REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NYERI

CRIMINAL APPEAL 84 OF 1999

1. JAMES KABACHIA WAMBUGU

2. JOSEPH MURIUKI NJOGU ..... APPELLANTS

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nyeri (Mr. Justice Juma & Mr. Justice Mulwa) dated 19th October, 1999

in

H.C. CR. APPEAL NOs. 345, 346, 347, & 348 OF 1998)

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JUDGMENT OF THE COURT

These two men, James Kabachia Wambugu, the 1st appellant, and Joseph Muriuki Njogu, the 2nd appellant, were tried jointly with two others on four counts of robbery with violence contrary to **section 296(2)** of the Penal Code. There were also four alternative counts of handling stolen property contrary to **section 322(2)** of the Penal Code but at the end of the trial the trial magistrate found the appellants and their two confederates guilty on all the robbery charges and, correctly, made no findings on the alternative charges. Upon their conviction, the trial magistrate imposed on them the mandatory death sentence provided under **section 296(2)** of the Penal Code. They all appealed to the High Court and that court allowed the appeals of the appellants' co-accused on all the four counts. The High Court confirmed the conviction of the 1st appellant on count four while the 2nd appellant had his conviction on counts one and four confirmed. They now appeal to this Court a second time, and that being so only matters of law arise for our consideration.

Count one concerned the robbery in the home of Amina Egala Magan (PW1) and the magistrate and the first appellate court were satisfied that a robbery did take place there and various house-hold goods were stolen therefrom. Count four involved robbery in the house of John Kiarie Mwangi (PW5) and the girl-friend of Mwangi's son was in that house. The girl-friend was Barbara Stevenson and she was a foreigner. By the time the case came up for hearing, Barbara had left the country and the prosecution were unable to call her to testify.

As regards the 2nd appellant, the prosecution evidence which the two courts below accepted was that Police Constable John Kitio (PW7) and other officers were being led by the 1st appellant to the house of the 2nd appellant but that somewhere on the way, they met the 2nd appellant. The 1st appellant pointed out the 2nd appellant to the police and on searching the 2nd appellant, they recovered from his pocket a hand-bangle and two pairs of earrings. Among the things stolen from Barbara were a bangle and earrings and David Mwangi Kiarie (PW6) identified these items as belonging to Barbara who was his girl-friend. Then the 2nd appellant led the police party to his house and according to PW7, they recovered in the 2nd appellant's house a kettle, a lesso, a pillow case, table-cloth and a hand-bag. These were subsequently identified by Amina as part of her property which was stolen when she was attacked in her house.

Amina stated in her evidence that she was able to recognise the 2nd appellant during the robbery. According to her while the other attackers in her house wore masks, the 2nd appellant did not wear a mask. She also alleged she was able to identify the 2nd appellant at an identification parade, but no such parade was in fact held and her identification of the 2nd appellant simply remained a dock identification. That identification was clearly insufficient, but the fact remains that items which Amina, John and David identified as having been stolen from them were said by constable Kitio to have been found either on the person of the appellant or in his house. On the bangle and earrings, the 2nd appellant's explanation was that he bought them from some electrical shop in Nairobi, and in support of that contention he produced a cash-sale receipt. The Judges in the High Court rejected that contention and on the evidence as it stands, the Judges were perfectly entitled to do so during their re-assessment and re-evaluation of the evidence recorded by the trial court. The 2nd appellant did not say anything with regard to the other things Kitio said he recovered from his house and the two courts below were satisfied the items were found with or in the house of the appellant. Whether the things were the property of the 2nd appellant and whether they were found in his house or elsewhere were each a question of fact and this Court can only interfere with the concurrent finding of the courts below if there was absolutely no evidence upon which a reasonable tribunal could make such a finding. We are satisfied the 2nd appellant was correctly convicted on count one and count two and there is no merit in his appeal.

And now for the first appellant. Kitio visited his house at around 3 a.m. on 11th January, 1998. The robbery in count four took place during that night between 3 a.m. and 4 a.m. According to Kitio it was the wife of the 1st appellant who opened the door for them when they knocked. The 1st appellant was, according to Kitio, hiding under the bed and had to be dragged out. He was taken to the police station and as a result of what the 1st appellant told Kitio and his party, they visited the house of the 2nd appellant. As we have seen, things stolen from the houses of Amina, John and David were found. After the visit to the house of the 2nd appellant, the police party revisited the house of the 1st appellant and according to Kitio, they recovered a sleeping bag and a hand-bag. Those items were said to have been stolen from the house of John and David (count four). The 1st appellant's contention was that nothing was found either in his house or on his person. He insisted that the prosecution produce the Occurrence Book for the relevant period and it appears he was saying that if the OB had been produced, it would have shown that he was not taken to the police station with any item. Mr. Mahan for the appellants told us that since the prosecution failed to produce the OB and gave no explanation for failure to produce it, the court should presume in favour of the 1st appellant that had the OB been produced, it would have supported the 1st appellant's case that he was arrested with nothing. That may be so, but the fact remains that the 1st appellant led police to the house of the 2nd appellant and there, items stolen during the robberies were found. Obviously the 1st appellant knew something about the robberies and the failure to produce the OB could not alter that fact. The Judges of the superior court agreed with the magistrate that the 1st appellant was found in possession of the items charged in count four on which he was convicted. We see no reason to warrant our dissenting from that conclusion. We are satisfied the 1st appellant was properly convicted on count four. In the event our order in the two appeals shall be that the appeals fail and we order that they be and are hereby dismissed.

Dated and delivered at Nyeri this 17th day of May, 2001.

R.S.C OMOLO

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JUDGE OF APPEAL

S.E.O BOSIRE

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JUDGE OF APPEAL

E. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR