



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Criminal Appeal 785 of 2007**

**ANTHONY MWITI NJERU.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

1. Anthony Mwit Njeru the appellant herein was charged with 4 counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**.
2. Brief particulars of the offences are that on the 11<sup>th</sup> of June 2005 at Civil Servants estate in Langata within Nairobi area, with others not before the court and while armed with dangerous weapons namely, pistols they robbed David Anasi Onyancha, of Kshs.4000/= one gold wrist watch make lerus, two mobile phones and one cheque leaf all valued at approximately Kshs.147,000. On the same date, time and place they robbed Susan Onyancha of Kshs.99,680/=, two gold rings, four wrist watches, six gold necklaces, an assortment of earrings and bracelets, four cameras and six gold medals valued at approximately Kshs.450,000/=. In count III they robbed Matilda Kerubo Nyakundi of a mobile phone make Erickson T100 worth Kshs.900/=. In count IV and on the same date, time and place attacked and robbed Linet Nyanchama Onyancha of one Motorola C-115 mobile phone valued at Kshs.4,999/-. In all four counts the assailants threatened to use violence against the victims immediately before or immediately after the time of such robbery.
3. The prosecution called a total of seven witnesses to prove their case. The appellant gave sworn testimony and called two witnesses. At the close of the trial the learned trial magistrate found the appellant guilty on all four counts and convicted him on all four counts.
4. On 18<sup>th</sup> of December 2007 the appellant filed his memorandum of appeal relying on five grounds of appeals in which he stated that several provisions of the law had been violated. The main grounds however were that the evidence of identification was inconclusive and that his alibi defence was not given due weight.
5. Being the court of first appeal we re-evaluated and analysed the evidence afresh keeping in mind that we neither saw nor heard the witnesses ourselves.

6. We agree with the learned counsel for the appellant Mr. Wagara that the evidence of identification was contradictory. PW1 was not able to pick the appellant from the identification parade and in court he maintained that he could not identify the appellant. PW2 the son to PW1 did not attend the identification parade and in court he stated that the man who attacked and tied them all up was not in court. He did not identify the appellant. PW3 testified twice. On the first occasion she did not identify the appellant. She also told the court that she had been called before an identification parade at Pangani police station and was not able to identify anyone.

7. Seven months later when PW3 was recalled she now purported to identify the appellant and said that she had identified him at an identification parade in Langata. At Langata police station she described the assailant as tall and slender but that the Accused in court looked bigger. She testified that the police had called her to the city morgue to look at a body of a person who had been shot and killed by the police, and that the body was that of a tall brown man with a scar to the right side of the forehead.

8. PW4 described the assailant as brown, frail and slender and she did not see any mark on him. PW5 was not sure which side of the head the scar was on. This is also the witness who purported to identify the appellant in remand as one of the attackers. The charges for which he was in remand appear to have been dropped after he became more useful to the police in other ways.

9. In the analysis of the evidence on record we find that the learned trial magistrate misdirected herself in several ways:

She acknowledged that the witnesses gave conflicting evidence on the location of the scar on the appellant's face but went ahead to find that the witnesses agreed on the general description of the appellant. She observed that the appellant seemed different in body size and weight from the description of witnesses but still found that he had been properly identified. She completely failed to consider the alibi defence or refer to it in her analysis at all. When she finally convicted the appellant the learned trial magistrate failed to indicate whether she had convicted the appellant on all four counts or some only thereof.

10. If the learned magistrate convicted the appellant on all four counts she should have sentenced him on count 1 and left the sentences on the other 3 counts in abeyance since the appellant cannot be put to death more than once. We note that the learned State Counsel Mr. Muriithi conceded the appeal on grounds that the evidence of identification was contradictory and did not form a basis for a proper identification in the circumstances of this case. We have re-evaluated and analysed all the evidence on record in totality and find that the appeal filed by the appellant has merit.

11. For the foregoing reasons we allow the appeal, quash the convictions and set aside the sentences on all the four counts. The appellant is acquitted of the charges of robbery with violence contrary to Section 296(2) of the Penal Code on all four counts. He is ordered to be set at liberty forthwith unless otherwise lawfully held.

**SIGNED DATED and DELIVERED** in open court this 7<sup>th</sup> day of **February 2012**.

**F. A. OCHIENG**

**L. A. ACHODE**

**JUDGE**

**JUDGE**