



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO.155 OF 2012**

*(An appeal from original conviction and sentence of Ogembo SPM'S C Criminal Case No. 1236 of 2011 by Hon. E.N. TANUI Senior Resident Magistrate dated June, 2012)*

**JACKSON ONDIEKI KURENDI .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant herein, **JACKSON ONDIEKI KURENDI**, was charged with one count of Robbery with violence contrary to **Section 296 (2) of the Penal Code**. Particulars of the offence were that on 7<sup>th</sup> December 2011 at Bomogachu village in Nyamache District within Kisii County while armed with an offensive weapon namely stone, robbed Florence Nyanchama of a handbag valued at Kshs. 200/=, Samsung Mobile phone make GTE1087T valued at Kshs. 2000/=, a flash light torch valued at Kshs. 150/=, cash money Kshs. 4,300/= all of total value of Kshs. 6,650/= and immediately before the time of such robbery wounded the said FLORENCE NYANCHAMA NYABUTO.

2. A trial ensued after the appellant pleaded not guilty to the charge and at the close of the trial, in which the prosecution called a total of 6 witnesses, the appellant was found guilty of the said charge of robbery with violence, he was consequently convicted and sentenced to suffer death.

3. Aggrieved by both the conviction and sentence, the appellant filed a petition of appeal to this court on 11<sup>th</sup> July 2012 and has set down the following grounds of appeal:

**1. That, the Learned Senior Resident Magistrate erred in law and fact by convicting the appellant when the prosecution had not proved its case beyond reasonable doubt.**

**2. That, the Learned Senior Resident Magistrate erred in law and fact by convicting and sentencing the Appellant when it had not been proved that he actually committed the offence of capital robbery.**

**3. That, the Learned Senior Resident Magistrate erred in Law and fact by convicting the Appellant with the offence charged when the charge was a defective one.**

**4. That, the Learned Senior Resident Magistrate erred in law and fact by convicting the appellant with capital robbery when the evidence on record did not disclose commission of the said offence.**

**5. That, the Learned Senior resident Magistrate did not properly analyze and evaluate evidence as presented to him both from the prosecution and the defence side.**

**6. That, the sentence imposed by the Learned Resident Magistrate is harsh and excessive in the circumstances.**

4. When the appeal came up for hearing before me 30<sup>th</sup> March 2017, the appellant informed the court that he would rely entirely on the written submissions he had filed in court on 2<sup>nd</sup> March 2017. I have perused the said written submissions and noted that the appellant expounds the grounds he raised in the petition of appeal.

5. The appellant argues that the complainant's testimony was contradictory because while on one hand she testified that she was robbed by an unknown person on 8<sup>th</sup> December 2011 while she was sleeping at her home, she at the same time said that she heard one person called Otoy Kurendi asking her to open the door so that she could receive her property which had been taken away from her while she was on her way home. The appellant took issue with the fact that the complainant did not mention his name as the robber in her first report to the police.

6. The appellant submitted that his alibi evidence was watertight and was not displaced by the prosecution who only presented the uncorroborated evidence of the complainant.

7. The appellant contended that the prosecution's case had several gaps and was not proved beyond reasonable doubt. He contended that the prosecution's case was wanting for failure to call known witnesses who were said to have been with the complainant on the day she claimed that she was robbed.

8. The appellant attributed the charge against him to previous disagreements with the complainant and stated that the complainant was using the criminal case to settle old scores.

9. Miss Ouko for the state submitted that the prosecution's case was not contradictory as the appellant was well known to the complainant and that PW2 found the complainant's bag in the maize plantation after she had been robbed. She added that PW3 interrogated the appellant who confessed that he had taken the bag while PW4 confirmed that the complainant had been assaulted.

Miss Ouko further submitted that after the robbery, the appellant went to the complainant home where he introduced himself, apologized to the complainant and promised to bring back her stolen items which the appellant then handed over to PW6. PW6 said he knew the appellant because they had worked together. According to the state, the appellant's evidence was corroborated by the testimony of PW6. Miss Ouko sought the dismissal of the appeal.

10. As the first appellate court, my duty is to re-evaluate the evidence tendered before the trial court afresh while bearing in mind the fact that I neither heard nor saw the witnesses testify.

11. The prosecution presented the evidence of 6 witnesses as follows:

PW1, FLORENCE NYANCHAMA NYABUTO was on her way from Kisii where she had gone shopping when she met a neighbor called Nyaboke who was also heading home and shortly thereafter, she parted ways with Nyaboke who proceeded to her home in the opposite direction and shortly thereafter she saw a man she described as a "young man" she had seen earlier, but that the man passed her and did not talk to her as he was talking on phone. Later, she met the said young man again still talking on phone by the road side but that no sooner had she passed him and moved 5 steps than she heard something hit her on the head from behind whereupon she fell down and the luggage she was carrying fell down and the items she had bought were strewn all over the place. While she was still lying down the young man came to her and took her bag while asking her who had hit her so hard. The bag had Kshs. 4,300/= in cash and a Samsung phone model GTE 107T. She added that the person who took her bag ran into the maize plantation whereupon she raised an alarm and one Job Nyamongo (PW2) came to her rescue. PW2 tried to give chase to the assailant who PW1 said had escaped and entered the maize farm that was nearby but

he was unable to find the robber. PW2 however managed to recover the complainant's bag which had been dropped in the maize farm which bag the complainant identified as hers but it was without the money, the torch and the phone.

