



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL NO. 218 OF 2010
GODFREY AMATETE OTOTA.....APPELLANT
V E R S U S
REPUBLIC.....RESPONDENT
JUDGMENT

The Appellant, **GODFREY AMATETE OTOTA** was charged and convicted of the offence of robbery contrary to **section 296 (1)** of the Penal Code.

The particulars of the offence were that on the 16th day of July, 2010 at Ikerumbi, Ematsatsi Sub-location, Kisa East Location in Khwisero District within Western Province robbed ROSEYINDA AMUNGA of Kshs.15,000/=, mobile phone make LG valued at Kshs.2,000/=, ID Card, 2 kg of sugar Kshs.200/=, imperial soap Ksh.70/=, ½ kg of meat Ksh.125/=, vegetable and fruits Ksh.100/=, record book and bag Ksh.300/= all valued Kshs.17,895/= and at the time of such robbery threatened to use actual violence to the said ROSELYINDA AMUNGA.

Aggrieved by the conviction, the appellant raised six grounds of appeal which can be summarized as follows:-

- That the evidence on record was not sufficient to sustain a conviction.
- That the trial magistrate shifted the burden of proof to the defence.
- That the trial magistrate overlooked the defence case.
- That the court relied on hearsay evidence and rumours.

During the hearing of the appeal, the appellant submitted that the case was framed up against him. Mr. Orinda for the State submitted that although the complainant's evidence is that of recognition, there were difficulties concerning the source of light.

The facts of the Prosecution case is that on 16th day of July, 2010, the complainant, PW1, ROSELYINDA AMUNGA MASHEMO was walking home at about 7.30 p.m. She met the appellant on the way and greeted him. The Appellant did not reply to the greetings. As the complainant walked on, she was attacked from behind. She turned and saw the appellant who robbed her of a basket that contained cash Kshs.15,000/=, a mobile phone, I/D card and groceries.

The complainant screamed for help and gave a chase to the appellant but the appellant managed to escape.

Neighbours who rushed to the scene were informed by the complainant about the robbery. The appellant who was named by the complainant as the culprit was subsequently arrested and charged with the offence of robbery and another count which is not a subject of this appeal.

In his defence, the appellant stated that on the material date he was away in Maragoli area where he had gone to attend the funeral of his aunt. He stated that when he returned home, after two days, he was arrested without being told the reason behind his arrest. He was then beaten and his house searched but nothing was recovered. That he was only found with two rolls of bhang and two other rolls of bhang were planted on him. The appellant's appeal is however limited to the conviction and sentence on the offence of robbery.

From the facts of the case it is clear that the appellant was convicted on the evidence of a single witness. Although the evidence of the complainant is that she recognized the appellant who was a neighbour, the time of the offence is stated as 7.30 p.m. According to the complainant there was moonlight. The intensity of the light from the moonlight is not described. At 7.30 p.m., one wonders whether it was a case of moonlight or twilight.

There was no recovery of any of the goods that the complainant was robbed of.

The evidence of the rest of the Prosecution witnesses dwells on the response by the complainant's neighbours to her distress call and the report to the police and the investigations carried out.

There is therefore no evidence to corroborate the complainant's evidence. The recognition was in difficult circumstances. It is evidence that cannot be said to be free of any possibility of error. It would be unsafe to sustain the conviction.

Consequently the appeal is allowed and the conviction on the offence of robbery contrary to **Section 296 (1)** quashed and the sentence of ten (10) years set aside.

Once the sentence for the offence of being in possession of narcotic drugs is served, the accused would be at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 6th day of March, 2012.

B. THURANIRA JADEN
J U D G E