



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Criminal Appeal 293 of 2005

PHILIP NANDI WAMUNA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Ochieng & Makhandia, JJ.) dated 22nd day of July, 2004

in

H.C.C.R.A. NO. 566 OF 2001)

JUDGMENT OF THE COURT

The appellant, **PHILIP NANDI WAMUNA** was jointly charged with **SAMUEL KINYANJUI MUNIU** with two counts of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the offence in respect of the first count were as follows:-

- “1. **SAMWEL KINYANJUI MUNIU**
2. **PHILIP NANDI WAMUNA**

On the 10th day of December 2000 at 3:30 p.m. at Jamhuri show ground public car park within Nairobi Province, jointly with others not before court while armed with a dangerous weapon namely simis robbed Simon Kimani Mbugua of his Kshs.2,650/= and at or immediately before or immediately after the time of such robbery used personal violence to the said Simon Kimani Mbugua”.

In respect of the second count the particulars stated:-

- “1. **SAMWEL KINYANJUI MUNIU**
2. **PHILIP NANDI WAMUNA**

On the 10th day of December 2000 at 3:30 p.m. at Jamhuri Show grounds within the Nairobi Area Province, jointly with others not before court, while armed with dangerous weapons namely simis, robbed Hellen Wanjiku Kimani of a wrist watch valued at Kshs.600/= and at or immediately after the

time of such robbery used Hellen Wanjiku Kimani personal violence to the said.”

From the foregoing, it is clear that the appellant herein was the 2nd accused during the trial before the Senior Principal Magistrate (Mrs. W. Karanja – as she then was). At the trial the prosecution called four witnesses while the appellant and his co-accused gave unsworn statements.

The facts giving rise to this appeal were fairly simple and straightforward. **Simon Kimani Mbugua (PW1)** had taken his wife **Hellen Wanjiku Kimani (PW2)** to Jamhuri Park to teach her how to drive on 10th December, 2000 at about 3.30 p.m. As the couple was involved in the exercise of teaching and learning how to drive they reached near some bushes. Suddenly people emerged from the bushes and confronted Mbugua and his wife. Two of those people went to Mbugua’s side while the other two went to his wife’s side. The two who went on Hellen’s side put a sword or a knife on her neck and forced her to lie backwards as they demanded money from her. She had no money but they managed to rip off her wrist watch. Mbugua was also having his share of the unpleasant afternoon experience as he was ordered to produce money while a knife was held against his neck. In a bid to save his life, Mbugua removed money from his inner pocket and gave it to them. In that process Mbugua lost Shs.2,650/- while his wife Hellen lost her wrist watch. This incident was witnessed by **John Abuya Isanda (PW3)** who reported it to a nearby police post. He rushed to the scene in the company of **Police Constable Rephilus Omondi (PW4)**. As the police officer Omondi and Abuya jumped out of the vehicle, the four assailants started running away. While two of them managed to escape the appellant and his co-accused were not so lucky as they were immediately apprehended. It was the evidence of PW1 and PW2 that the appellant was found in possession of Hellen’s wrist watch upon being searched at the scene after arrest. The two witnesses (PW1 & PW2) identified the appellant and his co-accused as their assailants during this incident.

When put to his defence, the appellant elected to make an unsworn statement in which he told the trial court that on the material day he was going to fetch firewood from the bushes when he saw some people quarrelling. Next to these people he saw his co-accused standing there and he (appellant) asked him what was happening. Then the complainant threatened his friend with a panga. The complainant drove off only to come back with police officers who then started shooting in the air. The appellant fell down only to be ordered to board the police vehicle. He was taken to the police post and then to Kilimani Police Station where he was charged.

In the course of her judgment the learned Senior Principal Magistrate stated:-

“I have considered the defence raised by the accused persons. I find the same a mere concoction of falsehoods. The same is untenable.

As stated earlier, none of the witnesses knew the accused persons before. They had no reason to fabricate the case against him.

I further note that the robbery took place at 3:30 p.m. in broad day light and the complainants had therefore ample and unfettered opportunity to see and identify the accused persons. It is further noted that PW3 a good law abiding citizen who had no interest in the matter at all saw the 2 accused persons among 4 others (sic) earlier on. He was able to see them clearly as they walked towards him and as they walked away. Indeed he is the one who pointed them out to PW4 even before they pounced on the unsuspecting complainants. His evidence therefore corroborates PW1 and PW2’s evidence very strongly.

Further PW4, the police officer also saw the 2 accused in the act. After they shot in the air, they ran after the robbers. Accused 1 unfortunately fell down, he was caught – Accused 2 was also unable to go very far and so he was also caught. None of those witnesses lost sight of the accused persons from the motor vehicle where they were carrying out the robbery all the way to the time they were arrested just a few meters from the motor vehicle.”

Having so stated, the learned trial magistrate proceeded to convict the appellant and his co-accused.

They were both sentenced to death as mandatorily provided by law.

Being aggrieved by the conviction and sentence, the two appealed to the High Court but the appellant's co-appellant died before their appeals could be heard. The appellant then proceeded with his appeal in the superior court. The superior court (Ochieng and Makhandia, JJ) considered the matter and came to the conclusion that the appellant's appeal lacked merit. They accordingly dismissed it in their judgment delivered on 22nd July, 2004. In the course of their judgment, the learned Judges of the superior court stated inter alia:-

“Having perused the record, we find that the robbery occurred at about 3:30 p.m., in broad daylight. The venue was an open park. And the two robbers were caught literally red-handed. Police Officers, who were alerted by PW3, arrived at the scene to find the four robbers attacking a couple (PW1 and PW2). When the robbers noticed the Police Officers, they ran off. However, when the police officers fired warning shots into the air, the 1st accused fell. He was promptly arrested, and the police recovered from him, some KShs.2,650/= which had been stolen from PW1.

The Police also arrested the appellant, before he could reach the bushes which were nearby. Later, a watch belonging to PW2 was recovered from the pocket of the appellant's jacket.

To our minds, it is very clear that the issue of identification did not arise at all, in this case. The appellant was caught in the act, and arrested a short distance away from his victims. We are therefore satisfied that this ground of appeal has absolutely no merit.”

Having so stated, the learned Judges concluded their judgment thus:-

“The learned trial magistrate who had the benefit of observing the demeanour of the appellant when he was testifying found that the prosecution witnesses had no reason to fabricate the case against the accused persons. She therefore found the defence to be untenable. We too have weighed the defence but find that it simply does not add up at all. We hold that the said defence was properly rejected.

In conclusion, we hold that the appeal has no merits. It is dismissed; and we therefore uphold both conviction and sentence.

The appellant did not give up after that determination by the High Court. He, therefore, decided to come to this Court by way of a second appeal. That being so only matters of law fall for consideration – **see section 361(1)** of the Criminal Procedure Code.

When this appeal came up for hearing before us on 16th November, 2006, Mr. Evans Ondieki appeared for the appellant while Mr. Kivihya assisted by Miss Wafula appeared for the State.

Mr. Ondieki's submissions which were presented with considerable force can be summarized under the following headings:-

- i) Section 77(2)(b) & (f) of the Constitution.***
- ii) Identification.***
- iii) Possession.***
- iv) Defence of the appellant.***

The submission relating to **section 77(2)(b) and (f)** of the Constitution was to the effect that the appellant did not understand English or Swahili and so he did not understand what was going on during the trial and even during his appeal in the superior court. It was Mr. Ondieki's contention that **section**

77(2)(b) and (f) of the Constitution was violated.

Our perusal of the record of the proceedings before the trial court reveals that the appellant and his co-accused were arraigned before Mrs. J. Ondieki a Senior Principal Magistrate on 18th December, 2000 when the charge was read and explained to them. The record shows that the languages used were English and Swahili. The court clerk/interpreter was one, Obonyo. The appellant and his co-accused on being asked to plead were shown as having pleaded “**Not Guilty**” to the two counts. The trial commenced on 13th February, 2001 when the charge was again read over and explained to the two accused persons who maintained their pleas of “**Not Guilty**”. It is to be observed that the appellant and his co-accused cross-examined the witnesses at length and when they were put to their defence, each was able to defend himself by stating what led to their arrest. By merely perusing the trial court’s record it cannot be said that the appellant did not understand what was going on. If he did not understand what was going on during the trial how come he was able to cross-examine the witnesses? In what language did he defend himself?

The record of proceedings in the superior court shows that the matter came up before Ochieng & Makhandia, JJ on 17th June, 2004 when the appellant addressed that court at some length. For the sake of completeness, this is what the appellant said orally during his appeal in the High Court:-

“I was charged with robbery with violence. PW2, the complainant stated that his watch, make Risesu whereas PW1 stated that the make of the watch was Pissasso. Those are different makes of the watch. On my arrest, PW3 stated that he saw me at a distance and showed PW4 who arrested me. I should have been searched immediately and not at the police station. I told the court that the watch was part of exhibits kept at the police station. It was not enough that the complainant stated that the watch was his in the absence of receipt indicating that he had bought the watch. PW4 arresting officer, did not bring any witness from the bar, yet such places usually has (sic) other patrons.”

We may pause here and ask, what language was the appellant using in all that he said both in the trial court and in the superior court? Has the appellant suddenly forgotten how to speak English or Swahili after his trial and the appeal in the superior court? The submission relating to **section 77(2)(b) and (f)** may appear attractive and exciting but in view of what we have said above, we find no merit in that submission.

The major ground in this appeal was on identification. It was Mr. Ondieki’s submission that the identification of the appellant by the husband and wife was not free from the possibility of error. From the summary of the events that took place on the material day, it was not disputed that the robbery took place at about 3:30 p.m. at Jamhuri Park. This was in broad daylight. The two complainants were husband and wife. The husband (**PW1**) was teaching his wife (**PW2**) how to drive. Suddenly four people emerged from the bushes and set upon the couple. These two (**PW1 & PW2**) were able to identify the appellant and his co-accused among the four assailants. As observed by the first appellate court, the two robbers were caught literally red-handed. The appellant was arrested immediately and on being searched PW2’s wrist watch was found on him. In our view, there can be no doubt about the appellant’s identification.

Mr. Ondieki’s next submission related to the issue of possession. He submitted that there was no evidence of possession. We must confess that we did not find any merit in this submission since there were concurrent finding by both courts below that the appellant was found in possession of the wrist watch belonging to the second complainant (**PW2**).

Lastly, it was submitted by Mr. Ondieki that the learned Judges did not consider the appellant’s defence. On perusal of the record of the superior court it clearly shows that the learned Judges considered the appellant’s defence and rejected it. This is what they said in their judgment:

“We too weighed the defence but find that it simply does not add up at all. We hold that the said defence was properly rejected.”

Need we say any more on this appeal? We think we have said enough. The appellant and his co-accused were caught red-handed in broad daylight. We appreciate the gallant efforts made by Mr. Ondieki in this difficult appeal and especially his industry and research on authorities. As for this appeal, we are of the firm view that the appellant's conviction was based on very sound and watertight evidence. We decipher no fault on the part of the trial court or the first appellate court. This appeal is clearly unmeritorious and we have no hesitation in ordering that the same be and is hereby dismissed in its entirety.

Dated and delivered at Nairobi this 8th day of December, 2006.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR