

Kshs.60,000/= and the Appellant informed him that she had taken it to cater for food for the visitors during the requested payment of dowry. P.W. 1 informed the Appellant that he was not ready to pay the dowry, whereupon the Appellant promised to bring back the money the next day. On that day P.W. 1 got home at 6.00 p.m. but the Appellant was not in the house and when he called her on her mobile phone, she informed him that she was on her way to the house. The Appellant arrived 30 minutes later and she pushed the door open and hugged him and it was then that a heavy set man followed her and got hold of P.W. 1 by the neck and face and warned him not to scream. A second person walked in armed with a hammer and he hit P.W. 1 on the head with it. P.W. 1 fell down and attackers started demanding for the money with the Appellant shouting that the money was not at the place where he had kept it. While on the ground P.W. 1's leg was hit with a hammer and that is when he informed them that the money Kshs.50,000/= was in his pocket together with his Nokia mobile phone and other documents. P.W. 1 further testified that he fainted and it was a neighbour who came to check him and gave him Kshs.,2000/= and took him to Kenyatta National Hospital where he was treated and discharged. He later reported the incident at Satellite Police Station and was issued with a P3 form. Later on the 18th July 2010 the Appellant went with police officers to his house alleging that he had assaulted her. P.W. 1 was arrested and charged in court and later released on bond. Later the Appellant was arrested and charged with the present offence. He identified the hammer which was used to assault him during the incident.

4. P.W. 2 – Eglen Amuko Esikumo a neighbour to P.W. 1, testified that on the material day she was in her house on the same plot where P.W. 1 resides. She was in the bathroom when she heard a commotion, and as she walked towards the plot she realized the commotion was coming from the house of P.W. 1. She managed to open the window to the house and on peeping inside she saw two men and the Appellant who at that time was checking the mattress and saying the money was not where it was supposed to be. One of the men was searching the complainant as his accomplice was holding P.W. 1 to the ground by the neck. She noticed cash on the floor and other items scattered all over the place. She went back to her house and informed her husband who had arrived at the time. The next day she learnt that P.W. 1 had been robbed the previous night.

5. P.W. 3 – Joseph Kinyua testified she assisted P.W. 1 to arrest the Appellant when P.W. 1 went to the Chief's office at Kawangware with a letter from Riruta Police Station seeking assistance. He testified that after P.W. 1 identified the Appellant at a place opposite Kawangware Supermarket, they took her to Riruta Police Station.

6. P.W. 4 – Dr. Zephaniah Kamau testified that on 31st August 2010 he examined P.W. 1 after a history of assault. He testified that this was about 1 month and 25 days after the alleged incident and the injuries may have been caused by a blunt object. He assessed the degree of injury as grievous harm and she completed and filed a P3 form.

7. P.W. 5 No. 31638 – Corporal Peter Kariuki testified that he was assigned this case to investigate. P.W. 1 came to the station and was issued with a P3 form which was duly filed. P.W. 5 also received a hammer which had allegedly been used during the incident. P.W.5 left the station on sick leave and on coming back found the Appellant had made false report of an assault at the station against P.W. 1. He carried out investigations and recorded statements from P.W. 1 and witnesses. He later arrested the Appellant with help from the Assistant Chief's office. He brought the Appellant to the station and charged her with the said offence and he produced the hammer as an exhibit.

8. When she was placed on her defence the Appellant gave unsworn evidence and did not call any witnesses. She testified that she was living with P.W. 1 till the material day when she separated with him after he assaulted her causing her to lose a tooth amongst other injuries. She went to live with her sister and on 18th July 2010 P.W. 1 had her arrested and taken to the police station. She testified that P.W. 1 sent for her the next day seeking for reconciliation but she refused as it was not the first time for him to beat her and she feared that eventually he would kill her. She further testified that the complainant was charged and was brought to court and later remanded at Industrial Area Remand. Later on P.W. 1 was released on bond and he went to her place of work and

threatened her. The next day P.W. 1 came with three men and she was arrested and taken to Riruta Police Station and charged with the said offence.

9. On 9th June 2011 the trial court delivered its Judgement and found the Appellant guilty as charged and sentenced her to suffer death as is by law provided. The court found that the charge facing the Appellant had been proved beyond any reasonable doubt and dismissed the Appellant's defence.

