



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 557 OF 2009**

***(AN APPEAL ARISING OUT OF THE CONVICTION AND SENTENCE OF A. ONGERI - SPM  
DELIVERED ON 2<sup>ND</sup> DECEMBER 2009 IN KIAMBU CMC. CR. CASE NO.2095 OF 2008)***

**PETER KAMONJO NJOROGE.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Peter Kamonjo Njoroge, 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 20<sup>th</sup> July 2004 along Moi Road, Magamano Village, Kiambu District, the Appellant jointly with others not before court, while armed with dangerous weapon namely pangas, iron bars, hammers and knives robbed Henry Kangara Njoroge of one pair of safari boots shoes, national identity card, one pocket diary, a Kenya Commercial Bank plate and cash Kshs.3,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Henry Kangara Njoroge. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted as charged. He was sentenced to death as is mandatorily provided by the law. He was aggrieved by his conviction and sentence and has duly filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted for the offence of robbery with violence yet he had not been identified by the victim of the crime. He further took issue with the fact that the trial court had admitted the evidence of identification yet the circumstance under which the said identification was made was not favourable for positive identification. He was aggrieved that the trial magistrate had convicted him on the basis of the recovery of the robbed items allegedly in his possession yet no evidence was adduced to support such finding. He faulted the trial magistrate for failing to give him an opportunity to defend himself and thereby breaching his right to fair trial. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant was represented by Miss Kamunde. She submitted that the Appellant was convicted on the basis of circumstantial evidence. It was the Appellant's case that the evidence adduced in support of the circumstantial evidence did not support the finding reached by the trial court. She submitted that the evidence adduced by the complainant was inconsistent and was not corroborated. She explained that the complainant told the court that he was attacked at night and therefore it was highly unlikely that he would have been in a position to identify the Appellant as the person who attacked him. She urged the court to discount the evidence of identification by the complainant because no identification parade was held to support the complainant's contention that he had identified the

Appellant among the persons who robbed him. She submitted that the evidence adduced by the prosecution witnesses was inconsistent and contradictory especially in regard to the circumstances under which the complainant was injured. She took issue with the evidence of the recovery of the items which were allegedly robbed from the complainant. It was her submission that PW6 had testified that the person whom the items was recovered from was one Karongo. There was no connection between the said Karongo and the Appellant. She urged the court to discount the evidence adduced by the police because it did not sufficiently link the Appellant with the crime. She explained that the police had testified that the Appellant had been apprehended by members of the public and was handed to the police by the said members of the public. She submitted that the exhibits which were produced in court were not actually recovered from the house of the Appellant. In the circumstances therefore, she submitted that there was no connection between the recovered items and the Appellant. She urged the court to allow the appeal, quash the conviction and set aside the sentence.

On his part, Mr. Karuri for the State opposed the appeal. He submitted that the complainant was attacked by robbers who injured him in the process. The complainant lost his right eye during the attack. He was robbed of his personal items. He did not identify any of his attackers. On the following morning, PW6 went to the house of the Appellant and found him tied with a rope. Members of the public were guarding him. The Appellant was wearing oversize safari boots and bloodstained jeans trousers. The complainant's pocket diary and ATM card were found in his possession. The blood in the shoes and the clothes were taken to the Government Chemist who confirmed the blood group to belong to the complainant. The complainant was able to positively identify the items that were found with the Appellant to be his property. He submitted that the Appellant was given every opportunity to defend himself during trial. He explained that the trial court properly applied circumstantial evidence to convict the Appellant. This was because the items robbed from the complainant were found in possession of the Appellant hardly a day after the robbery. He urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

***“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.***

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the Appellant on the charge of **Robbery** with **Violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

We have carefully re-evaluated the evidence adduced before the trial court. We have also considered the grounds of appeal put forward by the Appellant in this appeal. We have also taken into consideration the rival submission made by the parties to this appeal. As correctly observed by Miss Kamunde, the Appellant was convicted on the basis of circumstantial evidence. As was held by the Court of Appeal in the case of **Sawe –Vs- Republic [2003] KLR 364** at page 372:

***“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused.”***

In the present appeal, it was the prosecution's case that the complainant was attacked on 20<sup>th</sup> July 2004. In his testimony, the complainant testified that while he was walking home from Githunguri Township, he was accosted by a gang of robbers who attacked him with an iron bar. He was hit on the head with an iron bar. He was ordered to sit down. The robbers who were more than two in number, then robbed him of Kshs.3,000/-. They also robbed him of his pocket diary and his Kenya Commercial Bank ATM card. While he was on the ground, he was hit on his face resulting in his losing sight of his right eye. He lost consciousness. When he regained consciousness, he discovered that the robbers had also taken away his safari boots. He was able to seek assistance and was first taken home before he was admitted at Kiambu District Hospital and later at Kenyatta National Hospital. PW4 Dr. Zephaniah Kamau saw the complainant on 13<sup>th</sup> May 2005 and prepared a P3 medical form. He noted that the complainant had lost the use of his right eye as a result of an assault with a blunt object. He assessed the degree of injury as grievous harm.

Meanwhile, on 21<sup>st</sup> July 2004, at about 8.00 a.m. PW6 CIP James Macharia, attached to the District Commissioner's Office Githunguri received a report that members of the public had apprehended a robbery suspect at Kiaria Village. PW6 accompanied by APC Mwangi and CPL Kihara visited the village. They found the Appellants tied with ropes in his house. The Appellant was wearing jeans trousers which were bloodstained. He was also wearing oversize safari boots. PW6 searched the Appellant. He found him in possession of a diary and a bank plate. He also had a hammer which was bloodstained. The pocket diary and the safari boots were identified by the complainant as his property. The ATM card was in the name of the complainant. PW6 arrested the Appellant and took him to Githunguri Police Station. The case was investigated by PW7 CPL Francis Otieno. He found there was sufficient evidence to charge the accused. He also produced the exhibits that were found in possession of the Appellant. When the Appellant was put on his defence, he chose not say anything.

Having carefully evaluated the above evidence, it is clear to us that to establish the charge of **Robbery with Violence** contrary to **Section 296(2)** of the Penal Code by circumstantial evidence, the prosecution was required to adduce inculpatory evidence which connected the Appellant to the crime and which evidence was incompatible with his innocence. The complainant in this case was attacked and robbed at about 9.00 p.m. on the night of 20<sup>th</sup> July 2004. He was robbed of his safari boots, his diary, his ATM Card and cash Kshs.3,000/-. He was grievously injured. In fact, the complainant lost his eye during the robbery. He was left unconscious. When he regained consciousness, he sought help and was taken to hospital. He was admitted for a period of more than a fortnight. At 8.00 a.m. on 21<sup>st</sup> July 2004, the Appellant was found in possession of the safari boots, ATM card and the diary that were robbed from the complainant. The complainant positively identified the recovered items. The complainant told the court that he did not identify any of his assailants. The Appellant did not offer an explanation of how he came to be found in possession of property which had just been robbed from the complainant less than ten (10) hours before the same were recovered in his possession. In our considered opinion, we cannot fault the trial court for applying the doctrine of recent possession and circumstantial evidence to convict the Appellant for robbing and injuring the complainant. The circumstances under which the robbed items were found in possession of the Appellant raised a presumption that it was the Appellant who, jointly with others, robbed and injured the complainant. The prosecution proved this fact to the required standard of proof beyond any reasonable doubt. The Appellant did not adduce any evidence to displace this presumption. We hold that the circumstances under which he was found in possession of the items that were robbed from the complainant clearly points to the guilt of the Appellant. It is the Appellant who robbed the complainant and that is why he was found in possession of the said robbed items.

We find no merit with the appeal lodged by the Appellant. We uphold his conviction and sentence on the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The Appeal is dismissed. It is so ordered.

**DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER 2013.**

**L. KIMARU**

**JUDGE**

**P. NYAMWEYA**

**JUDGE**