REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL CASE NO. 12 OF 2010

ANTONY KIRINGA NJERU ……..…… APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(Appeal from the judgment of Hon. S.M. Mokua P.M. in Principal Magistrate's Court at Siakago in Criminal Case No. 350 of 2008 delivered on 5th February 2010)

J U D G M E N T

Antony Kiringa Njeru herein after referred to as the appellant was charged for the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code. The facts of the prosecution case as stated in the charge sheet are as follows:-

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.

On the 2nd day of February 2008 at around 8.30pm, at Karigiri village, Kanyuambora Location within Mbeere District of the Eastern Province while armed with dangerous or offensive weapon namely arrows and metal bar robbed Janet Muthoni Ciengo cash Kshs. 18,000/= and at or immediately before or immediately after the time of such robbery used actual violence by knocking down two teeth of the said Janet Muthoni Ciengo.

After a full trial, the appellant was found guilty, convicted and sentenced to death as provided by the law. Being aggrieved by the judgment of the learned magistrate, the appellant filed this appeal while relying on the following grounds:-

1. That the learned Senior Resident Magistrate erred both in law and fact by convicting the appellant on a capital offence and charge whose particulars were not proved and not supported by any evidence.
2. That the learned Senior Resident Magistrate erred both in law and fact by failing to consider that there was no sufficient light to enable to proof identification of the appellant.
3. The learned Senior Resident Magistrate erred both in law and fact by failing to find that the P3 form produced by PW4 and admitted by court as P Exhibit 2 had glaring inconsistencies which ought to have been ruled in favour of the appellant.
4. That the learned Senior Resident Magistrate erred both in law and fact by failing to find that failure by the prosecution to call and adduce evidence from the investigating officer was fatal to the prosecution case and the appellant ought to have been acquitted on this ground alone.
5. That the learned Senior Resident erred in fact by finding that the appellant was armed with arrows and a metal at the time of committing the alleged robbery when in act neither the complainant PW1 nor other prosecution witnesses adduced such evidence.
6. That the learned Senior Resident magistrate erred both in law and fact by failing to consider that PW1 did not mention the names of the appellant as the person who had attacked and robbed her o PW2 in whose homes he first took refuge.
7. That the learned Senior Resident magistrate erred both in law and fact by failing to consider the failure by the prosecution to call SIRIKA MUTURI who was alleged to have been in the company of the complainant (PW1) during the alleged robbery and who was listed as prosecution witness in the charge sheet left the PW1's evidence without adequate corroboration.
8. That the learned Senior Resident Magistrate erred both in law and fact by disregarding the fact that PW3 arrested the appellant among 5 other persons during a raid three months after the date of alleged robbery on 5th may 2008 and that he did not know that the appellant had a case or was wanted by Ishiara Police Station as a robbery with violence suspect.
9. That the learned Senior Resident Magistrate erred both in law and fact by convicting the appellant on insufficient evidence.
REASONS WHEREFORE: - *The appellant prays for orders:-*
a) That the appeal herein be allowed, conviction quashed, sentence be set aside and the appellant be set free.

During the hearing of the appeal, the appellant relied solely on the written submissions that he had earlier presented to the court. On the other hand, Mr. Wohoro who appeared for the Republic did not oppose the appeal. According to the learned counsel, the appellant was charged with the offence of robbery with violence. However, there was no evidence showing that the appellant was actually armed. In addition to the above, the learned State Counsel also stated that the Investigating Officer did not even give evidence in court. Besides the above, the learned State Counsel recalled that PW1 had stated that she had been assaulted by use of a torch. Apart from the above, the learned counsel also stated that throughout her statement, there was no mention of arrows and metal bar. He also took issue with the fact that there was no evidence by the investigating officer or arresting officer to support the issue of being armed with arrows and iron bar. In addition to the above, the learned counsel also stated that the Court of Appeal and High Court have emphasized the importance of the evidence of the investigating officer. In conclusion, Mr. Wohoro submitted that under the circumstances, he was unable to support the conviction and sentence. He was of the view that the evidence on record supports the offence of theft from a person. Being the first appellate court, we have the duty to reconsider and reevaluate the evidence which was adduced in the trial court before we make our own independent conclusions. In addition to the above, we also appreciate and are alive to the fact that we never saw nor heard the witnesses during the trial. Those are some of the basic principles which were set down in the case of **Gabriel Kamau Njoroge vs. Republic** [1982 – 1988] 1 KAR 1134.

In this particular case, PW1 Janet Muthoni Ciengo who has been named as the complainant in this case testified that on 2nd February 2008 while travelling from Nairobi she alighted at Kathigiri at around 8pm. After walking for about 30 meters, someone emerged from behind while walking very fast. By that time, PW1 was in the company of Sirima Muturi. She later decided to stand by the side of the road and the suspect reached them and asked where they were from. When the appellant insisted why they were walking by that time, PW1 put on the torch and saw the accused person. According to PW1, the appellant was well known to her since he used to be a loader. Unfortunately at that time, Sirima Muturi escaped while the accused got hold of the complainant on the neck and insisted that he be given money. It was the evidence of PW1 that the appellant assaulted her using a torch before she screamed. Apart from the above, she also testified that the appellant inserted his hands into her pockets with the view of taking money from her. She also testified that the appellant hit her teeth causing them to fall off. The complainant was able to identify the two teeth which had fallen off as exhibit 1. During the incident, the appellant managed to flee away with Kshs. 18,000/=. From there, the complainant went to Ireri's home which was near the scene. Subsequently, the complainant reported the incident at Ishiara Police Post. In his medical evidence Dr. Ndegwa Wanjuki who is the medical officer informed the court that he was familiar with the handwriting and signature of Dr. Oduor since they had worked together for 2 years. Apart from the above, PW4 identified the P3 form which had been filled by Dr. Oduor in relation to the complainant. PW4 further testified that when the complainant was examined by his colleagues, she was found with a scar on her upper lip and that two incisors were missing. The P3 form also indicated that a blunt object was used to inflict the injuries. Subsequently, the complainant was treated with antibiotics and the degree of injury was assessed as grievous harm. The good doctor produced the P3 form as exhibit 2. Though the complainant was a single witness, we are satisfied that she was able to recognize the appellant whom she had known as a loader. In addition to the above, we are also satisfied, from her evidence that the circumstances at the scene of crime were favourable to a positive identification. The complainant had a new torch with new batteries. From the above evidence, it is absolutely clear that the same is at complete variance with the charge sheet which states in part:-

" ..... ***While armed with dangerous or offence weapons namely, arrows and metal bar robbed Janet Muthoni Ciengo cash Kshs. 18,000/=. "***

The evidence by the complainant herself does not refer at all to any arrows or metal bar. That means there is a contradiction between what has been stated in the charge sheet and the evidence of the complainant who was actually at the scene of the incident. On that note, we do hereby agree with the learned State Counsel that the appellant was not actually armed with dangerous weapons as alleged. However, we respectively wish to differ with the opinion of the State Counsel that the evidence on record supports the offence of theft from the person. It is our considered opinion that the appellant should actually have been charged of the offence of grievous harm contrary to Section 234 of the Penal Code Cap 63 Laws of Kenya. Having stated the above, we are of the considered view that the evidence on record actually proves the charge of grievous harm contrary to Section 234 of the Penal code. In that event, we hereby reduce the charge to the latter. In exercise of our discretion, we also set aside the sentence and substitute the same with a custodial sentence of 10 years imprisonment.
The sentence runs from the date the Appellant was convicted by the lower court.
Those are the orders of this court.

10TH FEBRUARY 2012

MUGA APONDI
JUDGE

H. ONG'UDI
JUDGE

JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT IN THE PRESENCE OF:-

Ms. Matiru for State
Appellant in person
Njue CC

MUGA APONDI
JUDGE

H. ONG'UDI
JUDGE