10. Being dissatisfied with the trial court's Judgement the Appellant filed this appeal dated 23rd June 2011 based on the following grounds namely:-

1. **That the learned trial magistrate erred in law and fact by convicting her to suffer such a harsh sentence without enough evidence and thorough investigations.**
2. **That she stands by the truth that she is innocent and that she was falsely accused of charges that she did not commit.**
3. **That on that fateful night that her husband (P.W. 1) accused her of robbing him, he was at home and they had a domestic quarrel and ended up engaging in a fight whereby he beat her thoroughly, leaving her with a big cut on her left leg, chest pains and removed one of her tooth.**
4. **That in her defence she hit his leg with a hammer to block him from beating her further. P.W. 1 rushed her to hospital in Mtindwa where she was treated and the cut stitched. She was then discharged but she refused to go back home with him. Instead she went to her step sister's place in Kawangware.**
5. **That she filled a P3 form the following day (7th July 2011) and filed an assault case against him at the Satellite Police Station. This led to P.W. 1's arrest on 18th July 2011.**
6. **That P.W. 1 was later taken to court and remanded at Industrial Area Prison but she never got a chance to appear before the court as a complainant as he was released on bond.**
7. **That on his release he went ahead and filed a case against her that she had jointly with others not in court robbed him of Kshs.64,300 and his mobile phone on the night of 5th June 2011.**
8. **That the above cannot be true as on the said night she was at home with him and on the following night of 6th July 2011 he beat her and took her to hospital. Further why would he have waited for two months to report this to the police? This is because she was arrested on 6th September 2011 and that she had never known her husband to own that large amount of money since she had lived with him for 4 years.**
9. **That P.W. 1 went ahead and brought false witnesses to the court. And that the woman who claimed to have witnessed the robbery lied to the court because she had never seen her before and she had never resided in their plot.**
10. **That the whole case got her off guard as it was her case against her husband at the first time and how it turned out to be his case against her remains to be a mystery which she is pleading the court to solve.**
11. **That no proper investigations were carried out and the case was carried out very fast within a span of 9 months and this proves that there was no time for proper investigations.**
11. We have carefully considered the evidence herein. There is no doubt that the complainant and the Appellant were at the material time living together, whether as husband and wife or otherwise. A dispute, however, arose between them concerning how to spend Kshs.60,000/= which the

complainant had received from a welfare group. In the course of time the Appellant, not accepting the refusal of the complainant to pay her dowry using part of that money, arranged with others not before the court to rob the complainant of the same and his phone, and at the same time used violence against the complainant.

12. The Appellant in her defence denied that she robbed and attacked the complainant, and instead alleges that it is the complainant who beat her up that night. She actually filed a complaint against the complainant who was arrested and released on bond.

13. The issue for this court is to review the evidence before the trial court, analyze and re-evaluate the same and to reach its own independent findings. In doing that, we raise the following issues for determination:-

- a. ***Was this a domestic issue?***
- b. ***Was the complainant robbed and injured as alleged?***
- c. ***Did the Appellant commit the alleged crime?***

14. The Appellant and the complainant appear to have been having a difficult relationship, regardless of the length of that relationship or its nature. However, to the extent that it is alleged that Kshs,61,800/= together with a phone had been stolen by two or more people who also used violence against the P.W.1 is proof that the allegations, if proved, is no longer a matrimonial or domestic dispute but the crime as charged.

15. The evidence of prosecution's witnesses shows clearly that the complainant was robbed by the Appellant with two other people who also used violence against the Appellant. Identification here is not a major issue as the complainant knew the Appellant as they lived together. But even if identification was an issue, the evidence of P.W. 2 is clear that as a neighbour to P.W. 1 she went to his rescue when she heard the commotion that night. She opened the window to the room and was able to see the Appellant and two other men searching the complainant's room. She also saw money scattered all over the room. There was enough light to enable her see the people inside. P.W. 2 was not a friend or a relative to P.W. 1. They barely knew each other. Her evidence was credible. She described the other two men as one short, and the other tall. She also knew the Appellant by sight as they were neighbours. We are satisfied that the P.W. 2 identified the Appellant. If that is so, the next issue is this: What was the Appellant doing with the two men in the complainant's house? The complainant testified that after being robbed, the Appellant and her gang beat him up. He was given Kshs.2,000/= by his neighbor for a taxi to Kenyatta National Hospital. He was treated and discharged. P.W. 4, the doctor who examined P.W. 1 confirmed the said injury. In the case of **Oluoch – Vs – Republic [1985] KLR 519** the Court of Appeal in its obiter judgement established what constituted robbery with violence under Section 296 (2). The court stated that one would be found guilty of robbery with violence where:-

- a. ***The offender is armed with any dangerous and offensive weapon or instrument.***
- b. ***The offender is in company of one or more other persons or persons.***
- c. ***At or immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any persons.***

We are satisfied that the ingredients established in the above case aptly apply herein and that the Appellant committed the said robbery with violence.

16. We are also satisfied that the prosecution proved their case beyond any reasonable doubt. We find that the Appellant committed the offence as charged. The Appellants' defence is a sham and the trial court was right to reject the same.

17. In the end, we dismiss the Appellant's appeal and uphold the conviction and sentence by the trial court.

DATED, READ AND DELIVERED AT NAIROBI

THIS 14TH DAY OF NOVEMBER 2013

E. K. O. OGOLA

JUDGE

J. KAMAU

JUDGE

PRESENT:

In person - Appellant

No appearance for the State

Teresia & Kipkurui - Court Clerks