REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL AT NAKURU
Criminal Appeal No. 339 of 2003

JOHN NJUGUNA WAINAINA…….....…..……..…APPELLANT

VERSUS

REPUBLIC…….....……...RESPONDENT

JUDGMENT OF THE COURT

The appellant was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars were that on the 13th February 2003 at Ndendeu Farm Molo within Nakuru District jointly with another not before court while armed with a dangerous weapon namely a knife, he robbed James Wamea Njoroge of cash Kshs.5,100/- and at the time of such robbery used actual violence against him.

After a full trial the appellant was convicted and sentenced to death as by law provided. He was aggrieved by the said conviction and sentence and he preferred this appeal. His grounds of appeal can be summarized as follows:-

(a) The trial magistrate erred in law by convicting him without any sufficient evidence.

(b) The trial magistrate erred in law by convicting him of a capital offence without bothering to consider his age arguing that he was 17 years as at the time of his conviction.

(c) The trial magistrate erred by failing to consider his defence.

The prosecution evidence that was tendered before the trial court briefly stated was as follows:-

The complainant, **James Wamea Njoroge (PW1)** testified that on 12th February 2003 he sold his potatoes and raised Kshs.5,600/- and thereafter he paid his workers and remained with a balance of Kshs.5,100/-. On 13th February 2003, at about 7 a.m. he woke up and went to open the main door of his house and he met the appellant outside waiting for him. Suddenly, the appellant grabbed PW1 and forced him back into the house. The appellant had a knife in his hands and he forced the complainant to lie down. The appellant strangled the complainant and when PW1 asked the reason for the attack, the appellant demanded money. PW1 directed the appellant to his bed where he had kept the money. The appellant took it and ordered PW1 to jump on the bed and he covered him with a blanket as he threatened to strangle him to death if he woke up. The appellant then left the house and locked it from outside. PW1 was unable to scream as he had been hurt in his throat but when he realised that the appellant had left he jumped out of the house through a window and went to inform his neighbour **Samuel Chege Mwaura (PW2).**

PW1 said that the appellant was his neighbour and he had known him since he was a young boy and so he

had no problem in recognising him. After he informed PW2 about the incident, PW1 went to report the matter to the police. He said that he had been attacked and robbed by somebody whom he knew. Meanwhile the appellant disappeared to Eldoret upto 19th February 2002 when he returned and was promptly arrested. The stolen money was not recovered. However, in the cause of the robbery the appellant had dropped his cap in the house of PW1 and the same was collected and shown to court as an exhibit.

PW2, confirmed that he was indeed a neighbour of PW1 and on 13th February 2003 at about 7 a.m., PW1 went to his house and informed him that he had been robbed of Kshs.5,100/- by the appellant who had also strangled him.

PW3, Administration Police Constable **Josephat Wanyama** testified that on 20th February 2003 he arrested the appellant after he was notified that he had returned from Eldoret. He then took him to Molo police station. He said that the appellant admitted that the cap that was recovered from the house of PW1 belonged to him.

PW4, P.C. John Nganga who was based at Molo police station told the court that on 13th February 2003 at 11.20 a.m. the complainant reported that he had been robbed by the appellant of Kshs.5,100/-. He booked the report and later on 20th February 2003, PW3 took the appellant to the police station together with some new clothes which were in a bag as well as a cap which items were said to belong to the appellant and he produced these items in court as exhibits.

In his unsworn defence, the appellant said that on 13th February 2003 he was at home and after harvesting some potatoes he decided to go to Eldoret on 15th February 2003. He further stated that his grandmother gave him Kshs.1,100/-. which he used to buy some clothes in Eldoret. He returned home on 19th February 2003 and was arrested the following day. He denied that he was the owner of the cap that had been produced in court. The police searched his house and recovered a bag which contained some new clothes and when he was asked how he got those clothes he said that he bought them using he money which had been given to him by his grandmother.

He called his grandmother, **Ann Nyakianda (DW2)** as a witness and she said that she had given the appellant only Kshs.100/- when he was going to Eldoret.

We have carefully perused the evidence as hereinabove restated. We are by law mandated to re-examine and re-evaluate the same and arrive at our own independent conclusion. The trial magistrate convicted the appellant on the basis that he had properly been recognized by PW1 who was his neighbour and the evidence of PW1 had been corroborated by that of PW2. We note that the offence was committed in broad day light and immediately thereafter PW1 went and informed PW2 what had happened and clearly informed him that he had been robbed by the appellant who was also known to PW2 as all of them were neighbours.

It is instructive that the appellant disappeared from his home immediately thereafter and went to Eldoret where he bought some new clothes. Although he told the court that he was given a sum of Kshs.1,100/- by his grandmother to buy those clothes, his grandmother said that she gave him only Kshs.100/- which obviously was not sufficient to enable the appellant purchase the new clothes. The appellant's defence was therefore rightly rejected as being untenable.

On the issue of the appellant's age at the time of commission of the offence, no evidence was tendered by either the prosecution or the appellant during the trial but the charge sheet indicated that the apparent age of the appellant as "adult". No submissions on the issue were made before us and in our view the appellant appeared to be an adult. We therefore reject that ground of appeal.

We find that the appellant was properly convicted on visual identification evidence which is always better than identification evidence.

We are alive to the fact that in evaluating such kind of evidence, a court is enjoined to ensure beyond all reasonable doubt that the witness who gave the evidence of visual identification was honest and unmistaken about the evidence – see ***RORIA VS REPUBLIC [1967] E.A. 583***. In ***ANJONONI & OTHERS VS THE REPUBLIC [1980] K.L.R. 59*** the Court of Appeal emphasised the value of recognition evidence of an accused by a complainant as opposed to identification of a stranger. In that case, the court also cited ***R. VS. TURNBULL [1976] 3 ALL EA 549*** where a clear distinction was drawn between identification and recognition. The court stated that:-

"Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

The court was emphasising about the importance of avoiding possibilities of convicting an accused person through a mistake in identification and it went on to state that:-

"When the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a work mate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it."

In the present case, there was no dispute that the appellant and the complainant were neighbours and the complainant had known the appellant from his childhood. We do not believe that the complainant could have had any reason to frame up the appellant. In our view, the complainant was truthful and honest and his evidence was reliable and left no room for any doubt that he may have been mistaken about his recognition of the appellant. We do not find any merit in his appeal and we dismiss the same and confirm the conviction and sentence that was passed by the trial court.

Dated at Nakuru this 3rd day of March, 2006

M. KOOME

JUDGE

D. MUSINGA

JUDGE