



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 152 OF 2009

JONATHAN MUTUA NZANGWA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 4416 of 2007 in the Chief Magistrate's Court at Makadara – E Usui (SRM) on 01/04/2009)

JUDGMENT

1. **Jonathan Mutua Nzangua**, the appellant herein was convicted of the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** by Mrs. E. Usui the learned Senior Resident Magistrate (as she then was), at Makadara law courts. It had been alleged that on the 4th day of August 2007, at about 7.30 p.m. at Kayole Estate within Nairobi Province, jointly with another not before court, they robbed Jackson Kimindu of Kshs.20,400/= and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said Jackson Kimindu.
2. Upon conviction he was sentenced to suffer death in accordance with the law. Being aggrieved by the conviction and sentence, the appellant filed this appeal advancing four grounds of appeal.
3. In the first ground of appeal the appellant stated that he was not positively identified by **PW1**. We have carefully scrutinized and reassessed the evidence and find that there was no dispute that the complainant and the appellant were well known to each other. The testimony of **PW1** was that they had known each other for more than ten years before this offence. It was also the testimony of **PW2** that he had known the appellant for more than ten years and both witnesses stated that they were seated at the same table with the appellant and his girlfriend at Athusi bar on the date in question.
4. Moreover, the appellant too told the court that when the police came to arrest him on 11th November 2007, they were accompanied by one man whom he knew very well as he was his friend. That man was the complainant. We therefore find that identification was not in issue in the case before us.
5. We considered the next three grounds of appeal together. These were that his case was not proved beyond reasonable doubt, vital witnesses were not summoned to testify, and that his defence was

rejected for reasons far from the truth. We find that there were indeed material contradictions in the evidence of **PW1** and **PW2**, who were the main witnesses in this case which led us to the conclusion that there existed reasonable doubt in the prosecution case. The main contradiction on which in our view may be determined revolved around the appellant's whereabouts at the material time.

6. As pointed out by Mr. Mutua the learned counsel for the appellant, the appellant could not have been in two places at the same time. The relevant part of **PW1**'s testimony was that:

“We picked a matatu and left with accused and the girlfriend and we proceeded to Kayole. At Kayole we alighted at Jupiter or Kairi Kiiru bar near the Kayole main stage. It was about 7.20 p.m. At 7.30 p.m. accused left us in the bar with the girlfriend to call the landlord. After 20 minutes accused came back.”

His testimony as to the time of the actual robbery was that:

“It was about 8.00 p.m. and there was no one on 2nd floor.”

7. The evidence of **PW1** seemed to suggest that from the time the appellant came to sit at the table where **PW1** and **PW2** were seated at Athusi bar, **PW1** and the appellant never parted until they arrived at Kairu Kiiru bar in Kayole at 7.20 p.m. At 7.30 p.m. the appellant left only for 20 minutes as he tried to locate the landlord or agent, with whom they could negotiate the terms of the lease of the house **PW1** wished to rent. At about 8.00 p.m. the appellant was attacked and robbed by people whom he said comprised of the appellant and a man brought by the appellant.
8. **PW2** confirmed the evidence of **PW1** in so far as **PW1** and **PW2** were together at Athusi bar on the afternoon in question, and were joined by the appellant and his girlfriend. He left to go to work but when he returned shortly thereafter he found his three companions having left. Later that evening at 7.00 p.m. he met the appellant and his girlfriend at a bar in Embakasi. When he asked them where they had left **PW1**, only the girlfriend responded and said they had parted ways at OTC in town.
9. The evidence of the prosecution witnesses therefore, seems to place the appellant at two different locations at the time of the robbery. This being a criminal trial the prosecution were duty bound to prove their case against the appellant beyond reasonable doubt. It was not up to the appellant to prove whether or not he was at Embakasi or Kayole at the material time.
10. The Learned state counsel Miss Kimiri, conceded the appeal on behalf of the state, and submitted that the proceedings in the lower court showed that the evidence was not sufficient to sustain a conviction, and that she too noted the anomalies adverted to by Mr. Mutua on behalf of the appellant.
11. That being the matrix of this case, we find that the grounds and submissions tendered on behalf of the appellant have merit, and that the learned state counsel was wise to concede the appeal.

Reasons wherefore, the appeal is allowed and it is ordered that the appellant be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **24th** day of July 2013.

A. MBOGHOLI MSAGHA
B. JUDGE

C.
D. L. A. ACHODE
E. JUDGE