



IN THE COURT OF APPEAL

AT ELDORET

CORAM: TUNOI, O’KUBASU, J.J.A & DEVERELL, AG.J.A

CRIMINAL APPEAL NO. 100 OF 2004

BETWEEN

JAMIN WAFULA WABULULU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

Appeal from a judgment of the High Court of Kenya at Kitale (Etyang & Tunya, JJ) dated 30 th September, 2003

in

H.C.CR.A. NO. 172 OF 2001)

JUDGMENT OF THE COURT

The Appellant JAMIN WAFULA WABULULU alias SIMBA was jointly charged with four others on six counts of robbery with violence contrary to *section 296(2)* of the Penal Code before the Senior Principal Magistrate’s court at Kitale. They all denied the charges but after a full trial the appellant was convicted on counts 1,3,4,5 and 6 while his coaccused were acquitted on all the counts. The appellant’s appeal to the High Court was partially successful as the High Court quashed the appellant’s conviction on counts 1 and 5 and the sentences of death imposed thereon set aside. The High Court, however, dismissed the appellant’s appeal in respect of counts 3 and 4. He now comes to this Court by way of second appeal on those two counts.

The complainant in count 3 was *Robert Wechuli (P.W.4)* whose evidence was to the effect that on 30th November, 2000 he went to bed at about 10.00 p.m. leaving his children studying in the sitting room. While asleep he was awakened by the screams of his children. He heard a loud voice ordering the children to keep quiet or else they would be killed. Suddenly, a gang of people with torches entered the house and ordered *Wechuli (P.W.4)* out of bed. These people said that they had been hired for 20,000/- to kill him and that if he gave them that amount they would spare his life. He gave them Shs.3,000/= which was all the money that he had. They woke his wife to give them more money and she handed over Shs.2,600/-. His son George also gave them Shs.1,500/-. They locked up the members of the family in one room and they proceeded to ransack the house. They took a travelling bag, a wristwatch and a cap. After a long time the gang left. During this incident, P.W.4 was not able to identify any of those who had raided his home.

The complainant in count 4 was *Jerry Masakhalia Wakoli (P.W.1)* whose evidence was to the effect that on 1st December, 2000 at about 1.30 a.m. he was sleeping in his house when he heard people banging the door. Those who were banging the door claimed to be police officers. Before *Masakhalia (P.W.1)* could open the door he heard the door panes being broken and many people entered the house. These people had powerful torches and guns. P.W.1 was ordered to produce his briefcase. He directed them where the briefcase was and they brought it to him to open. The briefcase was opened but they found nothing of value therein. They ordered Masakhalia's wife to give them Shs.1,000/= so that they could go and she obliged by giving them that amount. They however, asked for more money. They inspected P.W.1's coats and found Shs.50/= which they took. They also took a Panasonic speaker worth Shs.3,000/=. These people then left but P.W.1 was unable to identify any of them. The next morning the neighbours of P.W.1 told him how they too had been attacked by a gang of robbers who robbed them of various items.

Pausing there for a moment it is to be observed that the appellant was not identified by any of the two complainants in those two counts. There was however, evidence of *Justus Wanjala Mangui (P.W.3)* to the effect that during that same night of 30th November, and 1st December, 2000, he was at the home of a village elder when the appellant and his group arrived and held him. P.W.3 said that this group held him because he had beaten his mother in law. This group which, appeared to be, under the leadership of the appellant demanded money from P.W.3 and then set on a mission which involved robbing people of that neighbourhood. It was the evidence of P.W.3 that when P.W.1 and P.W.4 were attacked he P.W.3 was still being held by this gang. Hence it was the evidence of P.W.3 that connected the appellant with the offences in counts 3 and 4. In upholding the appellant's conviction on count 3 the Judges of the first appellate court stated inter alia:-

"It is the evidence of P.W.3 that the raiders took him to the home of Robert Wechuli some 100 metres from his home and carried out a raid. He identified the appellant whom he had known before as a bicycle taxi man within Mitoto market as an active member of that raiding gang. In our view therefore evidence of P.W.3 sufficiently corroborated and strengthened the evidence of P.W.12 on the issue of the appellant's identification. Therefore the combined evidence of P.W.3 and P.W.12 was sufficient to sustain the appellant's conviction in count 3".

As regards count 4 the Judges of the first appellate court said:-

"The only evidence connecting the appellant to this robbery at Mr. Jerry Wakoli's home is the evidence of Mr. Justus Wanjala Mangui (P.W.3) whom the raider had taken hostage. We accept Mr. Mangui's evidence as credible. We are aware that it is evidence from a single identifying witness but we warn ourselves of the danger of relying on that evidence without corroboration. However, from the circumstances of this case, Mr. Justus Wanjala Mangui (P.W.3) had been taken hostage by the raiders and had sufficient time to observe the appellant whom he knew before in any case. His evidence is safe and credible. We rely on it and do hold that the appellant's conviction in count 4 was equally safe."

When the matter came up for hearing in this Court, it was the submission of Mr. Omwenga, for the appellant, that there was no positive identification. He referred to the evidence of P.W.4 and P.W.12. In his view P.W.12 did not identify the appellant and hence it was only the evidence of P.W.3 which connected the appellant with the offences in the two counts.

We have carefully considered the submissions made by both counsel for the appellant and the learned Principal State counsel Mr. Omutelema for the state and this being a second appeal we are only concerned with matters of law. The only issue that calls for consideration is identification of the appellant. As already observed the two complainants in counts 3 and 4 (P.W.1 and P.W.4) were not able to identify any of the alleged robbers. It was however the evidence of P.W.3 that connected the appellant with the offences committed that night which offences included counts 3 and 4. But the evidence of P.W.3 required very careful evaluation since this was the man who had been apprehended by this same group for having beaten his mother in law. P.W.3 was a man whose conduct in the village was suspect. He turned out to be the star witness. In our view, had the first appellate court carefully reconsidered the evidence of

P.W.3 perhaps it might have come to a different conclusion. It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its conclusions in deciding whether the judgment of the trial court should be upheld – See *Okeno vs. R.* [1972] E.A. 32.

In view of the foregoing we are of the opinion that the appellant’s convictions on counts 3 and 4 were unsafe. We accordingly allow the appellant’s appeal, quash the convictions recorded against him in the two counts, set aside the sentences of death and order that he be released from prison forthwith unless otherwise lawfully held.

Dated and delivered at Eldoret this 1 st day of October, 2004.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

.....

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR