



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 693 OF 2010**

**ELLY OPANDE NYASAKA ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From original conviction and sentence in criminal case Number 4715 of 2010 in the Chief Magistrate's Court at Makadara – A. LOROT (SRM) on 30/11/2010)*

**JUDGEMENT**

**Introduction**

1. The appellant **Con Elly Opande Nyasaka** faced a charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, in **Nairobi CM Cr. Case no. 4715 of 2010**, before Mr. A. Lorot, Senior Resident Magistrate as he then was. He was convicted and sentenced to suffer death as by law prescribed.

**Particulars of the Charge**

2. He had denied that on the 13<sup>th</sup> day of November 2009, at Basco Products Kenya Limited in Embakasi within Nairobi area, jointly with others not before court, while armed with dangerous weapons namely a pistol and knife, they robbed Ashani Dinesh Ravji of cash Kshs.307,446/=, and at, or immediately before, or immediately after the time of such robbery used actual violence against him.

**Grounds of Appeal**

3. Being disgruntled with the outcome of the trial, the appellant lodged a memorandum of appeal whose amended grounds advanced eight issues. These were that the evidence of **PW4** on recent possession was insufficient and incredible; the trial court did not observe **Section 169** of the **Criminal Procedure Code**; the doctor who conducted the post mortem was not heard; vital witnesses were not summoned; the burden of proof was shifted on the appellant; that the case was a frame up and that he was not given a chance to defend himself.

**Submissions**

4. Mr. Aduda who argued the appeal on behalf of the appellant consolidated the grounds and urged them together. He submitted first, that the violence stated in the charge sheet had not been proved.

- Second, that there was a discrepancy in the money stated to have been stolen and that which was recovered. Further that the learned trial magistrate was wrong to impose his own views that some of the money could have dropped during the chase.
5. Mr. Aduda also urged that the identification was not free from error since **PW2** was chasing people who were 100 metres away and he could only see the backs of their heads; that **PW2** testified that the bag was brown only to change and say that it was orange; that the woman who said that the money stolen from the factory was in the back pack did not testify and therefore her evidence should have been treated as hearsay.
  6. Mr. Aduda contended that both **PW2** and **PW5** found the appellant already under arrest. That they lost sight of him and that the possibility of having arrested the wrong person was high. He referred us to the case of **James Otieno Nyangito v Rep Cr. App 22 of 1991**. In the said case the Court of Appeal held that the link must not be broken in order to be sure that the person being pursued is the one who was arrested.
  7. Miss Njuguna opposed the appeal on behalf of the state. She submitted that the prosecution proved their case beyond reasonable doubt. She submitted that the operative word under **Section 296(2)** of the **Penal Code** is “or”. That since the appellant was armed with dangerous weapons and was in company with others the provisions had been satisfied.
  8. Miss Njuguna further urged that the contradiction in the money stated in the charge sheet to have been stolen, and that which was said in the evidence to have been recovered was explainable from the evidence.
  9. Lastly, Miss Njuguna submitted that the identification of the appellant was free from error since **PW2**, an employee of the company where the robbery occurred and **PW5**, the Traffic Police Officer who helped in the arrest, both saw him clearly.

### **Summary of the Case**

10. The undisputed facts of this case are that on 13<sup>th</sup> November 2009 **PW1**, a cashier at Basco Products Limited, was on duty at the company premises in the morning hours when three young men came into his office with a sales order and invoice for payment. He directed them where to go and make payment. The men went out briefly but suddenly turned back, pointed something which he said looked like a pistol at him, and ordered him to lie down.
11. **PW1** obliged and also released the safe keys to them as ordered. The men took the contents of the safe which was actually open, injured **PW1** on the head with “a pin like substance” and ran out. They were however pursued by members of the public and employees of Basco Products (K) Ltd. One of them was arrested with the help of traffic police officers on duty nearby and a bag containing Kshs.247,950/= recovered from him. He was escorted to Embakasi Police Station and charged and is the appellant in court.
12. In his defence, the appellant gave an unsworn statement denying the offence. He said that on the material date he was at a stage at about 10.00 a.m. about to board a motor vehicle to go to work when he saw a crowd of people chasing a man. He was shocked when one of the members of the crowd turned on him and said “hata ndio huyu mmoja wao” (here is one of them). He was arrested and taken to Basco Products (K) Ltd where the offence had occurred. From there police officers took him to Embakasi Police station and charged him with the offence.

### **Issues for Determination**

13. From the evidence on record and the grounds of appeal, we addressed three issues as follows:
  - (i) The provisions of section 296 of the Penal Code.

(ii) Discrepancy in the money stolen and that which was recovered.

(iii) Whether the evidence of identification was free from error.

## **Analysis**

### **Provisions of Section 296(2) of the Penal Code**

14. The question for determination was whether the offence of robbery contrary to **section 296(2)** of the **Penal Code** had been proved to the required standard against the appellant. For better understanding of the offence under this section we referred to the case of **Johanna Ndungu vs Republic Cr. App No. 116 of 2005 (unreported)** which sets out succinctly what constitutes robbery under **Section 295** of the **Penal Code** and under what circumstances such robbery may progress to become robbery under **Section 296(2)** of the **Penal Code**.

