



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 113 OF 2012

SAMUEL NZIUKI KANESA APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of the Principal Magistrate J. Karanja PM delivered on 9/8/2012 in Makueni Principal Magistrate Criminal Case No. 113 of 2012)

(Before Beatrice Thurairaja Jaden and J.M Ngugi JJ)

J U D G M E N T

1. The Appellant, **Samuel Nziuki Kanesa** was charged with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**.

The particulars of the offence were that on the 11th day of October 2011 at **Shimo Estate in Makueni District** within **Eastern Province**, jointly with others not before court robbed **Daniel Kiio Ngumbi** of his cash Kshs.8,600 and a **Nokia** worth Kshs.5,400 all valued at Kshs.14,000/= and at the time of such robbery used personal violence on the said **Daniel Kiio Ngumbi**.

2. When the Appellant was arraigned before the trial court, he pleaded not guilty. After a full trial, the Appellant was convicted and sentenced to death.
3. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on the following grounds:-

- v. **That the conviction was against the weight of the evidence.**
- v. **That prosecution failed to prove their case beyond reasonable doubts.**
- v. **That the defence case was not considered.**

4. The prosecution case was that on the 11/10/2011 at about 1.30 a.m. the complainant PW1 **Daniel Kiio Ngumbi**, who is a teacher, was at his gate waiting for it to be opened. Four people who claimed to be security officers arrived at the gate and started interrogating him. One of them punched the complainant on the mouth. The complainant fell down and was kicked and beaten and robbed of his cell phone and wallet containing Kshs.8,600/= and some documents.
5. The complainant screamed for help. Neighbours rushed to the scene and arrested the Appellant who was identified by the complainant as one of his attackers.

The Appellant was handed over to police officers on patrol duties. The Appellant was escorted to the

police station. After investigations the Appellant was charged with the offence herein.

6. The Appellant in his defence gave sworn evidence. No witnesses were called. The Appellant described himself as a mechanic. He stated that on the material day he had gone out to a bar for drinks. On his way home, he came across the complainant and two men at the gate and they seemed to be arguing. One of the men held the Appellant while the other frisked the complainant and robbed him then fled. When the Appellant reached where the complainant was, the complainant caught him by the leg and hit him on the head with a stone. Neighbours and police officers on patrol arrived at the scene. The Appellant was taken to hospital then to the police station where he was locked up and subsequently charged with the present offence.
7. **Mr Mulei** Advocate appeared for the Appellant. He relied on his written submissions which essentially expound on the grounds of appeal.
8. **Ms. Abuga**, a prosecution counsel, appeared for the State. The State was opposed to the appeal. The State relied on written submissions which I have duly considered.
9. This being a first appeal, we are duty bound to re-evaluate the evidence and the record afresh and come to our own conclusions and inferences – *See Okeno –vs- Republic (1972) EA 32.*
10. The complainant in his evidence narrated to the court how he was attacked by four people. He was injured and robbed of his properties. PW4 **John Kinyanjui Ndungu** who is a medical officer in his evidence confirmed that the complainant was injured. A duly completed P3 form was produced as an exhibit. PW2 **PC John Kiarie** testified on the arrest while PW3 **PC Lawrence Kamande** gave evidence regarding the investigations carried out.
11. The complainant was the only eye witness. In his evidence he identified the Appellant as one of the attackers. It was the complainant’s evidence that he did not know the Appellant before. The Appellant was not arrested with any of the stolen properties. The complainant’s evidence is that the Appellant was arrested about fifteen metres away from the scene. The complainant specifically pointed out the Appellant as the one who hit him. According to the complainant, there were security lights outside. However, the exact location of the security lights and the distance from the security lights to the scene was not described.
12. The complainant’s evidence is that of identification by a single witness in difficult circumstances. There is no description of the intensity of the light or the length of time the complainant spent with the Appellant during the ordeal. Further, the complainant testified that he was punched and fell unconscious for a few minutes. Although the complainant testified that neighbours rushed to the scene and arrested the Appellant, none of the said neighbours testified. We hold that the neighbours who arrested the Appellant are crucial witnesses who ought to have testified to shed light on the question of arrest.
13. The defence raised by the Appellant is that of an innocent passerby who was held by the leg by the complainant. We do not think that this defence was sufficiently considered. We give the Appellant the benefit of doubt. We are unable to say with certainty whether the complainant’s evidence was free from error.
14. With the foregoing, we hold that the appeal has merits and must succeed. Consequently, we quash the conviction and set aside the sentence. The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

J.M. NGUGI

JUDGE

JUDGE

Dated and delivered at Machakos this 30th day of ...October 2013.

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B. THURANIRA JADEN

JUDGE