



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**HCCRA NO. 25 OF 2019**

**ELIZABETH OTIENO AYUMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[Being an appeal against the conviction and sentence of the Senior Principal Magistrate's Court**

**at Maseno (Hon. R.S. Kipngeno SRM) dated the 9<sup>th</sup> October 2017**

**in Maseno SPMCCRC No. 138 of 2016]**

**JUDGMENT**

On 9<sup>th</sup> October 2017 the learned trial magistrate convicted the Appellant, **ELIZABETH OTIENO AYUMA**, for the offence of **Robbery with Violence** Contrary to **Section 296 (2)** of the **Penal Code**.

1. The Appellant was then sentenced to suffer death as by law prescribed.
2. In her appeal, the Appellant stated that the circumstances obtaining at the scene of crime could not have amounted to an offence of robbery with violence.
3. She is of the firm conviction that the prosecution failed to prove the ingredients of the offence in issue.
4. The Appellant asserted that her conviction was a set-up, a conspiracy and unsubstantiated revelations of cooked-up circumstances.
5. Finally, the Appellant argued that the death sentence was very arbitrary, inhumane and a degrading punishment which was against the principles of international laws, and also against the dictates of the Constitution of Kenya.
6. When canvassing her appeal, the Appellant emphasized that an essential ingredient which must be proved when a person is charged with the offence of robbery with violence, is the element of stealing.
7. In this case, the Appellant said that the Complainant failed to provide proof of ownership of the items which were allegedly stolen.
8. The Appellant further submitted that the prosecution did not even prove that the items which had allegedly been stolen, ever existed or that they were stolen.
9. It was the Appellant's case that the whole charge was founded upon the sour relationship between her and the Complainant. In the light of the said relationship, the Appellant submitted that the Complainant's statement was rendered nugatory, especially considering that the statement was not corroborated by the other prosecution witnesses.
10. An interesting feature of this case is that the Appellant was the Complainant's wife.
11. In the circumstances, as husbands and their wives share property in their matrimonial home, neither can be accused of stealing any such shared items, said the Appellant.

12. The Appellant pointed out that prior to being charged in the current case, she had lodged a complaint of assault, against her husband.
13. Even though the complaint had been withdrawn, following negotiations within the family, the husband had allegedly threatened to have the Appellant locked up.
14. The learned trial magistrate is said to have convicted the Appellant on the strength of **Section 20** of the **Penal Code**, yet it had not been proved that the Appellant had either aided or abetted the commission of the alleged offence, or that she had procured any other person to commit the offence.
15. Her reason for so saying is that although the Complainant had testified that he had heard some unknown persons telling the Appellant that;  
  
    **“Mama tumemaliza kazi”;**  
  
    **PW2**, who was in the same house during the attack, did not corroborate the Complainant’s evidence.
16. As far as the Appellant was concerned, **PW2** was at *“a great position to hear the conversations.”*
17. In the light of the sour relationship between the Appellant and the Complainant, this court was invited to hold that the trial court should not have relied solely on the evidence given by the Complainant.
18. The reason for that contention is that the credibility of the Complainant was highly questionable and was thus in dire need of corroboration.
19. The Appellant submitted that the evidence of a single witness should be corroborated by the evidence of an Independent Witness. If there was no such corroboration, the Appellant said that that would leave several gaps in the prosecution case, leading to an acquittal.
20. Another submission of the Appellant was that a conviction should be based on the strength of the prosecution case and not on the weakness of the defence put forward by the accused.
21. Noting that **PW2** had alleged that she had identified one of the assailants who goes by the name *“Boss”*, that person was never produced in court either as a witness or as a co-accused to the Appellant.
22. I was told that the failure to call all the relevant and/or independent witnesses, to corroborate the testimony of **PW1** and **PW2** had led to a miscarriage of justice.
23. That is particularly so in this case as the Appellant submitted that the case put forward by the prosecution was barely adequate.
24. In the result, the Appellant urged the Court to quash the conviction.
25. However, if the court did not quash the conviction, the Appellant requested the court to set aside the Death Sentence, and to proceed to hand down a more appropriate sentence.
26. In answer to the appeal, the Respondent submitted that all the ingredients of the offence of robbery with violence were proved.
27. The Respondent also pointed out that there was ample corroboration of the Complainant’s evidence, through the testimonies of **PW2**, **PW3**, **PW4** and **PW5**.
28. According to the Respondent, the appeal lacked merit.
29. Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions. During the said exercise of re-evaluation I will bear in mind the fact that I did not have the benefit of observing the witnesses when they testified.
30. I have carefully perused the record of the proceedings.
31. Nowhere in the said proceedings was there any suggestion made by the Appellant, that her relationship with the Complainant was sour.
32. She did not raise such an issue either during the cross-examination of the Complainant or of her daughter (**PW2**), or even when she gave her defence.
33. If anything, when the appellant gave her unsworn testimony she appeared to paint a picture of a caring wife. I say so because she said that she cooked and warmed water for her husband, the Complainant.
34. **PW1** testified that on the material day he arrived at his house at about 9pm.
35. The house had one sitting room and two other rooms which were used as bedrooms.

