



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

CRIMINAL APPEAL CASE NO. 140 of 2008

MWENDWA MUSILI..... APPELLANT
VERSUS
REPUBLIC RESPONDENT

(From the conviction and sentence by D.O. Onyango SRM in Cr. Case No. 65 of 2008 in the Senior Resident Magistrate's Court at Runyenjes delivered on 9th July 2008)

J U D G M E N T

The appellant in this case had been charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The facts of the prosecution's case as in the charge sheet are as follows:-

COUNT ONE

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

MWENDA MUSILI:- On the night of 1st and 2nd of September 2007 at Mwana wa Giti Village, Itabua Sub Location, Mbeti – North Location in Embu District of Eastern Province, jointly with others not before court while armed with dangerous weapons namely pangas, and iron bars robbed MARTIN MUKUNDI NJUE of Kshs. 1,000/= and a mobile phone make NOKIA 1110 valued at Kshs. 3,000/= all valued at Kshs. 4,800/= and at or immediately before or immediately after the time of such robbery used actual violence to the said MARTIN MUKUNDI.

COUNT TWO

STEALING CONTRARY TO SECTION 275 OF THE PENAL CODE

MWENDWA MUSILI:- On the night of 1st and 2nd of September 2007 at Mwana wa Giti village, Itabua sub Location, Mbeti-North Location in Embu District within Eastern Province, jointly with others not before court stole one pair of sports shoes valued at KShs. 400/= the property of Nicasio Njiru Njeru.

ALTERNATIVE CHARGE 2

HANDLING STOLEN PROPERTY CONTRARY TO SECTION 322 (2) OF THE PENALCODE.

MWENDWA MUSILI:- On the 2nd day of September 2007, at Mwana wa Giti Village, Itabua sub location Mbeti North Location in Embu District within Eastern Province otherwise than in the course of stealing dishonestly received and retained one pair of sports shoes valued at Kshs. 400/= the property of NICASIO NJIRU NJERU knowing or having reasons to believe it to be stolen property.

COUNT 3

STEALING CONTRARY TO SECTION 275 OF THE PENAL CODE.

MWENDWA MUSILI

On the night of 1st and 2nd September 2007 at Mwana wa Giti village, Itabua sub location, Mbeti

North Location in Embu District within Eastern Province jointly with others not before court stole 1 (one) pair of sports shoes valued at Kshs. 400/= the property of PATRICK MUCHANGI NJERU.

ALTERNATIVE CHARGE

HANDLING STOLEN PROPERTY CONTRARY TO SECTION 322 (2) OF THE PENAL CODE

MWENDA MUSILI:- On the 2nd day of September 2007, at Mwana wa Giti Village, Itabua sub location Mbeti North Location in Embu District of Eastern Province otherwise than in the course of stealing dishonestly received and retained one pair of sports shoes valued at Kshs. 400/= the property of Patrick Muchangi Njeru knowing or having reason to believe it to be stolen property.

After a full trial, the learned magistrate found the accused guilty as charged in count 1 and convicted him accordingly. Thereafter, the learned magistrate went ahead and imposed a death sentence as prescribed in Section 296 (2) of the Penal Code. In addition to the above, the learned magistrate also found the accused guilty of count two and three. Later on, he went ahead and sentenced the appellant to two years imprisonment for each count. Being aggrieved by the judgment of the trial magistrate, the appellant filed this appeal while relying on the following grounds:-

1. *That I pleaded guilty to the charge.*
2. *That the learned trial magistrate erred in law and fact by accepting the evidence of PW1 and PW2 who alleged that I was the intruder whereas I was not the one who chased and arrested.*
3. *That the learned trial magistrate erred in law and fact when convicting the appellant without considering that I was not arrested with any of the stolen items or money which was stolen as it was immediately after the attack.*
4. *That the learned trial magistrate erred in law and fact by accepting the evidence of PW6 regarding parade which was of no value as it was alleged that I was arrested immediately after the attack.*
5. *That the learned trial magistrate erred in law and fact by rejecting my defence which was safe to secure my acquittal in addition reasons of its rejection was not disclosed as stipulated by the provisions of section 169 (1) CPC and therefore pray the honourable court to consider or re-consider my defence.*

During the hearing of the appeal, the appellant appeared in person. Apart from the above, the appellant also handed over an amended supplementary grounds of appeal. The same states the following grounds:-

1. ***That the case for the prosecution in respect of count 1 was not proved to the required needed in law hence my subsequent conviction was unjustified and unsatisfactory.***
2. ***That the learned magistrate made an error in law by conviction me on count II and III hence imposing a sentence of 2 years imprisonment term instead of leaving the same in abeyance due to already entered conviction and sentence of death on count 1.***

On the other hand, the appeal has been opposed by Mr. Wohoro who appeared on behalf of the Republic. While making his submissions, the learned counsel referred this court to page 9 of the record and stated that the same clearly shows the conduct of the appellant. According to the learned counsel, the intruders ran away but the complainant shouted and one of them was arrested. The person who was arrested was later re-arrested and positively identified by PW1, PW2 and PW3. Apart from the above, he also submitted that the evidence of PW2 show clearly the violence by the appellant during the commission of the offence. The learned state counsel also referred this court to the evidence of PW3 who stated that he was able to identify the panga that was used during the robbery. PW3 emphasized that he and his brother never lost sight of the appellant when he was running from the scene. On the basis of the above, the learned counsel further submitted that all the ingredients of the offence were proved. He concluded his submissions by stating that the court reached a proper conclusion before convicting the appellant.

Since this is the first appellant court, we have the duty to re-consider and re-evaluate the evidence which was adduced before the trial court before we make our own conclusions. This court also appreciates and is also alive to the fact that we never saw nor heard the witnesses. Those basic principles were set down in

the case of **Gabriel Kamau Njoroge vs. Republic** [1982 – 88] 1 KAR 1134. In his evidence, PW1 Martin Mukundu Njue recalled that on the night of 2nd September 2007, he closed his shop at around 8pm and went to sleep. At around 1 am, he was woken up when the door was hit by what he later learnt was a stone. The wooden door got broken following the impact of the stone. The witness further explained that the shop and the room where he sleeps has only one door. After the door was opened, two people went in and PW1 realized that they were thugs. One of them had a panga while the other had a metal bar. The one armed with metal bar demanded that PW1 gives him money and his mobile phone. Later, PW1 offered them 1,800 which was on his bed and also a mobile phone namely Nokia 1110. Both the thugs had torches. The one who took the money and the phone went out first while the other one who had the panga left later. After the thugs left, PW1 and others started screaming after them while shouting, ‘*mwai, mwai.*’ In response, members of the public came to help while the two men were running in the same direction. After a while, a neighbor helped to arrest one of them after a 100 m from the shop of PW1. The man who was still armed with the panga was arrested and the weapon taken away from him. Neighbours later helped to search the man but nothing was recovered from him. It was the testimony of PW1 that his colleague who had the metal bar had run away with the money and the phone. Within a short while, a police vehicle came to the scene and the people explained what had happened. The suspect was by then carrying two pairs of sports shoes which were later identified by one Njiru and Muchangi. Njiru and Muchangi complained that they had left their shoes outside their houses which neighbours the one of PW1. Subsequently, PW1 and the neighbours accompanied the police to the Police Station where the suspect was locked in. On the other hand, PW2 Pius Kithinji Kiragu who was sleeping in the house of PW1 on the material day confirmed and corroborated the story of the 1st witness. In his evidence, PW3 Nicasio Njiru Njeru testified that on the night of 1st September 2007, he arrived in his house at around 9pm. After washing a pair of shoes, he placed the same on top of the iron sheets of his house to let it dry. From there, PW3 went to sleep but at around 1am he heard a scream from his neighbours. The neighbor who was screaming was actually PW1. On getting outside his house, PW3 saw two men running from the house of PW1. Though PW3 asked the two suspects to stop, they kept on running. While accompanied by his brother, PW3 chased the two suspects for about 100 m and managed to arrest the appellant. They forced the appellant to lie down before members of the public joined them. PW3 confirmed that the appellant was armed with a panga and that he was also carrying a paper bag where surprisingly he found his pair of shoes which he had earlier washed. Inside the paper bag was another pair of shoes belonging to his brother. Though they searched the appellant, they never recovered the money or mobile phone which had been stolen from PW1. On the other hand, PW4 Patrick Muchangi who had accompanied his brother confirmed and corroborated the story of PW3. Similarly, PW5 Stanley Kithinji Njogu confirmed and corroborated the story of PW3. On the other hand, the appellant explained in his defence that he normally sells traditional liquor known as ‘*keruche and busaa*’. The appellant explained that on 1st September 2007 at 6pm, while he was drunk in his house, two police officers went there. The said police officers are Abdi and Opara Odhiambo. According to the appellant, the police officers arrested him on that date because he was unable to give them money. The appellant explained that he was surprised when he was charged for the present offence.

From the evidence on record, it is abundantly clear that the appellant was arrested while he was running away from the scene of the incident. The prosecution witnesses explained clearly how the accused was arrested on the material night. It was the testimony of PW1 that he clearly saw the appellant in his house through the lights from the torch that he was flushing. On the other hand, PW2 was also able to identify the appellant who was carrying a torch during the robbery. Prior to that incident, PW2 had seen the appellant in their estate for two years. He also stated that the appellant used to deal in the business of repairing basins and *sufurias*. Immediately the offence was committed, when the appellant and his friend were running away from the scene, PW3 and PW4 assisted in arresting the appellant. Unfortunately, the other suspect managed to escape.

The above sequence of events clearly show that the appellant was positively identified during the robbery and he was also arrested shortly after the incident. The evidence against the appellant is obviously overwhelming and water tight. We do wish to find that the learned magistrate considered the evidence and reached a proper conclusion. Given the overwhelming evidence against the appellant, we hereby dismiss the appeal. We hereby uphold the conviction and confirm the sentence.

Those are the orders of this court.

DELIVERED, SIGNED AND DATED AT EMBU THIS 10TH DAY OF FEBRUARY 2012.

**H.I. ONG'UDI
JUDGE**

**MUGA APONDI
JUDGE**

In the presence of:-

Ms. Matiru for State

Appellant in person

Njue CC

**H.I. ONG'UDI
JUDGE**

**MUGA APONDI
JUDGE**

10TH FEBRUARY 2012.