REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 52 OF 2007

BENARD KEMBOI ROTICH RUTO.....1ST APPELLANT

EDWARD KALONGO SIRIMA.....2ND APPELLANT

TIMOTHY KISWA ETENDE ..... 3RD APPELLANT

VERSUS

REPUBLIC …….....……. RESPONDENT

(From the original conviction and sentence in Criminal Case No. 1767 of 2005 of the Chief Magistrate's Court at Kibera –by Wasilwa (Mrs) –Principal Magistrate)

JUDGMENT

The complainant, CHARLES KAHENDE KINUTHIA, withdrew KShs.50,000/- from K-Rep Bank along Naivasha Road on 21st February 2005. He intended to use the said funds to pay school fees for his son, John Kinuthia, who had just been admitted at the Dagoretti High School, in Form 1.

As he walked along the road, a vehicle stopped ahead of him, and the driver beckoned him. When he talked to the 4 occupants of the vehicle, the complainant was convinced that they were police offices. They told him that they were from the Flying Squad, and were investigating a criminal case in which the suspect was said to have been wearing clothes that were similar to those that the complainant was wearing.

For that reason, the 4 men got the complainant to enter their vehicle. They then asked him to prove that he had been to the bank, as he had told them.

PW 1 (the complainant) showed them the money which he had withdrawn from the bank. The men kept the money, together with a further KShs.1,500/- which was in **PW 1's** wallet.

PW 1's mobile phone was also taken by the 4 men.

Throughout the incident, **PW 1** saw no weapon. He testified that he gave out the money "freely"

That evidence has led the appellants to contend that there was no proof of the offence of robbery with violence **contrary to section 296 (2) of the Penal Code.**

As the respondent submitted, it is not mandatory that there be dangerous or offensive weapons or instruments for the offence of robbery with violence to be proved.

It is also not mandatory that violence be used in an incident giving rise to the offence of robbery with violence.

Pursuant to **section 296 (2) of the Penal Code**, the offence of robbery with violence is committed;

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.....”

Therefore, the fact that there were 4 persons who robbed the complainant would be sufficient proof of the offence of robbery with violence. It did not matter that they were not armed with dangerous or offensive weapons or instruments. It also did not matter that they did not use violence on the complainant or on any other person.

But then again, if **PW 1** gave out his money “freely”, was he robbed?

PW 1 gave out the money to persons who had introduced themselves as police officers. The men said that they were investigating some criminal activity in the area, and that the complainant fitted the description of the suspect. Therefore, **PW 1’s** reason for handing over the money was to prove that he had just come from the bank.

He was told that if he did not co-operate with the 4 men, his head would be blown up.

And when he was ordered to get out from the vehicle, **PW 1** asked for his money to be returned to him. But the money was not returned.

It is clear that the circumstances in which the money was handed over to the 4 men constituted coercive deception. We can compare it to a situation in which a medical doctor has carnal knowledge of his female patient by causing her to believe that it was a part of her treatment. Whereas the patient may “willingly” allow the doctor to have his way with her, the action constitutes the offence of rape.

So also a police officer who “asks” a person to hand over money to him, under the pretext of conducting investigations into a criminal offence, commits an offence if his actual intention is to keep the money to himself.

The offence in question was committed in broad daylight, at 10.00a.m. The complainant was inside a car with the 4 assailants for about an hour.

As the assailants had not covered their faces, that should have given the complainant sufficient time and opportunity to clearly see the assailants. Indeed, **PW 1** said that he did see the faces of the 3 appellants well.

However, **PW 1** was not involved in the arrest of the assailants. And thereafter, the police did not conduct any Identification parades, to ascertain if the complainant could identify any of the appellants.

Of course, we do appreciate the fact that soon after arrest, the appellants were taken to the police vehicle where **PW 1** was. In those circumstances, Identification Parades would have served no useful purpose because the complainant would have already seen the persons who had been arrested.

According to the complainant, the 2nd accused was arrested about 20 metres from where the complainant was. But he **(PW 1)** did not see the 1st accused being arrested. He also did not see the 3rd accused being arrested. That implies that the accused persons were not together at the time of arrest. They were apart.

That is consistent with the evidence of the arresting officer **(PW 2),** who said that the 3 persons ran to different directions.

PW 2 said that he ran after the 2nd accused and arrested him. But PW 3 said that it is members of the public who brought the 2nd accused to him.

PW 4 also said that the 2nd accused was arrested by members of the public. That puts to question the reliability of **PW 2’s** evidence.

PW 1 testified that a walkie talkie was recovered from the 1st accused. His evidence was that the said recovery was made when the police searched the 1st accused at the Report Office, at the Kabete Police Station.

However**, PW 2** said that the walkie talkie was recovered by members of the public.

PW 3 confirmed that the walkie talkie was recovered by a member of the public, who then gave it to him.

PW 4 corroborated the evidence of **PW 2** and **PW 3,** regarding the recovery of the walkie talkie. By so doing, those 3 police officers put to doubt the testimony of **PW 1**.

Because of the discrepancy in the evidence about the recovery of the walkie talkie, the trial court acquitted the 1st accused on the offence of conveying suspected stolen property contrary to **section 323 of the Penal Code.**

To our minds, once the trial court formed the opinion that **PW 1** was an unreliable witness, that assessment cannot have been limited to only one count in the charge sheet.

It is noted that whereas **PW 1** had specified in his first statement, that he only recalled a portion of the registration number of the vehicle, unknown persons completed the remaining portion. **PW 1** only recalled that vehicle used by the robbers had the registration number which included 466E. He did not state the first part of the registration when recording his statement.

But when he gave evidence in court **PW 1** gave the full registration as KAR 466E.

During cross-examination **PW 1** said that he did not know when the letters KAR were inserted into his statement. However, he nonetheless insisted that he was "positive" that the full registration was KAR 466E.

If he was so positive about that fact, **PW 1** should have given the full registration at the earliest stage i.e. when he was recording his first statement.

By insisting that the vehicle's registration was KAR 466E, yet he did not know where the letters KAR came from, **PW 1** displayed a trait that was not consistent with reliability.

Furthermore, it is difficult to envisage a situation in which robbers who had already accomplished their mission, would alight from their vehicle, in the company of their victim.

It is therefore entirely possible that the appellants were within the Muguga or Kiambaa area, for innocent reasons, as they said in their respective defences. That view is fortified by the fact that although the police officers had allegedly arrested the 3 suspects as they fled from the scene of crime, they did not immediately arraign them in court. If the evidence available to the prosecution pointed irresistibly at the 3 appellants, there would have been no need for further investigations, resulting in delays in having the appellants charged.

For all those reasons, we hold that Mr. Muriithi, learned state counsel, was right to have conceded the appeal.

In the result, the appeal is allowed. We quash the convictions for all the 3 appellants, and also set aside their sentences.

We order that the 3 appellants be set at liberty forthwith unless they are otherwise lawfully held.

Dated, Signed and Delivered at Nairobi this 13th day of February, 2012.

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FRED A. OCHIENG	**L.A. ACHODE**
JUDGE	**JUDGE**