



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL APPEAL NO. 38 OF 2014**

(CONSOLIDATED WITH)

**MARGARET MUTHONI GICHIRA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(Being appeal from the conviction and sentence of the Principal Magistrate's Court (S. Jalang'o) at Baricho, 358 of 2013 dated 27<sup>th</sup> June, 2014)*

**JUDGMENT**

1. **Margaret Muthoni Gichira**, the appellant herein was charged with Robbery with Violence contrary to **Section 296 (2)** of the **Penal Code** vide Baricho Principal Magistrate's Court Criminal Case No. 978 of 2013. The particulars of the offence as per the Charge Sheet were that on the 4<sup>th</sup> of November, 2013 along Marura 'A' road in Mwea West District within Kirinyaga County the appellant jointly with others not before court robbed SUSAN WANJIKU MUTHIKE of Kshs. 38,000/= and at or immediately before or immediately after the time of such robbery wounded the said SUSAN WANJIKU MUTHIKE. She denied the charge and the case proceeded to full trial upon which the appellant was found guilty and convicted and sentenced to death.
2. The evidence adduced at the trial court in summary showed that the complainant at the trial SUSAN WANJIKU MUTHIKE called as P.W. 1 on 4<sup>th</sup> November, 2013 together with her husband John Muthike Muchira (P.W. 3) sold their piece of land to a buyer at an agreed price of Kshs.400,000/=. The agreement or the transaction was done in an advocate's office named Mutunga Advocate here at Kerugoya town. P.W. 1 and P.W. 3 both testified that they were paid a deposit of Kshs.300,000/= and after paying out their financial obligations with the advocate, they remained with Kshs.100,000/=. Out of this amount, the complainant was given Kshs.40,000/= and she told the trial court that she paid Kshs.1,000/= to the appellant who had brokered the deal between them and the buyer. Later the complainant boarded same motorcycle with the appellant and headed back home but stopped at Kagio to purchase some beans worth Kshs.1,000/=. The husband (P.W. 3) was left behind in Kerugoya. The complainant further told the trial court that while on the way home, at around 4 p.m. the appellant diverted the motorcycle rider to Marura area where she together with the motorcycle rider robbed her of Kshs.38,000/= which she had remained with. She told the trial court the boda boda rider simply held her by the neck while the appellant ransacked her pockets and removed Kshs.38,000/= which was all she had and gave it to the rider who took off leaving the two behind. The complainant told the trial court that she tightly held the appellant and screamed for help whereupon the villagers around responded and rescued her. The appellant was arrested and handed over to Administration Police at Kangai Police Post who took her to Sagana Police Station from where she was later taken to court and charged with

- the said offence. The complainant stated that she was injured during the incident and the injury was confirmed by JOHN MWANGI (P.W. 4) the clinical officer from Kerugoya County Hospital who testified and confirmed that the complainant had suffered swollen lips and tenderness on the front part of the neck. He classified the injuries as “harm”.
3. The other witnesses called P.W. 2, P.W.3, P.W. 4 and P.W. 5 testified and to a large extent corroborated the evidence of the complainant. P.W. 5 who was the investigating officer produced a copy of the sale agreement as Prosecution Exhibit 1 which demonstrated the transaction, between John Muthike Muchira (P.W.3) and the husband to the complainant and one Wanjohi Kariuki the purchaser in the sale agreement.
  4. In her defence the appellant denied the offence and testified on oath that the complainant’s husband approached her on 3<sup>rd</sup> November, 2013 and offered to lease her his 2½ acres of land as he was said to have been experiencing financial constraints. She told the trial court that she agreed to lease the parcel at Kshs.50,000/= and they entered into a written agreement on 9<sup>th</sup> November, 2013 after which she claimed that she paid him the agreed amount. She further told the trial court that John Muthike (P.W.3) later told her that he wanted to lease the same parcel to someone else and be refunded her money. She agreed to the arrangement and on 4<sup>th</sup> December, 2013, she told the trial court they went to Advocate Mutunga office for an agreement but were told to go back and get the initial agreement. She added that it was while she was travelling back with the complainant to get the agreement that the complainant screamed attracting members of the public who came and stripped her naked before the Police came to her rescue and arrested her and later charged her with the offence after declining to refund Kshs.10,000/= to the complainant.
  5. The trial court after going through the evidence tendered found the appellant guilty and observed as follows:-

***“the disappearance of the money and the motorcycle from the scene coupled with injuries suffered by the complainant leads to one inference that the accused and the motorcycle rider violently robbed the complainant the money received from the sale of their land parcel No. L.R. MUTHITHI/CHUBIRI/601/”***

The learned trial magistrate then sentenced the appellant to death.

6. The appellant felt aggrieved and filed this appeal citing the following grounds:
  - i. ***That the constitutional right of the appellant was violated as she was detained for over 24 hours at the police Station with no reason being given.***
  - ii. ***That the learned magistrate erred when he failed to dismiss P. Ex 1 (sale agreement) which had a different name of advocate mentioned by P. W.1 and P. W. 3 who mentioned Mutunga Advocate.***
  - iii. ***That the learned trial magistrate erred by failing to consider contradictions between the evidence of P.W.1 and P.W. 3 and the P. Ex. 1.***
  - iv. ***That the learned trial magistrate erred when he convicted the appellant without considering that essential witness was not summoned to testify in court to clear doubt on how the incident occurred.***
  - v. ***That the trial magistrate failed to consider that the appellant was not found in possession of any property that could link her to the offence.***
  - vi. ***That her defence was not considered.***
  - vii. ***That the trial magistrate erred to convict her against the weight of evidence.***
  - viii. ***That there was no evidence to support the charge facing her.***
7. In her written submissions the appellant submitted that the prosecution case against her was not proved beyond reasonable doubt as required by law. On violation of her constitutional right, she submitted that the complainant and the Police had tried to extort Kshs.10,000/= as a bribe and that is why there was a delay in arraigning in court within 24 hour timeline.
8. On contradictions, the appellant pointed out while P.W. 1 and P.W. 3 stated that the advocate who drew the agreement was called Mutunga, the agreement produced as Prosecution Exhibit 1 indicated that the advocate who drew it was J. Ndana & Co. Advocate. She submitted the

- evidence tendered by the prosecution were unreliable because of the inconsistencies.
9. The appellant faulted the prosecution for not summoning what she termed as crucial witnesses and, listed some of the witnesses as follows:
    - i. J. N. Ndana Advocate who drew the agreement that was produced as P. Exh. 1.
    - ii. Mutunga Advocate.
    - iii. Wanjohi Kariuki (The buyer in the agreement).
    - iv. Witnesses in the agreement, Samuel Kariuki Muguta and Peter Ngando.
    - v. Joseph Kariuki.
    - vi. Wanjohi Kige.
    - vii. Moses Mbugua and any member of public who responded to the screams at the crime scene.

She submitted that the witnesses should have been summoned to testify in order to establish the truth, and cited the authority in the case of **BUKENYA –VS- UGANDA (1972) EACA** to support her contention and particularly the fact that the trial magistrate ought to have presumed that the evidence of the witness not called would have given adverse evidence to the prosecution case.

10. On defence, the appellant faulted the trial magistrate for not giving weight to her defence and shifting the burden to her instead of giving her the benefit of doubts that existed in the prosecution case.
11. The Respondent through the office of Director of Public Prosecutions represented by learned counsel Mr. Sitati opposed this appeal stating that the five witnesses called to testify gave overwhelming evidence in support of the charge. Mr. Sitati submitted that the complainant clearly identified the appellant as the person who had accompanied the complainant to an advocate's office where the transaction of selling a piece of land was concluded and contended that the appellant was a broker in the deal. Mr. Sitati added that it was the appellant who diverted the motorcycle rider to different place where she together with the rider robbed the complainant in broad daylight.
12. In response to the defence put forward, the respondent faulted the appellant for not producing an agreement to back her claims that she had leased a piece of land from the complainant and in order to show that she had been framed up.
13. On the weight of the prosecution case, Mr. Sitati submitted that all the ingredients of the offence were established and proved by the prosecution. He pointed out that the appellant was placed on the scene of crime by the evidence adduced, and the existence of a transaction detailing amount of money paid was proved by Prosecution Exhibit 1 which was the sale agreement. It was further submitted that evidence of violence used during the incident was proved by exhibits 2 and 3 though it was conceded that no weapon was used in the robbery.
14. On violation of her constitutional rights the State responded that this appeal was a wrong forum to ventilate about violation of her rights. Mr. Sitati denied that the prosecution was riddled with contradictions pointing out that the Mutunga Advocate said to have drawn the agreement could have done so in the office of Ndana Advocate. He further faulted the appellant for not challenging the production of the agreement during trial.
15. On the question of not summoning crucial witnesses, Mr. Sitati submitted that the prosecution had the liberty to summons witnesses who in their view would help prove the charge facing the appellant and were not under any obligation to call any other witness.
16. I have considered this appeal and submissions made by both the appellant and the respondent through Mr. Sitati learned counsel for the State.

To begin with the first ground in the additional grounds of the appeal, that is regarding allegation of infringement of constitutional rights of the appellant by the Police by not taking her to court within constitutional timelines, I agree with the respondent that though the concerns expressed by the appellant could be legitimate, this appeal is certainly not the right form to seek redress. This appeal is about whether or not the evidence adduced by the prosecution was sufficient to convict the appellant with the offence facing her. The appellant has the liberty to seek redress in a civil court if she feels that her constitutional rights were violated by the Police during or after her arrest and

confinement.

Now going back to this appeal, it is important in my view to relook at the provisions in the statute that creates the offence for which the appellant was charged in order to determine the merits of this appeal. **Section 295** of the **Penal Code** defines robbery as follows:

***“Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to overcome resistance to its being stolen or retained is guilty of the felony termed robbery.”***

Subsection 1 of the said Section prescribes the sanction or the punishment of the offence which is imprisonment for 14 years. The appellant was charged with robbery with violence contrary to **Section 296 (2)** of the **Penal Code** which provides as hereunder:-

***“If the offender is armed with any dangerous or offensive weapon or instruments, or its in company with one or more other person, or persons, or if, at 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.”***

The particulars of the charge facing the appellant and indeed the evidence adduced clearly showed that neither appellant nor her accomplice the motorcycle rider was armed with any dangerous or offensive weapon. The appellant has contended the evidence adduced was not sufficient to convict her but Mr. Sitati opined that all the ingredients of the offence were proved. The necessary ingredients of the offence of robbery with violence were listed in the Court of Appeal case of **AJODE –VS- R [2004]2 KLR Pg 89** as follows:

- i. ***“If the offender(s) is armed with any dangerous or offensive weapon or instrument or***
- ii. ***If he is in the company of one or more other person or***
- iii. ***If at or immediately after the time of the robbery wounds, beats, strikes or uses any other violence to any person.”***

The above description with the use of the word “or” implies that if any of the 3 conditions is fulfilled then the offence under **Section 296 (2)** of the Penal Code would be said to have been committed. This therefore implies that one does not necessarily have to be armed with a dangerous weapon or offensive weapon while committing robbery in order to be found guilty for robbery with violence contrary to section 296(2) of the Penal Code. See **DANIEL NJOROGE MBUGUA – VS- R [2014]eKLR & OLUOCH –VS- (R 1985) KLR.**

17. The appellant was in the company of a motorcycle rider who was not apprehended and is still at large. The evidence adduced at the trial court also showed that violence was used during the robbery incident as the motorcycle rider was said to have held the complainant tightly by the neck as the appellant ransacked her pockets and robbed her of Kshs.38,000/=. John Muthike (P.W. 4) the clinical officer from Kerugoya County Hospital produced medical evidence to show that the complainant did suffer injuries which he classified as harm. It is however, important to note that prove of an injury during robbery with violence is not one of the ingredients of the offence as described above and illustrated in the authorities I have cited above.
18. The appellant has faulted the learned magistrate for not considering that there were inconsistencies and contradictions on the prosecution case particularly given the fact that the advocate described by P.W.1 and P.W. 3 was one Mutunga Advocate while the agreement produced as an exhibit referred to Ndana Advocate. In my view the inconsistency did not affect the weight of the evidence of the prosecution’s case as Mr. Mutunga Advocate could as well have been working in the firm of Ndana Advocate. Furthermore, the appellant herself testified that she went with the complainant and met the said Mutunga Advocate at Kagumo before proceeding to Kerugoya where they were told to wait in the office as the transaction was going on. So whether it was Mutunga Advocate drawing the agreement or Ndana Advocate as indicated in the Prosecution

- Exhibit 1 was not so material to the prosecution case. It was necessary to show the source of the money and the chain of events that led to the conclusion that the appellant had in the company of another person robbed the complainant. If the appellant had any issue with the said agreement, she ought to have opposed the production of the agreement and call for the author of the agreement.
19. The appellant contended that she was not found with the money stolen which is true but the evidence adduced showed that the motorcycle rider went with the money leaving behind the appellant who was caught by the complainant as she screamed for help. It is not a must that one has to be found in possession of the property stolen to be found guilty of robbery with violence. The appellant was rescued from irate members of the public and the evidence of Cpl. John Wachira (P.W. 2) and Philip Kigen (P.W. 5) the investigating officer corroborated the evidence of P.W. 1 and P.W. 3. The identification of the appellant was positive and I agree with the prosecution that the evidence adduced clearly placed her at the scene of crime. In her own defence, she conceded that she was travelling with the complainant at the material time on a motorbike.
  20. I have re-evaluated the evidence adduced at the trial and particularly the evidence of P.W. 1 and P.W. 3 who told the trial court that the appellant was a broker in the land transaction and that she was not happy after everyone including the witnesses to the agreement was paid. P.W. 1 told the trial court that the appellant made noise outside the office forcing her husband John Muthike Muchira (P.W.3) to intervene and asked his wife (P.W. 1) to give her Kshs.1,000/= which she did. This however, appeared not to have satisfied her. The complainant told the trial court that the appellant diverted the motorcycle rider to a place known as Marura where they robbed her. This is a clear indication that the appellant had hatched a plot with the rider to rob her because the appellant knew that the complainant was carrying money after witnessing the transaction. In my view the prosecution established both the motive and act itself which all pointed to the appellant.
  21. The cited discrepancies or inconsistencies or contradictions in the evidence of P.W.1 and P.W.3 did not affect in any significant way the weight of the prosecution case.
  22. Now turning to the defence adduced, though the appellant contended that the learned trial magistrate did not give weight to the same, I find that the defence was considered and given due consideration in the judgment. The appellant's defence was not supported by facts. She told the trial court that she had leased land from the complainant's husband but did not produce any agreement to back up her claims. Furthermore the dates she gave in her defence concerning when she entered into lease agreement did not add up. She told the trial court that she entered into a lease agreement on 9<sup>th</sup> November, 2013 when the record shows that she was arrested on 4<sup>th</sup> November, 2013 for the offence. I also find that the version of events she gave concerning what took place in the advocate's office and what happened as she boarded a motorbike with the complainant at Kagio to be unbelievable. Her defence was simply weak and could not create any basis for the trial court to have doubts concerning the guilt of the appellant.
  23. I also agree with the Respondent that the law does not place an obligation on the prosecution on the number or the character of witnesses to establish or prove an existence of a fact. The appellant has listed a number of witnesses she felt should have been summoned but in her petition of appeal she did not raise any prejudice suffered by the failure of the prosecution to call the cited witnesses. That ground of appeal is therefore not well taken as it was also raised without leave of this Court in accordance with **Section 350 (2) of the Criminal Procedure Code**.

In the end I find that the evidence adduced by the prosecution at the trial was overwhelming and the trial court was correct in reaching the conclusion it did. This appeal therefore lacks in merit and the same is dismissed. Both the conviction and sentence are upheld.

*Dated and delivered at Kerugoya this 30<sup>th</sup> day of May, 2016.*

**R. K. LIMO**

**JUDGE**

30.5.2016

Before Hon. Justice R. Limo J.,

State Counsel Sitati

Court Assistant Willy Mwangi

Appellant present

Interpretation English/Kikuyu

Sitati for State present

Margaret Muthoni Gichira - appellant in person present.

**COURT:** Judgment signed, dated and delivered in the open court in the presence of the appellant in person and Mr. Sitati for State.

**R. K. LIMO**

**JUDGE**

30.5.2016