



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Criminal Appeal 342 of 2008**

**MARGARET WANJIRU NJERI .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in Criminal Case No. 8047 of 2007 of the Chief Magistrate's court at Kibera by Mr. Maundu (Senior Resident Magistrate))*

**J U D G M E N T**

**MARGARET WANJIRU NJERI**, the appellant herein, was convicted for the offence of **Robbery with violence contrary to section 296 (2) of the Penal Code**. She was then sentenced to suffer death as by law prescribed.

In her appeal, the appellant has raised three (3) issues, namely,

(a) The evidence of identification was doubtful because it was;

(i) by a single witness;

(ii) in difficult circumstances;

and

(iii) was uncorroborated

(b) The prosecution failed to prove the case beyond any

reasonable doubt;

(c) The trial court failed to give appropriate consideration

to the defence.

When canvassing the appeal, the appellant submitted that although the offence was committed during the daytime, (at about 6.00p.m.), there were many other members of the public who were walking about in the vicinity. In the circumstances, as the appellant did not testify that the appellant behaved in a suspicious manner before the complainant was robbed, it was submitted by the appellant that the complainant had no reason to pay special attention to the appellant.

Secondly, the appellant pointed out that the first step that the complainant described was that she was hit on the eye. In the circumstances, the appellant believes that the complainant did not have an appropriate opportunity to clearly observe those who robbed her.

Thirdly, because the assailant alleged to be the appellant was wearing a cap, and also because the complainant did not specify the duration of time when she observed the said assailant, this court was told that that made doubtful, the alleged identification.

The number of robbers was also said to have been unclear. The complainant told **PW 4** that there were five (5), comprising one (1) lady and four (4) men; yet the complainant told the trial court that there were four (4) robbers, comprising three (3) men and one (1) woman.

As far as the appellant was concerned, that brought into questions the credibility of the complainant.

The appellant submitted that the only reason for her arrest was that she was wearing some head-gears which appeared to resemble that which had been worn by one of the robbers.

However, the prosecution is said to have failed to describe any unique features of the alleged head-gear. Indeed, the prosecution is faulted for failing to exhibit the head-gear to the court.

In answer to the appeal, Ms Mwanza, learned state counsel, submitted that the identification of the appellant was positive because the robbery took place during day-time, and also because the cap worn by the appellant did not cover her face.

The complainant also described the appellant as having a light complexion, and whose age was about the same as that of the complainant.

According to the respondent, the appellant was not arrested because of the cap she was wearing, but because the complainant had identified her facially. The identification is said to have been positive because the two ladies were very close to each other, when the complainant wrestled with the appellant.

As the appellant was said to have been in the company of the men who robbed the complainant, the respondent submitted that the offence of robbery with violence had been proved.

It was the contention of the respondent that the absence of any dangerous weapons was not material.

The respondent also said that the fact that the appellant did not personally steal from the complainant was not material. She was with the group that robbed the complainant.

Finally, the respondent submitted that the appellant's defence was simply a bare denial.

Being the first appellate court, we have re-evaluated all the evidence on record and drawn our own conclusions.

**PW 1** is the complainant. She testified that she was robbed by 3 men and 1 woman. The time of the incident was stated as 6.00p.m.

**PW 1** was walking back to her house after escorting her mother. She noticed 3 men and one woman following her. They were about 15 metres behind her.

Suddenly, **PW 1** was hit in her right eye, with a fist. **PW 1** did not identify the person who hit her in the eye.

**PW 1** testified that the appellant hit her on the left shoulder. Meanwhile, the 3 men, who had been

with the appellant, grabbed **PW 1**'s handbag and ran away.

**PW 1** described the **complainant's** clothing and physical appearance. She said that the appellant was brown, and was about the same height as her. **PW 1** also said that the appellant was wearing a grey trouser, a black T-shirt and a cap. The said cap was not covering her face.

After the assailants left, **PW 2** arrived at the scene. He advised **PW 1** to go to hospital. But because **PW 1** did not have any money, she only went to hospital on the next day.

**PW 1** reported the incident at Muthangari Police Station. She testified that she told the police she could identify the appellant because she had observed the appellant properly, when the appellant was close to her.

Eleven days after the incident, **PW 1** saw the appellant standing outside a shop. The appellant was in the company of 3 other girls.

**PW 1** noted that the appellant was wearing the same cap that she had been wearing on the date of the incident.

**PW 1** went to the Kawangware Chief's Camp, and reported that she had seen one of the persons who had robbed her. 2 Administration Police Officers accompanied **PW 1** to the place where they arrested the appellant.

During cross-examination, **PW 1** denied the appellant's contention that she (**PW 1**) fought with the appellant. The fight was alleged to have been over a man (**PW 2**).

**PW 1** also denied the appellant's suggestion that she (**PW 1**) used to cohabit with **PW 2**.

According to **PW 1**, she had not known the appellant prior to the robbery.

**PW 1** also denied having ever lived in the same plot with the appellant and with **PW 2**.

**PW 2** testified that he found the complainant being robbed by 3 men and one lady. The men ran away before **PW 2** got near, but the lady remained behind.

**PW 2** testified that the lady was struggling with **PW 1**. He saw her properly.

During cross-examination, **PW 2** denied the appellant's contention that **PW 1** was his wife and that he (**PW 2**) had lived in the same plot with the appellant.

It was the evidence of **PW 2** that **PW 1** had been bitten on her biceps.

**PW 3** is a medical doctor. He examined **PW 1** 3 days after the robbery.

The doctor found human bite marks on the left upper arm of **PW 1**. **PW 1** also complained to the doctor about pain above the left breast.

**PW 4** was the Investigating Officer. He was based at the Muthangari Police Station.

It was his evidence that the OCS Muthangari Police Station assigned him to investigate this case about 4.00p.m. on 3rd November 2007. By that time, **PW 1** had already reported that she had been attacked by 4 men and one (1) women.

According to **PW 4**, the appellant did tell him that she and **PW 1** had fought. The appellant denied robbing **PW 1**. The appellant also denied being with any other person when she fought with **PW 1**.

But **PW 4** believed the story told by **PW 1**, as she had injuries. Secondly, **PW 1** told **PW 4** that she knew the appellant physically.

When the appellant was put to her defence, she said that she knew nothing about the offence.

She admitted being arrested by two men, who were in the company of **PW 1**.

In effect, the appellant abandoned her line of defence, which had taken shape when she was cross-examining **PW 1** and **PW 2**. At that stage, she had suggested to the complainant and to **PW 2** that she (the appellant) had fought with **PW 1**; and that they were fighting over a man (**PW 2**).

The appellant did not reveal any more information about the alleged fight.

Of course, we appreciate that the accused person has no legal publication to prove his defence or to say anything in his own defence. But if he should choose to say nothing in answer to the evidence tendered by the prosecution, the accused person must appreciate that the court would be entitled to infer that his defence was a bare denial. In such circumstances, if the evidence produced by the prosecution was sufficient to prove the offence with which the accused as charged, a conviction would follow.

But even if an accused person says nothing in his defence he cannot be convicted unless the evidence produced by the prosecution was sufficient to prove the case against him beyond any reasonable doubt.

In this case, the robbery took place at 6.00p.m. Both **PW 1** and **PW 2** say that it was still daytime. In the circumstances, the issue of the sufficiency of lighting did not arise.

**PW 1** was attacked suddenly. She was hit in her right eye, using a fist. She did not see who hit her.

Thereafter, **PW 1** was bitten. She says that it is the appellant who bit her on the left shoulder. But **PW 2**, who arrived on the scene immediately therefore, saw bite-marks on **PW 1**'s biceps.

Dr. Zephania Kamau examined **PW 1** and found human bite marks on the left upper arm.

In other words, neither **PW 2** nor **PW 3** testified about any bite marks on the complainant's shoulder. That means that the testimony of **PW 1** was not corroborated, as regards the injury allegedly inflicted to her shoulder.

**PW 1** had testified that she had not known the appellant before the date of the incident.

However, in the P3 form, the police to whom **PW 1** reported the incident, had indicated clearly that **PW 1** had alleged;

“to have been assaulted by somebody known to her.....”

That piece of evidence does not support the testimony of **PW 1**.

More fundamentally, **PW 4** was instructed at 4.00p.m, on 3rd November 2007, to investigate the incident. That was about two(2) hours before **PW 1** was robbed!!

Not only did **PW 4** testify that he commenced investigations before **PW 1** was robbed, the P3 Form also stated that the offence was committed on 3rd November 2007, at 4.00p.m.

Those pieces of evidence do not support the testimony of the complainant.

The offence allegedly committed on the complainant was also specified as “Assault”. That is provided for in the P3 Form.

In effect, the P3 Form appears to support the line of defence alluded to by the appellant, when she was cross-examining **PW 1** and **PW 2**.

The injuries which persuaded the investigating officer that **PW 1** was telling the truth, were not inconsistent with the appellant's said line of defence, which the appellant had told **PW 4** about, right from the beginning.

In the result, the evidence adduced did not prove that the appellant did rob the complainant. The conviction is unsafe. We there fore quash it, and set aside the sentence. We order that the appellant be set at liberty forthwith unless she is otherwise lawfully held.

**Dated, Signed and Delivered at Nairobi, this 31st day of January, 2013.**

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**FRED A. OCHIENG**

**JUDGE**

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**LYDIA A. ACHODE**

**JUDGE**