



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANGA**

**HIGH COURT CRIMINAL APPEAL NO. 399 OF 2013**

**(Appeal from the Original Conviction and Sentence in Criminal Case No. 334 of 2011 dated 25<sup>th</sup> October 2012 in the Chief Magistrate's Court at Thika by Hon. Ndeda - PM)**

**PETER WAINAINA KABAGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

The Appellant Peter Wainaina Kabage was convicted by the Hon. PM Ndeda for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was tried and upon conviction sentenced to suffer death.

He has appealed to this Court against the said conviction and sentence. In the Appeal filed on 9<sup>th</sup> November 2012, he set out the Grounds of Appeal as follows:-

1. That the learned trial Magistrate made an error in law and fact by convicting the Appellant on contradictory, uncorroborated and unreliable evidence.
2. That the learned trial Magistrate made an error in law and fact in holding that the offence charged was proved to the required standard.
3. That the learned trial Magistrate made an error in law and fact in failing to observe that the genesis of the charges emanated from perennial grudges co-existing in the Appellant's family.
4. That the learned trial Magistrate made an error in law and fact in relying on the evidence of recognition without considering that the same lacked merit.
5. That the learned trial Magistrate made an error in law and fact by proceeding with the trial in a language not known to the Appellant.

He was furnished with the certified proceedings and filed handwritten Submissions. He urged Grounds 1, 2 and 3 together. He stated that he will not dispute the allegations by the complainant that the robbery was actually committed against her. However his central dispute was his complicity in the crime.

When the trial commenced on 17<sup>th</sup> January 2011, the accused appeared before the Resident Magistrate Hon. L. M. Wachira and pleaded guilty to the charges. The charges were read over to him

in Kikuyu. The Court Clerk Wanjiku translated and he stated after the charge that **it is true**. The facts were read and he stated that the facts were not true. A plea of Not Guilty was entered and hearing date set.

The trial commenced before Hon. Ndeda PM on 3<sup>rd</sup> February 2012. The complainant testified and there was no cross-examination by the Appellant. The Appellant did not object to the adjournment the prosecution applied for. He did not ask any of the prosecution witnesses any questions and when the Court ruled that he had a case to answer he stated he would keep quiet and wait for the Court verdict.

The defences now being raised on Appeal are new. The Appellant never raised issues of grudges within his family as cause for the charges he faced. That has come up as a ground of appeal. He also did not give any statement whether unsworn or sworn in his defence. He left the Court to determine the matter on the strength of the prosecution evidence that was unchallenged. He was arrested on the date of the incident in broad daylight by members of the public after the complainant raised the alarm. His accomplice managed to escape but the Appellant was arrested by the public and handed over to the area Chief and then to the Police. The Appellant was found with the weapon he had threatened the complainant with, namely a *panga* and the 100/- he robbed from her. The Complainant did not previously know him and neither did she have a grudge with him to warrant an accusation that she was framing him or setting him up.

On his Appeal, the State has opted to leave the matter to Court. The offence is grave and carries the death sentence. In the case of robbery with violence, three main ingredients are necessary.

1. If the offender is armed with any dangerous or offensive weapon or instrument; or
2. Is in company with one or more other person or persons; or
3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats or strikes or uses any other personal violence to any person.

In the case, the complainant testifies that the Appellant and another person armed with a stick accosted her and that it was the Appellant who snatched her purse. At pages 11 and 12 of the record the complainant stated:

**One was carrying a panga...the one with a panga rushed and took my purse...they took the purse opened saw 100/- my phone documents. I then screamed neighbour came and arrested the one with the panga. The one with a stick run away. When a crowd came the accused said he had armed himself with a panga to cut human beings who offended him..... it is the accused Wainaina who had the panga....it is accused on the dock who had a panga.**

The evidence she gave was succinct and she positively identified the Appellant as her assailant. She was consistent that it was the Appellant who had the panga during the robbery. The Appellant took her 100/- from the purse. He did not question her. Upon his arrest and subsequent search Kshs. 100/- was found on him together with a panga. This was immediately after the incident as the complainant screamed attracting the crowd that arrested the Appellant. The evidence linking the Appellant to the incident is uncontroverted and is consistent at all points. The divergence on the exact time the incident took place is not fundamentally material as the Appellant was found near the scene with the item stolen namely cash. The doctrine of recent possession is applicable.

Having carefully considered Grounds and Petition of Appeal we find that the learned trial Magistrate did not err either on the law or facts. The conviction was safe and the sentence lawful. We thus find no merit in this Appeal and dismiss it in its entirety.

**Dated, signed and delivered this 28<sup>th</sup> day of November 2013**

**Maureen Onyango**

**JUDGE**

**Nzioki wa Makau**

**JUDGE**