



REPUBLIC OF KENYA

High Court at Kerugoya

Criminal Appeal 126 of 2012

MUCHANGI NJIRU.....1ST APPELLANT

EDWIN MUTURI KAGANE.....2ND APPELLANT

LAWRENCE MUCHANGI NJERU.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from the Sentence and Conviction of E.K. NYUTU Resident Magistrate Embu in Criminal Case No. 1130 of 2005 on 29<sup>th</sup> July 2008)*

### J U D G M E N T

MUCHANGI NJIRU, EDWIN MUTURI KAGANE & LAWRENCE MUCHANGI NJERU hereinafter referred to as the 1st, 2nd and 3rd appellants respectively were charged with the offence of **Robbery contrary to Section 296(1) of the Penal Code**. The particulars as stated in the charge sheet were as follows:-

*On the 29<sup>th</sup> day of March 2005 at Kimari Market, Kiriari sub-location, Ruguru Location in Embu District within Eastern Province, jointly robbed KIURA NJAMIU of his Kshs.11,000/= and at or immediately after the time of such robbery threatened to use actual violence to the said KIURA NJAMIU.*

The matter was fully heard and the appellants were convicted and sentenced to 7 years imprisonment. And being aggrieved by the judgment have appealed against both conviction and sentence raising the following grounds:-

1. *The learned trial Magistrate erred in law and in fact by convicting and sentencing them relying by the evidence of PW1 regarding identification by recognition where the circumstances were not conducive he did not mention their names when he reported to police station.*
2. *The leaned trial magistrate erred in law and fact by convicting and sentencing them relying on*

***the evidence of Pw2 who only alleged that he saw them at the bar taking beer with second accused which is not an offence.***

- 1. The leaned trial magistrate erred in law and fact by accept in the evidence of PW1 without warning herself of the dangers of convicting by the evidence of a single identifying witness.***
- 2. The leaned trial magistrate erred in law and fact by failing to consider their defence which was safe to secure their acquittal. In addition reasons of its rejection was not disclosed as stipulated the provisions of section 169(i) of the Criminal Procedure Code.***

When the appeal came for hearing all the appellants presented the court with written submissions expounding their grounds of appeal. The state through learned state counsel Mr. Miiri opposed the appeal. He submitted that the learned trial magistrate correctly relied on the evidence of PW1 & PW3. As even PW3 told the court that the appellants were bad people. The incident occurred At 2 p.m. so there was no error in the identification. The appellants elected to remain silent. On sentence he said the sentence of 7 years was lenient. The 1st appellant raised an issue on the Occurrence Book report and date of incident.

This being a first appeal this court has the duty to re-evaluate and reconsider the evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this. I am guided by cases of

- 1. PANDYA VS REPUBLIC [1957] WA 336***
- 2. GABRIEL KAMAU NJOROGE VS REPUBLIC [1982-88] 1KAR 1134***

The evidence adduced is to the effect that on 29/3/2005 2 p.m. PW1 was from the bank (Kiriari Sacco). He withdrew Shs.11,000/= to pay his tea pickers. As he went home, 1st, 2nd and 3rd appellants caught up with him near the slaughter house. The 1st appellant held him while the 2nd and 3rd appellants dropped him down. The 2nd appellant took his money from his breast pocket. They were not armed and there were no passerby then. Though he screamed nobody came to his rescue. The appellants fled. He reported the matter the next day. The appellants were later arrested on the same day. All the appellants were known to him. They were arrested from Green bar where the 2nd appellant worked. PW2 was at green bar to see a friend who works there. This was on 29/3/2005 2 p.m. Inside the bar he found PW1 and the appellants all seated. After 30 minutes PW1 left and the appellants followed him. The latter returned after 30 minutes. The returned separately. He overheard them ask each other “how are we going to share”. He got suspicious about this talk. The next morning he reported to the chief.

PW1 then came in to report to the chief how he had been robbed. He recorded his statements at Manyatta police station. He said he knows the appellants well as they are all from Kiriari. PW3 received a report from PW1 on ¼/2005. It was about the robbery by people known to him. PW1 took him and APC Kipagega to the people who had robbed him and they arrested them. He further said the appellants were notorious bad people in the community. And 2nd appellant had a pending case against him. This officer did not investigate this case. The appellants all elected to remain silent and say nothing in their defence.

The learned trial Magistrate in her judgment said she was satisfied that the appellants had been identified at the scene. Secondly that the appellants were notorious people with bad character within the area of Kiriari and that is how they were known to him.

I will consolidate all the grounds and deal with them simultaneously. In the offence that faced the appellants two main ingredients had to be established. These are

- 1. stealing***
- 2. actual violence or threats of the same***

The prosecution had a duty to establish that indeed a theft of Shs.11,000/= had occurred. There cannot be a theft without an object or item worth being stolen. Was this ever established? PW1 said he was from the bank and had withdrawn Shs.11,000/=. There was no evidence produced before the court to confirm

such withdrawal e.g. bank statement or withdrawal slip. What is it that convinced the court that indeed PW1 had Shs.11,000/= on himself that day? I find none. Without theft the offence of robbery cannot be complete.

Secondly PW1 told the court he was followed from behind by the 3 appellants. PW2 stated that PW1 had been with the 3 appellants in Green Bar seated down. PW1 never mentioned having been in Green Bar with his assailants. Thirdly PW1 stated that he made his report on 30th March 2005 but the appellants were arrested on the same day of the offence.

PW2 says the report by him and PW1 was made to the chief on 30th March 2005 and they were referred to the Manyatta police station where they went to report and he recorded his statement. PW3 from Kathangari AP Post which is under Manyatta police station said PW1 made his report to the post on 1/04/2005.

After the report PW3 and another officer led by PW1 went and arrested all the 3 appellants. Its not even shown how and from where they were arrested. In cross examination PW3 stated that the 2nd appellant was arrested from the stage at Kiriari. On the other hand PW1 stated that at page 30 lines 13-19

***“I accompanied the 2 police officers who went to arrest the accused. The accused persons were known to me. The 1st accused was employed in a bar called Green Bar. We found the three accused persons inside the bar. The 1st accused was selling beer while the 2nd and 3rd were sitting inside the bar”.***

The charge sheet shows that the appellants were arrested on 2/4/2005. So with all these dates i.e. 29/3/2005, 30/3/2005, 1/04/2005 and 2/4/2005 being floated as the dates of arrest, which among them was the actual date of arrest?

Fourthly PW3 was only an arresting officer. There was no investigating officer in this case, and if there was any he/she never testified. The issues like evidence of possession of Shs.11,000/=, date of arrest etc would have been streamlined by an investigating officer. Fifthly the statement by PW3 in his evidence in chief that the appellants were notorious persons of bad character in their village was uncalled for.

Unfortunately the learned trial magistrate in her judgment refers to it and even states that it was by that character that the appellants were known by the officer so the officer knew them as the culprits. It was the duty of the officer to prove to the court that the appellants had committed the offence and not to link them to it because of their 'bad' character.

My evaluation of this evidence makes me arrive at the conclusion that had the learned trial magistrate analyzed the evidence well she would not have convicted the appellants. I allow the appeal. The conviction is quashed and the sentence set aside.

The appellants to be set free unless lawfully held under a separate warrant.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF MAY 2013.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Mr. Miiri for State**

**All Appellants**

**Njue CC**