**“In order to appreciate properly as to what acts constitute an offence under Section (296) (2), one must consider the sub-section in conjunction with section 295 of the Penal Code.**

**The essential ingredients of robbery under Section 295 are use of or thereof to use actual violence against any person or property and at or immediately before or immediately after to further in any manner the act of stealing. Therefore the existence of the afore described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in Section 296(2) which we give below and any one of which if proved will constitute the offence under the sub-section.**

- 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.”**

If one of these ingredients is satisfied, the offence will be proved.

15. In the case before us **PW6**, CPL Kilonzo who investigated the case testified that there was recovery of a bag containing cash, a pistol and a knife. The evidence was not clear however, on who was found with the pistol or the knife. **PW1** testified that something like a pistol was held against him during the robbery, but the recovered implement was not shown to him in court for purposes of identification.

16. The record however shows that the robbers numbered three and that they threatened to use violence. Two of them succumbed to the injuries inflicted upon them at the time of the arrest. One of the ingredients of **Section 296(2)** of the **Penal Code** was satisfied and the offence was therefore proved.

### **Discrepancy in the Money stolen and Recovered**

17. The charge sheet states that the complainant was robbed of Kshs.307,446/- but the evidence shows that what was recovered was Kshs.247,950/=. We observe that **PW1** testified that at the close of business on 12<sup>th</sup> November 2009 he had Kshs.247,950/- in his drawer. That on the morning of the robbery he had already made sales worth Kshs.59,446/=. This is what brought the sum total of Kshs.307,446/-. He also testified that the monies were stored separately in the drawer as noted above the appellant was not alone in the robbery. That in our view could explain why not all the money that was stolen was recovered.

18. We observe that **PW5** testified that he was left guarding the scene of arrest and the bag of money

that was recovered, while **PW2** testified that the bag of money was returned to the Company. In our view this contradiction was not material enough to shake the prosecution case.

### **Whether the Evidence of Identification was Free from Error.**

19. To begin with we observed that the offence occurred in broad daylight in the morning hours of 13<sup>th</sup> November 2009. **PW1**, **PW3** and **PW4** who interacted with the robbers in the office were not able to identify the appellant. The appellant came to be charged because it was said that he was seen running from the premises that were robbed with a back pack on his back, when the alarm went off.
20. To establish whether the appellant had been linked without a doubt, to the commission of the offence with which he was charged, we scrutinized and reconsidered the evidence on record as is our mandate as the court of first appeal, to draw our own inferences and reach our own conclusions.
21. The important evidence on the arrest of the appellant was tendered by **PW2**, Mr. Shetti an employee of Basco Products (K) Ltd, and **PW4**, PC Langat a police officer who was on duty in the area at the material time.
22. **PW2** was at work at the material time when he heard noises. According to his evidence when he went out of his office, he saw people running “helter skelter.” He went towards the main gate and saw three men running to the main gate. One of the men carried an orange coloured back pack that had blue patches. The three men ran out of the gate.
23. **PW2** testified that at about that time one of the company vehicles came to the gate and he got in and chased the three men who were about 100 metres ahead of him. He could hear one of their female employees shouting that the back pack contained their stolen money, and he therefore pursued the man with the back pack. **PW2** maintained that when they came to National Oil Petrol Station he saw the man with the back pack scale the wall of the petrol station. **PW2** alighted from the motor vehicle and pursued the man. He caught up with him and arrested him.
24. **PW5**, P C Langat entered the scene at the point when the man with the back pack came running towards National Oil Petrol Station with members of the public in tow. **PW5** had been deployed on traffic duties together with a colleague along Outer Ring road opposite the said National Petrol Station. He testified that he saw the man who was under pursuit jump over a fence into the petrol station. That he rushed towards the man but by the time he got to him he had already been arrested.
25. **PW5** testified further, that one member of the public identified himself as an employee of Basco Paints Factory (**PW2**) and informed him that the man under arrest was among robbers who had just robbed their factory. That member of the public was now holding the orange and blue bag that had been recovered from the man under arrest.
26. Both **PW2** and **PW5** identified the appellant as the man who was being chased and who was running with a back pack on his back. There is no evidence that from the time each caught sight of the appellant whom they noted because of the orange and blue back pack, they lost sight of him till he was arrested. The evidence also shows that there was a crowd involved in the chase but the appellant was running ahead of it. **PW2** was able to catch up with him using a motor vehicle. **PW5** saw him because he was running towards the direction in which **PW5** was stationed.
27. We are therefore satisfied that his conviction was not predicated on the allegations of the female employee who said that the stolen loot was in his back pack. The conviction was based on the evidence of **PW2** who chased him from the company and arrested him. That evidence was fortified by the testimony of **PW5**, and the fact that indeed the stolen money was found in his back pack. **PW2** described the back pack as brown but corrected himself to say it was orange with blue

patches. **PW5** described it as orange and blue.

28. We are also satisfied that the appellant was given a chance to defend himself and that there is no evidence he was not framed.

29. Having given careful consideration to all the circumstances of this case, we are satisfied that the learned trial Magistrate properly convicted the appellant based on sound evidence. We therefore confirm the conviction and sentence and dismiss the appeal.

**SIGNED DATED and DELIVERED** in open court this **5<sup>th</sup> day of December 2013.**

**MUMBI NGUGI**

**L. A. ACHODE**

**JUDGE**

**JUDGE**