36. **PW1** slept in one of the bedrooms, whilst the Appellant slept in the other bedroom together with their 3 children.
37. After having a bath, **PW1** retired to his bedroom. He then heard the door being opened.
38. Upon **PW1** enquiring who was opening the door, the Appellant answered that she was taking the children for a short-call outside.
39. Immediately thereafter, some people came into the house and headed straight to **PW1**'s bedroom. He had locked the door with a latch, but the people broke down the wooden door.
40. They robbed him of his money, being Kshs 3,000/= from the drawer on his bed, and another Kshs 500/= from his trouser pocket.
41. The attackers also took away the Complainant's Techno mobile phone.
42. The other things they took included **PW1**'s **ATM PIN** Number; Power Inverter and Power Control.
43. Whilst robbing him, the assailants cut him on the head and on the cheek, using a panga.
44. When he fell down, he pretended to be dead, by staying very still.
45. At that point, the assailants went into the sitting room and they said;
- “Mama, tumemaliza kazi.”**
46. When the Appellant came out to the sitting room, the assailants repeated the statement;
- “Tumemaliza kazi.”**
47. At that stage, the Appellant took a torch and went to where **PW1** was lying down.
48. **PW1** testified that the Appellant checked his head, to ascertain if he was dead.
49. When the Appellant appeared satisfied that the Complainant was dead, she continued talking to the assailants.
50. There was a quarrel between them, about having killed the Complainant for very little money.
51. **PW1** said that the Appellant reassured the assailants that after the Complainant's funeral, she would pay the assailants, as all the assets including the livestock would belong to her.
52. The Appellant then escorted the assailants out of the house.
53. As they walked away, **PW1** managed to sneak out of the house, and hid in the cow-shed.
54. After a little while the assailants returned and found that **PW1** was not where they had left him.
55. The Appellant quarreled with the assailants because it was clear that they had not killed **PW1**.
56. Thereafter, **PW1** managed to get assistance from his brothers who took him to the hospital.
57. **PW2, MIRIAM**, was 8 years old when she testified at the trial.
58. She is the daughter to **PW1** and the Appellant.
59. On the material day, **PW2** was inside their house, together with the Appellant and **PW2**'s siblings.
60. After **PW1** arrived and entered his bedroom, the Appellant whispered to some people who came into the house and went under the bed.
61. The said people then kicked down the door to **PW1**'s bedroom.
62. When in the Complainant's bedroom, the people “cut” him.
63. **PW2** testified that she and the Appellant did not scream because the Appellant had told the children that if they screamed, the assailants would also “cut” them.
64. During that incident, **PW2** was awake, seated on her bed.

65. **PW2** corroborated the evidence of the Complainant, that the Appellant escorted the assailants outside the house.

66. When the Appellant returned to the house and found **PW1** gone, she began to clean the house. She used a piece of cloth to clean the house, as it was drenched in blood.

67. Again, that piece of evidence corroborated the testimony of the Complainant, who had said that he lost a lot of blood.

68. During cross-examination, **PW2** said that she recognized one of the assailants as a person called “Boss”.

69. **PW3** is a brother to the Complainant.

70. He testified that when **PW1** sought help from him, **PW1** had panga cuts to the head, face and the left hand. He also said that **PW1** arrived at his (**PW3**'s) house, literally naked.

71. **PW3** took the Complainant to Kombewa District Hospital, where first-aid was administered on him.

72. The Complainant was then referred to the Jaramogi Oginga Odinga Teaching & Referral Hospital, where he was admitted.

73. **PW4, APC VICTOR MOGERE**, was in the company of the area Assistant Chief, when they arrested the Appellant at her house.

74. When **PW4** arrived at the house, the Appellant told them that she had last seen her husband at 2pm on that day.

75. Obviously, if, as both **PW1** and **PW2** said, that the Appellant was at home when the Complainant got back home at 9pm, it was an untruth for the Appellant to say that she last saw **PW1** at 2pm.

76. **PW4** also said that there were blood stains on the beddings and on the floor.

77. According to **PW4**, there had been an attempt to mop-up the blood from the floor, but there was still the smell of fresh blood in the air.

78. **PW5, APC VICTOR OMONDI**, was together with **PW4** when they arrested the Appellant.

79. He also confirmed that there was clear evidence that the floor of the sitting-room had been made wet. Nonetheless, there was still blood stains on the bed, walls and gunny bags which contained farm produce.

80. I find that the testimony of both **PW4** and **PW5** corroborated the testimony of **PW2** who had said that she saw the Appellant cleaning up the blood from the floor.

81. **PW6, PC JOSEPH EMURON**, was the Investigating Officer.

82. He produced, inter, alia, a green tunic which had been used to mop up the house.

83. He testified that his investigations revealed that the Appellant never screamed when **PW1** was being attacked.

84. He also testified that the Appellant destroyed some evidence by mopping up the blood from the house.

85. When the Appellant was put to her defence, she said she had been woken up from her sleep by the screams of **PW1**.

86. The Appellant said that she joined in the screaming.

87. She denied any knowledge of the offence that she had been charged with.

88. At this stage, I do concur with the appellant, that an accused person should not be convicted on the basis of his or her weak defence. A conviction should only be based upon the strength of the case proved by the prosecution.

89. In this case the evidence proved that the Complainant was slashed with a panga, and left for dead.

90. He was assaulted whilst being robbed by 3 people, who had gained entry into his house.

91. As **PW2** said, it is the Appellant who facilitated the entry of the assailants into the house.

92. The Appellant did not lay claim to either the money or the phone which the Complainant said belonged to him, or to the Power Inverter and Power Control.

93. I consider it a complete afterthought for the Appellant to now submit that by virtue of her being the wife of the Complainant, she shared in the ownership of the items allegedly stolen.

94. In any event, the Complainant expressly said that the money from the drawer and from his trouser pocket together with the Techno phone was his. I find that the Complainant did not have any obligation to produce any documents or any other evidence to demonstrate that the money belonged to him.

95. As the money and the other items were taken away by the assailants, and were never recovered, the Complainant was permanently deprived of them.

96. As the assailants took away the money and the other items unlawfully from the Complainant, I find that the prosecution proved beyond any reasonable doubt that the assailants had stolen the said items.

97. I also find that it is the Appellant who procured the assailants and who also facilitated their entry into the Complainant's house.

98. The assailants were definitely not strangers to the Appellant.

99. Accordingly, I find that the learned trial magistrate cannot be faulted for holding that the Appellant was a Principal Offender within the meaning set out in **Section 20 (1)** of the **Penal Code**.

100. She enabled and aided the assailants to commit the offence.

101. I find no merit in the appeal, and do therefore confirm the conviction.

102. I also note that the trial court did give to the Appellant an opportunity for mitigation.

103. In other words, the sentence was not just handed down without having accorded the Appellant an opportunity for mitigation.

104. In any event, I find that the circumstances under which the offence was committed was so callous that the Appellant was deserving the sentence which the learned trial magistrate handed down.

105. In the result I also uphold the sentence of the death penalty.

**DATED, SIGNED and DELIVERED at KISUMU**

This **26<sup>th</sup>** day of **September** 2019

**FRED A. OCHIENG**

**JUDGE**