12. On the same night, while at her home at about 11 p.m., PW1 heard her a knock on her door and on asking who it was, the person knocking said he was "Otoyo Kurendi". The person then asked for forgiveness and said that he had brought the phone and torch which he had earlier snatched from her. The complainant feared opening the door at that time of the night but her nephew Dadius Marita (PW6) who was sleeping in the kitchen heard their conversation came out and was given the complainant's mobile phone and torch by the person who identified himself as "Otoyo Kurendi".

13. On the following day 8<sup>th</sup> December 2011, the complainant heard someone talking outside and on opening the door she saw the same person she had seen the previous day on her way home and she alerted the village elder and her relatives who came. She stated that the young man, who was the accused in the dock then sought for her forgiveness and returned to her Kshs. 200/= which she identified in court as MFIP 5 (a) and 5 (b). She stated that members of the public wanted to lynch the appellant but the village elder escorted him to the area chief where the appellant also asked for forgiveness. PW1 was treated at Nyamache District Hospital and later reported the case to Nyangusu Police Station where she handed over the bag, torch, phone, Kshs. 200/= and the stone that was allegedly used to assault her. She was then issued with a P3 form which was filled and produced as an exhibit.

14. PW3, JOSEPH OBWOGI was the assistant chief of Kiobegi Sub-location who on 8<sup>th</sup> December 2011 heard screams from members of the public and on going to the scene found the appellant on the verge of being lynched on allegations of robbery. He then escorted the appellant to Nyangusu police station after recovering exhibits comprising a torch, bag, stone, mobile phone and 2 one hundred shilling notes from the complainant.

15. PW4, JOSEPH MOKUA NYANGAU was the clinical officer who on 8<sup>th</sup> December 2011 treated the complainant after her assault on 7<sup>th</sup> December 2011. He stated that the complainant had a swelling on the neck and head. He produced the P3 form and treatment notes as exhibits 6 (a) and (b) respectively.

16. PW5 PC JOEL MACHARIA was the investigating officer who rearrested the appellant after he was taken to Nyangusu police station by PW3. He produced the stone, handbag, torch, mobile phone and money (200/=) as exhibits in court.

17. PW6 DADIUS MARITA was on 7<sup>th</sup> December 2011 asleep in her aunt's (PW1) kitchen when at about 11pm a person who identified himself as Otoyo Kurendi knocked on his door and handed over to him a mobile phone and torch belonging to PW1. He said he was able to identify "Otoyo Kurendi" as the appellant as there was moonlight and that he knew him as they had once been engaged in making bricks together.

18. After the close of the prosecution's case, the trial magistrate found that a prima facie case had been established against the appellant who was then put on his defence.

19. In his unsworn evidence before the trial court, the appellant stated that on 8<sup>th</sup> December 2011, he went to the home of PW6 upon receiving information that one of the children of PW6 was unwell and on reaching the home of PW6, he found many people sitting in his house including the complainant and no sooner had he greeted them than they pounced on him and tied him with ropes over claims that he had robbed PW1. He denied having robbed PW1 and the people gathered at the home of PW1 started beating him.

20. He stated that he had suffered a lot at the hands of the family of PW1 who had conspired to kill his brother and in 1995 gave him fake money that led to his arrest, conviction and sentence for 3 years. He stated that the family of the complainant had chased him away and prevented him from building a house.

21. I have considered the arguments made by the appellant and the state. I find that there are 3 issues for determination in this appeal namely:

**a) Whether there was positive identification of the appellant.**

**b) Whether there was sufficient evidence to convict the appellant for the offence of robbery with violence.**

22. On the first issue of identification, I am aware of the danger of convicting an accused person based on the evidence of a single identifying witness made in difficult circumstances. In the instant case, the offence of robbery is reported to have taken place in broad daylight at about 1.10 p.m. while the complainant was walking towards her home from a shopping spree. The complainant's account of events that preceded her attack and subsequent robbery were as follows:

**“While walking I met the said young man again talking on the phone beside the road. I just passed him. I did not talk to him. I passed him and continued walking but before taking more than 5 steps I heard something hard which hit me on the head from behind. I fell down. The luggage on my head fell and poured all over on the road. While down, I saw the said young man, next to me. I asked him what he had done. He picked my bag while asking me who it was that hit me so hard. The bag had a Samsung phone model GTE 1087T, a touch and Kshs. 4300/= in cash.”**

23. The above extract of the complainant's testimony shows that she did not know or could not identify the appellant as the robber as she simply referred to him as “young man.” Clearly, the term “young man” cannot be deemed as sufficient or proper identification as it is clear that the complainant did not know her attacker either by name or by appearance prior to the robbery incident. It is instructive to note that even though the complainant testified that she had met the same “young man” a short moment before her attack while in the company of one Damaris and one Nyaboke, the said Damaris and Nyaboke were not called as witnesses to corroborate the complainant's testimony that the appellant was the same young man they had earlier met on the road on the day of the robbery.

24. The trial magistrate had the following to say in his judgment about the identification of the appellant by the complainant:

**“Shortly she saw the young man that she had seen earlier with Damaris approaching her. The said young man whom she identified as the accused person passed her while talking on phone. He walked ahead of her.”**

25. It is clear from the above extract of the judgment that even the trial court noted that one Damaris, had also seen the complainant's attacker and this reinforces my view that the said Damaris should have been called as a witness to corroborate the complainant's evidence bearing in mind the fact that this was a capital robbery case wherein the stakes, upon conviction, are higher as the offence carries a death sentence.

In the case of **Nzaro vs Republic (1970) KLR** it was held that an accused person should not be convicted in a criminal case on evidence of identification which could be mistaken. The court further stated that it must be satisfied that the identification relied upon is free from possibility of an error, and must warn itself against conviction on evidence of identification that the defence alleges is mistaken.

26. In **Bukenya vs Uganda (1972) EA 547**, the court of Appeal held that failure to call crucial witnesses by the prosecution entitles the court to make an adverse conclusion against the prosecution case and acquit the accused person.

27. In the instant case, I find that not only did the prosecution fail to call the said Damaris to assist in identifying the appellant in court by placing him at the scene of the robbery but the prosecution also failed to call known witnesses who were allegedly present when the appellant “confessed” to the complainant over the robbery and asked her for forgiveness.

28. It was the complainant's evidence that on the next day after the robbery, the appellant came to her home ostensibly to apologize to her for having robbed her. The complainant testified as follows:

**"On 8/12/2011 at 6 a.m. I heard someone talking outside. I opened the door and the person I saw outside is the one I had seen previously with Damaris. He is the one who had snatched the bag from me. I told him to wait for me. I went to call the village elder called Ombati and other neighbours and relatives. We had a meeting. The young man who is he accused person on the dock asked for forgiveness. He said he had used the money and only remained with Kshs. 200/= The money is in two 200 notes."**

29. I note that apart from PW6, who was the complainant's nephew, neither the village elder nor other relatives and neighbours were called to testify on the claim that the appellant sought for forgiveness from the alleged robbery. Moreover, PW6 stated that he was able to identify the appellant on the night in question because there was moonlight without disclosing the intensity of the said moonlight. In line with the decision in **Bukenya vs Uganda (supra)** I cannot help but infer that the witnesses could have given adverse evidence to the prosecution case. No explanation was given for failure to call the said witnesses.

30. On the second issue as to whether there was sufficient evidence to convict the appellant, with the charge of robbery with violence, I am 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:

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

31. As was held in the case of **Oluoch vs Republic (1985) KLR 549**, proof of any of the above ingredients of robbery with violence is enough to be a basis of a conviction under **Section 296 (2) of the Penal Code**.

32. In the instant case, the complainant did not say that the "young man" whom she saw talking on phone just before she was attacked was armed with any weapon or was in company of any other person. In fact, the complainant did not say that it was the appellant who hit her on the back with a stone. In my humble view, it would appear that since the complainant alleged that she was hit with what she described was "something hard", she simply assumed that whatever hit her was a stone thrown by the "young man" because she had passed him on the road on her way home. I hasten to add that in a serious case such as the one facing the appellant, it was not safe to convict the appellant based on assumptions.

33. The prosecution was under a duty to prove the case against the appellant beyond reasonable doubt. In this case however, I find that there are certain aspects of the prosecution case that can arouse serious doubt in the mind of any reasonable person.

34. Apart from incidents such as failure to call crucial eye witnesses and the doubtful identification of the appellant by the complainant and her nephew PW6, I also find that the claim by the complainant and her nephew (PW6) that the appellant went to their home in the dead of the night at 11 p.m. on the night of the robbery ostensibly to apologize for the robbery to be stranger than fiction and to leave a lot to be desired.

35. I find it incredible that a violent robber, as the one described by the appellant, could have the guts to go to his victim's home in the night on a mission to apologize. It would appear that the complainant and her nephew (PW6) wanted the court to believe that the appellant had, in the twinkling of an eye and in the same style as that of Biblical Saul-turned- Paul, suddenly seen "light" at night on his way to "Damascus" and all over sudden become repentant. I find this portion of the complainant's story to be unconvincing and doubtful especially in light of the fact that independent witnesses who were reported to have

witnessed the appellant “apologizing” to the complainant on the morning after the mid night confession were not called to testify.

36. Having evaluated the evidence afresh, my finding is that the conviction was unsafe. The prosecution did not prove its case against the appellant beyond reasonable doubt. The appeal has merits and it is hereby allowed. Consequently, I quash the conviction, set aside the sentence and order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

**Dated, signed and delivered in open court this 25<sup>th</sup> day of May, 2017**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Otieno for the State
- Appellant in person
- Omwoyo court clerk