI NJOROGE …….....…… APPELLANT

AND

REPUBLIC …….....…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lady Justice Lesiit & Ochieng, JJ) dated 27th January, 2005

in

H.C.CR.A. NO. 1087 OF 2002)

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JUDGMENT OF THE COURT

The appellant ***JAMES MWANGI NJOROGE*** was convicted by the Senior Principal Magistrate, Kiambu for the offence of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code and sentenced to death. The full particulars of the charge were that:

"***On 21st November, 2001, at Kwamaiko Township in Kiambu District within Central Province jointly with another not before the court, while armed with swords and a toy pistol robbed PETTER NGOTHO NJONGORO of cash Kshs.20,000/= and one mobile phone make Ericsson T18 all valued at Kshs.34,500/= and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said PETER NGOTHO NJONGORO".***

The appellant appealed against the conviction and sentence to the superior court but his appeal was dismissed. This is therefore a second appeal.

The complainant Peter Ngotho Njongoro (PW1) owned a wholesale and retail shop at Ngemwa Trading centre. On the material day a customer, Paul Kabande Kimani (PW3) went to the shop at about 9.00 a.m. to buy shop goods for sale. Shortly thereafter, the appellant went to shop accompanied by a "*black man*". The appellant removed what looked like a pistol while the black man produced a Somali sword. They pushed PW3 into the shop and ordered him to lie down. They also demanded money from him and PW3 gave them Shs.400/= which he had. The black man then took the complainant's mobile phone and demanded money. The complainant showed them the drawer. The complainant who was seated on a chair was ordered to lie down. The black man took about Shs.20,000/= from the drawer.

By a strange twist of fate, motor vehicle registration number KAE 163D which supplies cigarettes to the shopkeepers in the area arrived at the shop at the relevant time causing panic to the appellant and his

accomplice. The complainant got courage to scream for help and the black man ran out followed, after a short interval, by the appellant. Stanley Thuo (PW2) an Administration Police constable who was one of the two police officers escorting the cigarette vehicle saw two people emerge from the shop and chased the appellant who ran into a coffee shamba. The complainant, PW2, PW3 and members of public all chased the appellant. The appellant ran towards a coffee farm with the pistol raised in the air scaring the members of the public. The members of public caught up with him and beat him viciously. APC Stanley Thuo (PW2) recovered the "*toy pistol"* from his inside coat pocket and rescued him from the members of public. He was taken to Ngemwa Police Patrol Base and later to Kiambu Police Station.

At the trial, the appellant denied the offence. He explained that he had leased a cereals shop at Ngemwa Trading centre and that on the material date the complainant went to his shop and claimed that he was owner of the shop and wanted to take it back. The complainant wanted to close the shop but the appellant stopped him. The complainant left but later came back with two policemen and three people. They beat the appellant saying that the appellant had robbed the complainant's brother of a Television set. He was then taken to the police station.

The trial magistrate evaluated the evidence of the three material witnesses, namely, Peter Ngotho Njongoro (complainant), APC Stanley Thuo (PW2) who is among the people who chased the appellant and recovered the "*toy pistol"* from him and Paul Kabande Kimani (PW3), the customer who also joined in the chase. The trial magistrate was satisfied that robbery took place in broad day light and that both PW1 and PW3 identified the appellant at the time of the robbery. The trial magistrate was also satisfied that PW2 saw the appellant emerge from the shop and run away and that PW2 chased the appellant until he was arrested and never lost sight of him. She concluded thus:

"***Clearly this is a clear case where the evidence flows in a very straight forward manner. From the moment the accused robbed PW1 and 3 to the moment he was arrested his pursuers never lost sight of him. His defence is that he was arrested after quarreling with PW1 over a shop. I do not believe him. Indeed, the evidence adduced against him by the prosecution is overwhelming".***

In the appeal in the superior court the appellant contended, among other things, that prosecution did not discharge its burden proof, that the evidence of his arrest was not conclusive; that the trial magistrate failed to make proper reference to his defence; that the charge was defective as it did not state that the weapons used were dangerous or offensive and that the evidence did not support the charge as there were discrepancies in the evidence and the charge.

The superior court considered all the grounds of appeal. It also considered the evidence regarding the robbery, the escape, the chase and the subsequent arrest of the appellant and believed the evidence. The superior court was satisfied that trial magistrate had considered the defence in totality but considered it afresh and concluded in part:

"***We find the appellant's defence was clearly an afterthought. The alleged quarrel he had with the complainant and which happened on the day before his arrest was never raised during the complainant's cross-examination. The appellant also alleged that those police officers who arrested him went to his (Appellant's) shop accompanied by the complainant. No such a question was put to PW2 the sole arresting officer, neither did he cross-examine PW4 the investigating officer over the issue".***

The supplementary memorandum of appeal in this Court contains same grounds which were raised in the superior court.

The evidence of the robbery, the arrival of the vehicle which supplies cigarettes at the scene, the escape of the appellant and his accomplice, the chasing of the appellant, the arrest of the appellant and the recovery of the home made gun are all matters of fact.

The superior court subjected that evidence to a fresh and exhaustive examination and re-considered the appellant's defence and reached the same conclusion as the trial court.

There are absolutely no reasons for interfering with the concurrent findings of fact by the two courts below.

The discrepancy between the charge and the evidence concerning the name of the place where the robbery occurred was considered by the superior court. Most of the witnesses referred to the scene of robbery as Kwamaiko. The complainant referred to the place as Ngemwa. The appellant himself also referred to the place as Ngemwa Trading Centre. It seems that both names refer to the same general area. Like the superior court, we find that the discrepancy did not go to the substance of the charge or occasion any failure of justice.

The two courts below investigated the complaint that the charge was defective and considered the ingredients of the offence of robbery with violence under ***Section 296 (2)*** of the Penal code. The particulars of the charge specifically stated that the appellant was in the company of another and that they were armed with swords and a toy pistol. What the witnesses referred to as a "*toy pistol"* was found by the ballistic expert to be a home – made gun which was incapable of being fired but which was nevertheless, a firearm as defined in the Firearms Act. The trial magistrate found that it had a close resemblance to a toy pistol. The home – made gun could not be fired and perhaps, for that reason, it could not be classified as a dangerous or offensive weapon. However, the Somali sword which the appellant and the accomplice had is intrinsically a dangerous weapon. The fact that the weapon or instrument is not described as a dangerous or offensive weapon in the charge does not generally speaking make the charge defective. It is sufficient, if the weapon is described in the charge and shown by evidence to have been intended for use to cause injury. It is also sufficient if the other ingredients of robbery with violence under ***Section 296 (2)*** are proved. In this case the robbers were more than one. We are satisfied that the charge of robbery with violence under ***Section 296 (2)*** of the Penal Code was proved.

The evidence against the appellant was overwhelming. He was properly convicted and this appeal has no merit. It is dismissed.

Dated and delivered at Nairobi this 5th day of May, 2006.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR