



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL 215 OF 2007

ROBERT MUTASH AUDA.....
APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

(An Appeal arising out of the conviction and sentence of Ms. H. Wasilwa PM in Criminal [Case No. 6065 of 2005](#) delivered on 3rd April 2007 in the Chief Magistrate's Court at Nairobi)

JUDGMENT

The Appellant was charged with 5 offences of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the first offence were that on the 10th day of August 2005 along Naivasha road in Nairobi within the Nairobi area, jointly with others not before court while armed with dangerous weapons namely pistol robbed John Ndichu Kamau of his motor vehicle registration number KAR 711 V Nissan matatu valued at Kshs.800,000/= and at or immediately before or immediately after the time of such robbery used personal violence to the said John Ndichu Kamau.

The particulars of the second offence were that on the 10th day of August 2005 along Naivasha road in Nairobi within the Nairobi area, jointly with others not before court while armed with dangerous weapons namely pistols robbed Sarah Wangari of her cash Kshs.500/= and a motorolla mobile phone valued at Kshs.3,500/= of such robbery used personal violence to the said Sarah Wangare.

The particulars of the third offence were that the 10th day of August 2005 along Naivasha road in Nairobi within the Nairobi area, jointly with others not before court while armed with dangerous weapons namely pistols robbed Isaac Alinga Andeche of his mobile phone make motorolla V50 valued at Kshs.4,500/= and at or immediately before or immediately after the time of such robbery wounded the said Isaac Alinga Andeche.

The fourth offence's particulars were that on the 10th day of August, 2005 along Naivasha road in Nairobi within the Nairobi area, jointly with others not before court while armed with dangerous weapons namely pistols robbed Robai Nafula Wanyonyi of her cash Kshs.45/=, wallet and personal documents all valued at Kshs.2,500/= and at or immediately before or immediately after the time of such robbery used personal violence to the said Robai Nafula Wanyonyi.

Lastly, the particulars of the fifth offence were that on the 10th Day of August 2005 along Naivasha road in Nairobi within the Nairobi area, jointly with others not before court while armed with dangerous weapons namely pistols robbed Elijah Gachie Murithi of his cash Kshs.5,000/= and at or immediately

before or immediately after the time of such robbery used personal violence to the said Elijah Gachie Murithi.

The Appellant were arraigned in the trial court on 18th August 2005 and he pleaded not guilty to all the charges against them. He was tried, convicted of two of the offences of robbery with violence and sentenced to death for one of the offences. The sentence for the second offence was to remain in abeyance. The Appellant being aggrieved by the judgment of the trial magistrate appealed both his conviction and sentence. His main grounds of appeal were that the magistrate relied on a defective charge sheet to convict and sentence him, that the magistrate relied on unreliable and inconsistent evidence and that the magistrate failed to consider his defence and convicted him on weak reasons, thus contravening section 169 (1) of the Criminal Procedure Code.

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called six witnesses. PW1 was Robai Nafula Wanyonyi and she was also the fourth complainant. She testified that on 10th August 2005 at 7 p.m she boarded a vehicle registration number KAR 711V at Nakumatt Lifestyle on Ngong road. Further, that upon reaching Kawangare BP stage 3 men boarded the vehicle and proceeded to rob her and the other passengers. She testified that she was robbed of her wallet which had two bibles and Kshs 45/=, and that she lost property worth Kshs 2,500/= in the robbery.

PW1 stated that upon reaching Kawangare near the Sudanese school, one of the passengers wanted to alight and two of the robbers then fled. The third robber was about to alight but that PW1's husband held on to him and closed the door. The robber dropped a wallet he had which had many telephones. The driver of motor vehicle then drove to Kabete police station where the third robber was arrested, and the passengers handed over the things he had dropped to the police.

PW2, Isaac Alingo Andecho who is the husband of PW1 and the third complainant corroborated PW1's evidence. He in addition stated that he was robbed of his phone, Kshs 40/= and identification cards and other documents. PW2 also testified that he was bitten on the hand by the third robber as he was trying to alight, and that he later went to hospital for treatment. He testified that he was not given a P3 form and could not get the treatment notes from the doctor who had since moved away.

PW4, John Ndichu Kamua who was the first complainant, was the driver of the motor vehicle registered as KAR 711V. He said he was driving the said vehicle, a Nissan Matatu from Nairobi along Kawangare to Limuru. He gave a similar account of events that occurred upon reaching BP Kawangare stage, and added that when the robbers entered the motor vehicle one of them hit him with a hard object on his eye. He stated that he could not identify the person who was arrested as he was at the front of the vehicle driving.

PW3 was PC Kiptanui Bowe whose employment number is 83411. He testified that he works at Kabete Police Station and that on 10th August 2005 at about 8pm a Nissan matatu, registration number KAR 711V arrived at the station, with people inside making noise. He was informed by the passengers in the motor vehicle that the Appellant had boarded the motor vehicle with two others who were armed with pistols and proceeded to rob the passengers. Further, that the Appellant was grabbed by one of the passengers as he tried to alight, and had bitten the passenger who had held onto him, who was still bleeding when they arrived at the police station. PW3 testified that he arrested the Appellant and handed him over to the report officer.

PW5, Corporal Peter Indeché testified that he worked at CID Kabete, and that on 1/11/2005 he was given a file on a case of robbery with evidence, with the account of the robbery as given by the previous prosecution witnesses. He stated that he was not given any exhibits, but that on 21/8/2006 he got the registration number of the motor vehicle that was involved in the robbery namely KAR 711V, and took the motor vehicle to the Nairobi Area Station to be photographed.

The last prosecution witness was PW6, Corporal Stephen Nyamai who stated that he worked at CID Nairobi Area station, and on 21/8/2006 PW 5 brought a motor vehicle registration number KAR 711V which had been hijacked and recovered, and asked him to photograph it. PW6 stated that he took four

photographs of the motor vehicle, and he produced the photographs of the said motor vehicle as exhibits in court.

After the close of the prosecution case, the trial magistrate found that a *prima facie* case had been established against the accused and he was placed on his defence under section 211 of the Criminal Procedure Code. The Appellant gave sworn evidence and did not call any witnesses. He stated that on 10/8/2005 he boarded motor vehicle registration number KAR 711V at the Kenyatta stage and after the vehicle reached Kawangare he was robbed of his phone Nokia 3310 and Kshs 758/= by robbers who boarded the motor vehicle and later ran away. He stated that he together with other passengers decided to report the robbery at Kabete Police Station, but that upon reaching the station, it was alleged by one of the passengers that he was one of the robbers, and he was arrested and charged with the offences herein.

The Appellant's grounds of appeal in his Amended Memorandum of Appeal can be collapsed to one main ground, which is that there was insufficient evidence adduced to support the charge and conviction of robbery with violence. It was submitted by the Appellant in this regard that none of the victims testified that the assailants were armed with pistols, and PW1 testified that nobody was beaten or injured during the robbery. Further, that PW4 testified that he did not see or identify the assailants who hit him, and that no medical evidence was produced in support of the allegations that the victims suffered actual violence.

Ms. Matiru for the State opposed the appeal. She submitted that the Appellant was restrained by other passengers in the motor vehicle after committing the robbery therein, and was identified by PW1 and PW2 who saw him clearly using the lights in the said motor vehicle which were on throughout the robbery. Further, that this was confirmed by PW3 who found him in the motor vehicle at the police station at the time of arrest. It was submitted that the evidence of the Appellant's identification was clear, and that he was placed at the scene of the robbery, even if the items that were stolen were not recovered.

We have considered the arguments made by the Appellant and the State, and we find that the issue for determination by the court is whether the ingredients of a charge of robbery with violence were proved. The Appellant in this case were charged with and convicted of two counts of robbery with violence under section 296 (2) of the Penal Code which reads thus:

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”

We are guided by the decision in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** which sets out what constitutes robbery with violence under section 296(2) of the Penal Code as follows:

- 1. If the offender is armed with any dangerous or offensive weapon or instrument, or**
- 2. If he is in the 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 strikes or uses any other violence to any person.**

We are also alive to the requirement that proof of any one of the above ingredients of robbery with violence is enough to base a conviction on under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**. The particulars of the charge meet the criteria set out above as they specify that the Appellant was jointly with others who were not before the court at the time of committing the robbery. PW1 and PW2 testified that there were three persons who robbed them, including the Appellant, whom they managed to restrain. In addition they were able to take him to the police station and he was arrested by PW3. The fact of the robbery was collaborated by PW4.

The Appellant was therefore in the company of more than one person at the time of the robbery and one of the ingredients of the offence of robbery with violence was met. He was also positively identified by PW1, PW2 and PW3. It is thus our finding that that there was sufficient evidence to convict the Appellant

with the offence of robbery with violence, and that the said conviction was safe. The testimony of PWI that no weapon was used during the robbery and that no person was injured during the robbery is not fatal to the conviction. We also note that the Appellant did admit to being at the scene of the crime and of the robbery, and offered no credible explanations as to how he came to be identified as one of the robbers.

We accordingly uphold the conviction of the Appellant for two charges of robbery with violence contrary to Section 296(2) of the Penal Code, and the sentences for these convictions are found to be legal. It is so ordered.

DATED AT NAIROBI THIS 15TH DAY OF NOVEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE