



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL 27 OF 2008

MICHEAL NGUGI NJOROGHE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(AN APPEAL ARISING OUT OF THE CONVICTION AND SENTENCE OF U.P.KIDULA CM
IN CRIMINAL CASE NO. 9437 OF 2004 DELIVERED ON 29TH JANUARY 2008 IN THE
CHIEF MAGISTRATE'S COURT AT THIKA)**

JUDGMENT

The Appellant was charged with 5 offences of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the first offence were that on the the 10th day of October, 2004 at Murera Village in Thika District of the Central Province, jointly with others not before court being armed with dangerous weapons namely iron bars, axes and pangas robbed Patrick Kairu Kahengeri of unknown amount of money and at or immediately before or immediately after the time of such robbery murdered the said Patrick Kairu Kahengeri.

The particulars of the second offence were that on the 10th day of October, 2004 at Murera Village in being armed with dangerous weapons namely iron bars, axes and pangas robbed Ruth Njeri Kairu of cash Kshs.350/= and at or immediately before of immediately after the time of such robbery used actual violence to the said Ruth Njeri Kairu.

The particulars of the third offence were that on the 10th day of October, 2004, at Murera Village in Thika District of the Central Province, jointly with others not before court being armed with dangerous weapons namely iron bars, axes and pangas robbed Patricia Njeri Kairu of unknown amount of money and at or immediately before or immediately after the time of such robbery used actual violence to the said Patrick Njeri Kairu.

The fourth offence's particulars were that on the 10th Day of October, 2004 at Murera Village in Thika District of the Central Province, jointly with others not before court being armed with dangerous weapons namely iron bars, axes and pangas robbed Josephine Wanjiru Mukora of cash Kshs.10,000/= and a mobile phone make Siemens A 35 all to the total value of Kshs.15,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Josephine Wanjiru Mukora.

Lastly, the particulars of the fifth offence were that on the 10th day of October, 2004 at Murera Village in Thika District of the Central Province, jointly with others not before court being armed with dangerous weapons namely iron bars, axes, and pangas robbed Geoffrey Macharia Mwaura of cash Kshs.12,600/=, one sagem 3020 mobile phone, one Siemens A 35 mobile phone and assorted shop goods all to the total

value of Kshs.26,425/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Geoffrey Macharia Mwaura.

The Appellant were arraigned in the trial court on 26th October 2004 and he pleaded not guilty to all the charges against them. He was tried, convicted of two of the offences of robbery with violence and sentenced to death for all the offences. The Appellant being aggrieved by the judgment of the trial magistrate appealed both his conviction and sentence. His main grounds of appeal were that he was not positively identified, and that evidence was not sufficient to convict him of the charge of robbery with violence.

Mr Karuri for the State opposed the appeal and submitted that the complainant in the first offence the Appellant was charged with was killed during the robbery and was staying in the same house with the complainants in the second to fourth offences. He stated that the death of the complainant was confirmed by PW 10.

Further, that PW1 who was one of the complainants stated that she knew the Appellant from before and was able to identify him. Mr. Karuri stated that here evidence was corroborated by that of PW2, PW3 and PW4, who saw the Appellant and that there was electricity light that was on at the time.

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called nine witnesses. PW1 was Patricia Njeri Kairu , PW2 was Tabitha angari Kairu and PW3 was Ruth Njeri Kairu. They were all students as the time and resided with their aunt and grandmother, who were PW4 and PW5. They all testified that on10/01/2004 they were asleep when they heard noises outside their house asking their grandfather to open the door.

PW1 stated that she peeped outside and that she was able to see one of the attackers whom she knew before because he used to undertake bodaboda taxi business. She testified that when they attackers entered her aunt's room as she saw him as the lights were on, and she identified him at the police station. She testified that they found her grandfather in the farm with a cut on his head and he later died in hospital.

PW2 and PW3 who were in the same room testified that when the attackers entered their room the lights were on and that they saw one of the attackers who PW3 described as short and brown, and PW2 stated that she had seen before as he came from nearby. They also identified him at the police station, and PW3 stated that she was robbed of Kshs 350 during the incident.

PW4 was Josephine Wanjiru was testified that at the time of the incident she was sleeping in the same room with her mother PW5 when the robbers attacked and demanded she opens the door. That she put on the lights and opened the door, and the attackers threw an iron bar in her direction which hit her on the leg. She stated that the iron bar was the one in court. She testified that she was able to see one of the attackers who was short and brown, and that she was robbed of 20,000/= and a phone which was an A35 Siemens.

She also testified that the attackers asked her to take them to the other rooms, and left when the heard the police coming. She stated that they later found her father in hurt on the head and they took him to hospital where he died. PW5 was Patricia Njeri Kairu the mother of PW4 and wife to the deceased complainant, who gave a similar account of events as that of PW4 and stated that she was robbed of Kshs 2000/= during the incident.

PW6 Geoffrey Macharia Mwaura testified that he was at his shop on 10/10/2004 when the attackers came and asked him to open, and that the attackers had axes and iron bars. They robbed him of Kshs 12600/=, two phones, juices, cigarettes saps and cooking fat. He said he was later called by the police and identified the goods robbed from him at the police station.

PW7 was Sergeant Betty Cheruiyot who was based at Ruiru Police Station and who was the investigating officer. She stated that on 9/10/2008 they received a report from a lady that she was attacked on her way

home, and that on the way to her home at 2.am they found some items on the road namely iron bars, cooking fat juice, batteries and a torch. They were people outside some shops who told them that there had been a robbery and they took the items to the police station. She testified that PW6 later came to the police station and identified them as items that had been stolen from his shop, and that P1 and PW2 informed her that they were able to identify one of the attackers and give his description and he was subsequently arrested. PW7 produced the items they recovered as exhibits in court.

PW8 was P.C Robert Muriithi who testified that on 12/10/2004 a complainant in the case took them to Kwa Kahiru shopping centre and pointed out one of the people who had robbed him at a video showing shop. He stated that they arrested the person who was the Appellant, and searched his house and later took him to the police station. PW9, cip Nelson Taiti on his part testified that he was OCS at Kabati Police station and that he conducted an identification parade on 15/10/2004 where the Appellant was identified by PW1, PW2, and PW3.

The last witness was PW10, Doctor Peter Muruiki Ndegwa who testified that she works with Dr Jane Wasike, a pathologist with the Ministry of Health and knows her handwriting and signature. He produced as an exhibit a post-mortem report by Dr. Wasike showing that the cause of death of Patrick Kairu Kahengeri, the deceased complainant, was a fatal head injury due to a blunt object.

After the close of the prosecution case, the trial magistrate found that a *prima facie* case had been established against the accused and he was placed on his defence. The Appellant gave unsworn evidence and did not call any witnesses. He stated that he lives in Ruiru and was a bodaboda cyclist, and that on 12/10/2004 he was in a video shop when he was arrested. The police took him to his house and searched it but did not recover anything, and that on 15/10/2004 three women identified him at an identification parade at the Ruiru Police station.

We have considered the arguments made by the Appellant and the State, and we find that the issue for determination by the court is whether there was positive identification of the Appellant and whether the ingredients of a charge of robbery with violence were proved. The Appellant in this respect argued that the witnesses claimed to know him prior to the robbery and recognized him, but that none of them described him to the police in their first reports, and that their identification was therefore an afterthought.

Further, that there were inconsistencies and contradictions in their evidence, and the circumstances of his identification were of shock and fear and there was no clear evidence of the intensity of the light available. The Appellant submitted that for this reason the prosecution did not prove their case against him beyond reasonable doubt.

On the first issue of identification, the law is as stated in Mwaura v Republic [1987] KLR 645, in which the Court of Appeal held, *inter alia*, that:

“In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light”.

In addition it has been stated by the Court of Appeal in Anjononi and Others vs Republic, (1976-1980) KLR 1566 that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

PW1 and PW2 testified that they knew the Appellant before the robbery and were able to recognize him during the robbery. The Appellant himself stated in his evidence that he was a bodaboda cyclist which confirms the evidence by PW1 that she knew him because he operated a bodaboda taxi. The identification parade was therefore superfluous in the case of PW1 and PW2 as the Appellant had been recognized at the time of the robbery.

In addition the Appellant was recognised by two witnesses, and described and identified by one more

witness being PW3 and the conditions obtaining during the time of his identification were favourable, as there was electric light that was on in the rooms at the time of the robbery. From the evidence PW1, PW2 and PW3 they saw him as they observed the robbery from their rooms, and when he entered the rooms which had lights on. The witnesses were also consistent in their description of the Appellant as brown and short. It is thus our finding that there was a positive identification of the Appellant in the circumstances of this appeal.

On the second issue as to whether the prosecution proved the charges beyond reasonable doubt, the Appellant in this case were charged with and convicted of five counts of robbery with violence under section 296 (2) of the Penal Code which reads thus:

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”

We are guided by the decision in Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported) which sets out what constitutes robbery with violence under section 296(2) of the Penal Code as follows:

- 1. If the offender is armed with any dangerous or offensive weapon or instrument, or**
- 2. If he is in the company with one or more other person or persons, or**
- 3. If at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person.**

We are also alive to the requirement that proof of any one of the above ingredients of robbery with violence is enough to base a conviction on under section 296 (2) of the Penal Code as was held in Oluoch vs Republic, (1985) KLR 549.

In the present appeal we find that the prosecution brought evidence of all the ingredients of the offence. There was evidence of the weapons found at the scene that were used in the robbery, namely axes and iron bars. There was also evidence brought of the items that were stolen during the robbery, and those that were recovered. Lastly, evidence was brought of the death of one of the complainants arising from injuries he sustained during the robbery. We have also found that the Appellant was placed at the scene of the crime having been positively identified by the witnesses. The charges of robbery with violence against the Appellant were therefore proved beyond doubt in our opinion.

The particulars of the charge meet the criteria set out above as they specify that the Appellant was jointly with others who were not before the court at the time of committing the robbery. PW1 and PW2 testified that there were three persons who robbed them, including the Appellant, whom they managed to restrain. In addition they were able to take him to the police station and he was arrested by PW3. The fact of the robbery was collaborated by PW4.

We accordingly uphold the conviction of the Appellant for the five charges of robbery with violence contrary to Section 296(2) of the Penal Code, and the sentences for these convictions are found to be legal. We however order that the sentences for the second to fifth offences of robbery with violence be held in abeyance.

It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF NOVEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE