



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 102 OF 2012**

**JANET WANJA WAITHANJE.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 454 of 2010 in the Chief Magistrate's court at Kiambu – C. Oluoch (PM) on 23/3/2012)*

**JUDGMENT**

1. This is an appeal against conviction and sentence in **Cr. Case no. 454 of 2010**, for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. It had been alleged that on 10<sup>th</sup> day of March 2010 at about 9.00 p.m. at Munene Estate in Kiambu District within the Central Province, the appellant together with others not before court, while armed with a dangerous weapon namely, knife, they robbed Jackson Waweru of one mobile phone make Nokia 1110, ignition keys, remote and helmet all valued at Kshs.10,000/=. That at the time of such robbery they used personal violence against the said Jackson Waweru.
2. In the alternative she was charged for handling stolen goods contrary to section **322(2)** of the **Penal Code** wherein. It was alleged that on the same date and place, otherwise than in the course of stealing, she dishonestly retained one helmet knowing or having reason to believe it to be stolen.
3. The appellant was sentenced to suffer death in the manner prescribed by law, and being dissatisfied, filed an appeal based on grounds that she was a victim of the robbery, that the prosecution's case was not proved beyond reasonable doubt and that her defence was reasonable since the exhibit did not link her to the robbers.
4. The learned state counsel, Mr. Mutua opposed the appeal stating that the oral evidence of **PW1** the victim was credible, and was not shaken on cross examination. He submitted that the appellant specifically asked for the rider of motorcycle registration number KMC H565H before **PW3** called **PW1** the rider thereof, to come and take her to her destination. Mr. Mutua further contended that the security light from the Equity Bank and the duration that the appellant took to wait for **PW1** to arrive, was sufficient to enable **PW3** to identify her.

5. The gist of the prosecution case was that on the 10<sup>th</sup> March 2010 at about 8.00 p.m. **PW1**, the complainant who is a motor cycle Taxi rider at Kahawa West, was taking the appellant to Munene estate, as a fare paying passenger, when they were set upon by two robbers on the way. The robbers stabbed him in the abdomen and robbed him of a mobile phone, Kshs.500 and a driving licence. Another motorcycle rider who was passing by and heard his screams alerted the police manning the road block nearby.
6. The police came to the scene and upon searching the surrounding coffee plantation, they found and arrested the appellant. She was taken to Kiamumbi Police Station and subsequently charged.
7. In her sworn defence the appellant admitted that she was a pillion passenger on **PW1**'s motorcycle on the ill-fated night. She however testified that along the way they hit a pot hole and she fell off the motorbike. That suddenly, they were attacked by two men who first ordered them to lie down, before they pulled her into the coffee plantation and ordered her to undress. That she lost consciousness and when she came to, she was naked and had lost her bag and mobile phone.
8. According to the appellant she ran out of the plantation to seek help when she heard the sound of a motor vehicle. She came upon the police and instead of helping her they arrested her. She was later charged with an offence which she denied.
9. From the evidence therefore, it is not in dispute that the appellant was the fare paying pillion passenger who was riding with **PW1** on the night in question from Kahawa West to Munene Estate. She herself admitted this fact and both **PW1** and **PW3** saw and spoke with her at the passenger picking bay before she left with **PW1**. They had therefore identified her and were able to pick her from an identification parade later.
10. There is also no dispute that two robbers set upon **PW1** and the appellant as they were riding on the road that runs through the coffee plantation towards Munene Estate. **PW1** sustained stab wounds in the abdomen as is evinced by his own testimony. The said testimony was corroborated by that of **PW4** his brother, who received the report and traced him at a hospital in Kahawa West and transferred him to Kiambu District Hospital for better medical attention.
11. The testimony of **PW1** was also corroborated by **PW2** a fellow motorcycle taxi operator at Kahawa West who happened to pass by soon after **PW1** had been stabbed. He saw him emerge from the coffee plantation screaming and bleeding from the abdomen. **PW1** mounted his motorcycle to take himself to the nearest hospital, while **PW2** rode to the road block to report the robbery to the police manning it.
12. **PW7** the medical doctor also confirmed that she examined **PW1** on 18<sup>th</sup> July 2011 and filled a P3 form in his regard. Her findings were that he had bruises on the left side of the face and a penetrating stab wound 1cm above the umbilical cord. The witness classified the degree of injury as grievous harm.
13. As properly framed by the learned trial magistrate, the only issue which we must determine is whether the appellant was a member of the gang that set upon and robbed **PW1**, or was herself a victim of the robbery.
14. The pertinent facts for consideration to determine the foregoing issue are that when the appellant arrived at the passenger picking area at Kahawa West, she declined the ride offered by **PW3** and waited there for what **PW3** said must have been 10 to 15 minutes. She then approached him and asked where the rider of motorcycle registration number KMC H565H was. **PW2** summoned **PW1** to come and ferry her. It therefore appears that she was looking for this specific rider.
15. We also note that according to the evidence, when **PW1** was attacked on the way the appellant was not alarmed and instead she laughed. It is instructive that she herself was not raped or injured at all in the attack and at the time of arrest did not report that anything had been stolen from her.

Further, **PW1** testified that the appellant demanded that the assailants pay her for luring the victim into their trap. The evidence further states that she was not dragged as she stated in her defence but fled into the coffee plantation together with the robbers.

16. Finally, according to **PW5** one of the arresting officers the appellant was arrested a short while later in the coffee plantation in close proximity to the scene of the robbery. She was found standing in the plantation by the officers who were searching for the robbers and she was still in possession of **PW1**'s helmet. She did not emerge on her own to seek help neither was she naked as she stated. We are therefore satisfied that the appellant was a member and not a victim of the gang. We also find that she was acting in concert with the other robbers when she lured **PW1** into their trap and therefore the acts of each are attributed to all of them.

17. We therefore find that the ingredients of the offence of robbery contrary to **Section 296(2)** of the **Penal Code** were satisfied. The upshot of the foregoing is that this appeal lacks merit and we accordingly dismiss it in its entirety.

**SIGNED DATED and DELIVERED** in open court this **20<sup>th</sup>** day of **May 2014**.

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**MBOGHOLI MSAGHA**

**L. A. ACHODE**

**JUDGE**

**JUDGE**