



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 39 OF 2014
PAUL MUIGAI KING'ORA.....APPELLANT
VERSUS
REPUBLIC.....PROSECUTOR

(Appeal from the Judgment of the Chief Magistrate's Court at Naivasha S. M Githinji –Chief Magistrate delivered on the 16th January 2014 in CMCR Case No. 599 of 2012)

JUDGMENT

The appellant **PAUL MUIGAI KING'ORA** has filed this appeal challenging his conviction and sentence by the learned Chief Magistrate sitting at Naivasha Law Courts.

The appellant was arraigned in court on 28/2/2012 facing a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were that

“On the 27th day of February 2012 at Site Estate in Naivasha Municipality within Nakuru County, jointly with another not before court robbed RICHARD MUTISO WAMBUA of one mobile phone make E2, National Identity Card, Electors Card, Tax Pin photocopy, old mutual saving card, three pay slips, contract pass card, passport and cash Ksh 1,000/= all valued at Ksh 7,000/= and at or immediately after the time of such robbery used actual violence to the said RICHARD MUTISO WAMBUA”

The appellant pleaded ‘**Not Guilty**’ to the charge and his trial commenced on 23/7/2012. The prosecution led by **CHIEF INSPECTOR MUIA** called three (3) witnesses in support of their case.

The complainant ‘**Richard Mutiso Wambua**’ testified as **PW1**. He told the court that on 27/2/2012 at about 8.00pm he left Nairobi for Naivasha. The vehicle he was travelling in had a puncture on the way and as a result they arrived in Naivasha at 10.00pm. The complainant then went to get a *boda boda* to take him home. He went to Carnivore Stage where several *boda boda* operators were parked. **PW1** selected one rider (the appellant) and they agreed on a fare of Ksh 100/=. The complainant gave out a Ksh 200 note and was told to wait for his change.

They set off on the journey to Full Gospel Church where the complainant was to alight. The *boda boda* rider also carried a female passenger whom he claimed was going in the same direction. The lady was a stranger to the complainant.

Near the District Hospital the lady alighted and went to gate of her plot. She then returned saying that she had brought with her the wrong keys and she asked to be taken back to town (the stage) to collect the correct keys. The lady and the appellant conversed in Kikuyu language which the complainant did not understand well. They all set off again and returned to Carnivore Stage. The lady and the appellant went inside for about ten (10) minutes then returned. Again all three boarded the motor bike and returned to the lady's plot.

Upon arrival at the plot both appellant and the lady alighted from the bike leaving the complainant alone. They went to the gate but did not open it. The appellant then returned to where the complainant was and began to question him about the contents of his bag. Suddenly the appellant held the complainant in the style commonly known in street parlance as '*Kupiga ngeta*' and felled him to the ground.

As the two struggled the lady came and took the complainant's Nokia phone. The appellant took his wallet containing personal documents and cash Ksh 1,000/=. During the struggle the motor bike fell onto the complainant's leg and injured him. The appellant and the lady then jumped back onto the motor bike and rode away leaving the complainant alone at the scene.

The complainant then walked back to the *boda boda* stage with his leg injured and bleeding. One of the other *boda boda* riders took him to hospital. They promised to trace the appellant. Complainant reported the matter at Railways Police Station and went to Naivasha District Hospital where he was treated.

The next day the complainant received information that his assailant had been apprehended. He went to Kabati area where he found the appellant in handcuffs having been arrested by police. The complainant positively identified him. The appellant then led them to a place near his house and under a stone the complainant's personal documents were recovered. The mobile phone and cash were never recovered. The appellant was taken to the police station and was later charged with the offence of Robbery with Violence.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied totally any involvement in the Robbery incident.

On 16/11/2014 the learned trial magistrate delivered his judgment in which he convicted the appellant of the Offence of Robbery with Violence and thereafter sentenced him to life imprisonment. Being aggrieved the appellant filed this present appeal.

The accused who was unrepresented during the hearing of the appeal opted to rely on his written submissions which had earlier been filed in court. Ms OUNDO learned State Counsel made oral submissions opposing the appeal.

This being a first appeal, this court is obliged to re-examine and re-evaluate the prosecution case and draw its own conclusions on the same (see AJODE Vs REPUBLIC [2004] 2 KLR 81) likewise in the case of MWANGI Vs REPUBLIC [2004] 2 KLR 28 the Court of Appeal held

“1. An Appellant on the first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate courts own decision on the evidence.

2. The first appellate court must itself weigh the conflicting evidence and draw its own conclusions”

The first issue this court must determine is whether the incident as described by the complainant amounted to a Robbery with Violence. The Court of Appeal in the case of HASSAN MOHAMMED NAMWIBA Vs REPUBLIC [2014] eKLR defined the Offence of Robbery with Violence as follows-

“There are three ingredients forming the offence of robbery with violence contrary to Section

296(2) of the Penal Code

These are:

- (i) That the offender is armed with a dangerous or offensive weapon or instrument, or**
- (ii) That the offender is in the company of one or more persons**
- (iii) That at the time of robbery he or they visit violence on any person**

There is no duty on the part of the prosecution to prove beyond reasonable doubt all the three ingredients as the offence is proved to the required standard if one of those ingredients of the Offence of Robbery with Violence is proved”

In this case although the complainant made no mention of the appellant or the lady he was with being armed, he did state that the appellant grabbed him in a choke hold commonly referred to as **‘Kupiga ngeta’** and felled him to the ground. In the course of the struggle the motor bike fell on the complainant’s leg and injured him for which he had to seek treatment.

Secondly the appellant did not act alone. He was clearly acting together with the **‘lady passenger’** who was probably a decoy to give the complainant a false sense of security. The complainant told the court that the appellant and the lady were conversing in Kikuyu vernacular which he did not understand. Further when the lady went into the Carnivore bar to collect keys she had supposedly **‘forgotten’** the appellant went with her and they remained there for about ten (10) minutes.

Finally on this point this lady actively participated in the robbery in that when the appellant felled the complainant to the ground the lady rushed and took his mobile phone. The fact that the appellant and this lady rode off together leaving the complainant alone at the scene is clear proof that they were in **‘cahoots’**. I find that at least two of the ingredients of robbery with violence have been proved. I therefore find that this incident did amount to a robbery with violence as envisaged by Section 296(2) of the Penal Code.

The next issue is that of identification. Has there been a clear identification of the appellant as one of the perpetrators of the offence.

The complainant told the court that this incident occurred after 10.00pm. It was night time and therefore have been dark. However it must be noted that the complainant first met the appellant at the **‘Carnivore Stage’** where he had gone to hire a *boda boda*. The complainant in his evidence at Page 7 line 21 stated

“There were security lights in a line of Bars at the place.....”

Therefore at the stage where he first met the appellant there were security lights which undoubtedly enabled the complainant to see the appellant well. The two spoke and negotiated the fare. The complainant even handed to the appellant a Ksh 200 note.

It is also important to note that the complainant spent a fair amount of time in the company of the appellant. They rode together to the scene, rode back to the stage (where there were security lights) and made their way a second time to the scene. All this time the complainant was in close proximity with the appellant and had ample time and opportunity to see the appellant well.

The appellant was apprehended the following day with the help of other *boda boda* riders who identified him as the one amongst their group who had ferried the complainant. **PW2 EVANS MUNGAI NJOROGE** was one of the *boda boda* riders. He confirmed having been informed by the complainant of the incident. **PW2** and others traced the motor cycle and reported to their chairman. Together with police they followed the motor bike to where it was parked and arrested appellant from that house.

The complainant did positively identify the appellant after his arrest as the man whom he had hired to ferry him home.

Aside from this evidence of identification there also exists evidence of recovery **PW3 PC NICHOLAS BARASA** was one of the officers who arrested the appellants. He states that after arrest the appellant led them to a spot near the toilet. The appellant lifted up a stone and beneath that stone they recovered the complainant's identity card, pay slips, bank cards, passport photographs and other documents. All these documents were produced as exhibits in the case **P exb 1 to P exb 7**. The complainant was able to identify the documents as his indeed most of the documents bore the name of the complainant. The fact that the appellant knew exactly where the complainant's stolen documents had been hidden clearly implicates him in the theft. Moreover this recovery was made barely 24 hours after the robbery occurred. The only possible way the appellant could have had knowledge of the presence of the complainant's documents under that stone was because he was a party to the robbery and the hiding of the documents under a stone next to his house. The circumstantial evidence points squarely at the appellant.

The appellant gave an unsworn defence which basically amounted to a bare denial. He denied having robbed the complainant and denied having led the police to recovery of the stolen items. There would be no reason why the complainant, **PW2** and **PW3**, neither of who knew each other before would gang up to implicate the appellant, also a person whom they did not know before. I find no merit in the accused's defence and hereby dismiss the same.

Finally the appellant raised as a ground of appeal the fact that he was not permitted by the trial court to recall **PW1** and **PW2** after the first OB Report was availed. The record indicates that on 31/7/2013 the appellant applied to have the case heard afresh on the basis that he had just been furnished with the first OB report. The learned trial magistrate declines to allow a *denovo* hearing but allowed for **PW3** (the arresting officer to be called for cross-examination). Neither **PW1** nor **PW2** both of whom were civilian witnesses had any input in preparing the OB report. The relevant witness would have been **PW3** the arresting officer and the appellant was able to cross-examine him after receiving the first OB report. I find no merit in this ground of the appeal and the same is dismissed.

Based on the foregoing I find that the appellant's conviction was sound and I do confirm that conviction. The death sentence being the mandatory sentence for this offence was proper and I do uphold that sentence. The upshot is that this appeal fails in its entirety and is hereby dismissed.

Dated and delivered in Nakuru this 24th day of April, 2017.

Appellant in person

Mr. Motende for State

Maureen A. Odero

Judge