



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Criminal Appeal 4 of 2006

MARTIN KIRIRA WAWERU APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lessit & Ochieng', JJ) dated 30th November, 2004

in

H.C.CR.A. NO. 506 OF 2002)

JUDGMENT OF THE COURT

The appellant in this appeal, **Martin Karira Waweru**, was charged with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of the offence were as follows: -

“On 19th October, 2001 at Runda Estate Nairobi within Nairobi area, jointly with others not before the court while armed with dangerous weapons namely pistol, screw driver, military dagger and telephone wire robbed GRACE WANJIKU WAHOME of her one mobile phone make Siemens M-30 valued Kshs. 4,99/- and at or immediately before or immediately after the time of such robbery used personal violence to the said GRACE WANJIKU WAHOME.”

The case was first heard in the Chief Magistrate’s Court at Nairobi (Miss S. Ndambuki SRM). The Chief Magistrate summarised the facts adduced in evidence presented by the prosecution witnesses before her in the following terms:-

“.....The accused while armed with dangerous weapons, a pistol and a knife went to the residence of Mr. Kibe at Runda where the complainant PW 1 (Grace) and one Faith Nyambura PW 2 (Faith) were working as domestic house helps According to Grace she was told by Faith that there were some people at the gate who were claiming that they had come to repair the telephone. Grace refused to let them in saying that she had not been told by her employer that anyone would be coming to repair the telephone but the two people found their way into the house. Grace decided to call her employer to ask her whether she had asked anyone to go and repair the telephone but while one of the men was where the telephone was, the other one grabbed her by the neck and started strangling her. The person who was strangling her, the accused’s colleague, stopped strangling Grace when he noticed that Faith was coming into the kitchen. Faith then went out screaming and she was followed by the accused’s colleague. The accused then produced a knife and led Grace upstairs and asked her to give him Shs. 2

million and the mobile phone. He threatened to stab **Grace** with the knife.”

According to **Grace**, when the accused noticed that his colleague had left, the accused started walking out of the house with his knife and carrying a paper bag pursued by **Grace** who was screaming and calling him a thief who had stolen a mobile phone and was armed with a knife. The mobile phone belonged to **Grace**.

At this stage the accused was arrested by some members of the public not far from the gates of the compound. **Grace** saw him arrested and, according to her, the Mobile phone and the knife with which she had been threatened was removed from his pockets. Inside the paper bag, which he was carrying, there was found, according to **Grace**, a screwdriver and a piece of wire, which looked like a telephone wire.

During her cross examination by the accused **Grace** stated that the mobile phone and the knife had been removed from the accused's pockets by the time the accused was brought back into the compound.

During the trial the mobile phone (said to be worth Shs. 4,499/-) was marked for identification as MFI 1, the knife was marked MFI 2, the screwdriver was marked MFI 3 and the wire was marked MFI 4.

These four objects were produced as exhibits to the Court by P.W.4 P.C. Richard Kimathi who gave evidence that they had been given to him at the Runda Police Station by the EARS guards who claimed to have taken the accused from the members of the public who initially apprehended him.

None of the members of the public who made the initial arrest gave evidence except for P.W.3 James Wafula Wamalwa who testified that he worked at a neighbouring house as a shamba boy. He was outside that house disposing of some rubbish when he saw a young woman (identified as P.W.2 **Faith**) leaving the neighbouring house screaming “wizi wizi” meaning “thieves thieves”. She was being followed by a young man who pointed a gun at him resulting in his not arresting this man who escaped.

Faith was still screaming in the road when the accused came out of the gate of the neighbouring house. She said that the accused was one of the thugs who had gone into their residence. P.W.3 together with one Muriuki who also worked at the neighbouring house chased the accused and managed to arrest him. P.W.3 identified the accused in the dock as the person he and Muriuki arrested. They took him to the neighbouring house. By this time there were very many members of the public at the scene. The EARS guards also arrived there, the alarm having been activated. According to P.W. 3 the accused was then searched and the accused was found with what were later produced as Exhibits 1 to 4.

None of the EARS guards were called to give evidence at the trial so that there was no evidence from them as to when and how the exhibits came into their possession.

No identity parade was held and the identification of the accused as one of the two persons who entered the house and began to strangle **Grace** was a dock identification by both Grace and Faith. Neither of them mentioned any particular feature enabling them to recognise him though it must be remembered that all the events took place in broad daylight.

The appellant gave unsworn evidence in his defence the gist of which was that he was walking through Runda Estate following a lead to a possible vendor of sacks that he wished to purchase. As he was walking he met three young men who were running away. About 30 metres away he met **Faith** whom he did not know who was screaming loudly. According to the accused, **Faith** explained that some thugs had been to their residence but they had run away but she was wondering what they might have done in the house where there was another lady working. The appellant claimed to have offered help to **Faith** but when they met **Grace** coming from the house **Grace** started screaming saying that the appellant was one of the robbers whereupon **Faith** started claiming that the appellant was one of the robbers. The appellant claims that he then sensed danger and ran away pursued by many who eventually caught him. He was then taken by the EARS guards who had arrived in a vehicle, which took him to the Police station.

He claimed that the four exhibits were produced by **Grace** from a paper bag she came with to the Police

station. He was, he claimed, being framed for something he did not do.

The evidence relating to the finding of the four exhibits lacked clarity.

Grace stated, during cross examination by the appellant, that the mobile phone and the knife were removed from the appellant's pockets by the time he was brought into the compound of the house which is consistent with the search of the appellant having taken place outside the compound before he was brought into the compound.

Faith claimed to have seen the mobile phone being removed from the appellant's pocket but did not see the other objects namely the knife, the screw driver and the piece of wire being so removed. Her evidence is not clear as to at what stage she saw objects being found in the appellant's pockets though it seems that it was after the accused was brought into the compound and after the arrival of the EARS guards.

PW.3, the gardener from next door, said the following in his evidence in chief in relation to the searching of the appellant: -

"We managed to arrest him and we took him to the residence where he had come from. The alarm had been activated and the EARS security alarm systems arrived at the scene. By this time there were very many members of the public at the scene. We searched him. We found him with this knife (MFI - 2). He also had this screw driver (MFI -3) and this wire which looks like a telephone wire (MFI -4). He also had this mobile telephone set (MFI -1)....."

This evidence seems to be more consistent with the search having taken place in the compound and this was confirmed by him when he was cross-examined when he said *"we took you back to the compound and we searched you."*

We have come to the conclusion that we should give the appellant the benefit of the doubt. This doubt arises from the lack of any evidence from the EARS Guards or anyone else as to the movement of the exhibited items from their recovery upon search of the appellant and the arrival of those exhibits at the Police Station. The identification of the appellant was by way of dock identification coupled with the finding of the stolen items on the person of the appellant. This latter aspect was critical to the strength of the identification evidence and yet for the above reasons we regard the evidence relating to the finding of the incriminating exhibits to be insufficiently cogent to result in proof of guilt beyond reasonable doubt.

Mr. V.M.N Wohoro, the Senior Principal State Counsel appearing for the State stated that he found it difficult to uphold the conviction stressing that PW1 was the only witness to the robbery. He did not support the conviction. This was proper in our view.

We also consider that defence Counsel has made a valid criticism of the judgment of the Chief Magistrate in that there was no specific reference to the reasons for not accepting the appellant's defence that he was caught up in a *"mob justice"* situation and the superior court in its judgment likewise did not dwell on this as a possibility giving rise to reasonable doubt as to his guilt.

Accordingly we allow the appeal and hereby quash the conviction of the appellant for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code and set aside the sentence of death. We hereby order that the appellant be released forthwith unless he is otherwise lawfully held.

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

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR