



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL COURTS COMMERCIAL & TAX) DIVISION)

CRIMINAL APPEAL 24 OF 2008

DENNIS OMETE NYANDIKA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No.310 of 2006 of the Chief Magistrate's Court at Nairobi by T.N. Ngugi (Mrs) – Senior Principal Magistrate)

JUDGMENT

The appellant, **DENNIS OMETE NYANDIKA**, was convicted for the offence of Robbery with violence contrary to **section 296 (2) of the Penal Code**.

He was thereafter sentenced to suffer death as by law provided.

He has appealed to the High Court, challenging his conviction. As far as he was concerned, he was wrongly convicted because he was also a victim of the robbers.

The incident giving rise to the charges against the appellant was very sad. It took place on the night of 31st January 2006, at Muthaiga North Estate, Nairobi.

At about 9.45p.m.a group of men entered the house of Mr. Peter Kennedy, where he lived with his wife Patricia Mary Kennedy. The men gained entry into the house through the kitchen door.

At the time, the appellant was working for the Kennedys as a cook. He was in the kitchen, undertaking various tasks.

The robbers physically assaulted both Mr. and Mrs. Kennedy, whilst demanding information about the whereabouts of money.

Meanwhile, some of their colleagues ransacked the house, and carried away numerous items, including a Music system; a radio; 20 bracelets; 7 necklaces; 4 mobile phones; 2 remote control gadgets; wrist watches; kikois; a Christmas cake; blankets, chocolates; 4 pairs of shoes; a dinner set; T-shirts; pens; wallets; a Kodak camera; a tea pot; one bottle of Smirnoff vodka; 2 rings; diskettes etc.

Following the assault visited on Mr. Peter Kennedy, he passed away.

It is common ground that the appellant helped the complainant (Mrs. Patricia Kennedy) to take Mr. Kennedy to hospital, where the latter was pronounced dead.

The appellant then returned to the house, and continued performing his regular duties.

However, on the 3rd of February 2006, the appellant's house was searched by police officers, who recovered many items belonging to the complainant. It is then that the appellant was arrested.

However, the appellant says that he had nothing to do with the robbery at his employer's house. If anything, he told the court that he too was tied up by the robbers.

The fact that the appellant had been tied up was corroborated by **PW 6**, Consolata Adego.

PW 6 used to work for the Kennedys' as a house-help. On the material night the robbers led her into a toilet, where they tied her hands behind her back. They also gagged her mouth, before locking her up, inside the toilet.

After the robbers left, and when the house had become quiet, **PW 6** managed to free herself. When she got out of the toilet, she found the appellant inside a room that was next to the sitting-room. **PW 6** testified that the appellant's hands and legs were tied.

After the appellant had untied himself, he went and sat with Peter Kennedy, holding him.

Those actions of the appellant, until that stage, appear to be more consistent with innocence than guilt.

However, when many items belonging to the complainant were recovered from the appellant's house, the tide appeared to have changed against the appellant.

But the first question that then arises is why the police did not search the appellant's house immediately. That question might perhaps be better put in the following manner:

“Why did the police only decide to search the appellant's house days after the robbery?”

The answer was provided by **PW 7**, Caroline Jane Kennedy, who is a daughter to the complainant.

On the material day, **PW 7** was not at her parents house in Muthaiga North. She was at her own house in Gilgil, where she worked as a cateress in a private Boarding School. She was picked up from the school on the morning of 1st February 2006. The person who picked her up is Kefa, the family driver.

Therefore, **PW 7** did not have any first-hand information on the robbery. However, she did receive a phone-call from a person named George Onyango, who told her that it was the appellant who had “directed” the robbery.

PW 7 then promptly informed her brother about the information she had received from George Onyango.

Thereafter, the police were informed. They then arrived at the residence of the Kennedys, where the appellant used to stay, and they searched the appellant's house.

During cross-examination, **PW 7** first said that although the person who phoned her, identified himself as George Onyango, she (**PW 7**) did not have any idea who the caller was.

However, when **PW 7** was referred to the statement which she had recorded with the police earlier, she admitted that Onyango used to be an employee of her father. The said Onyango had escaped after stealing Kshs.100,000/- about 18 months before the incident which gave rise to the case against the appellant.

PW 9, PC Paul Rono, was one of the police officers who searched the appellant's house. He said that the

search was conducted on 6th February 2006.

At the time they got to the scene, they found that the complainant (**PW 1**) also had keys to the appellant's house.

PW 9 testified that the appellant was arrested on 3rd February 2006. He was arrested because **PW 9** had received information from an informer, that the appellant was involved in the robbery and the killing of Peter Kennedy.

Notwithstanding that information, **PW 9** did not search the appellant's house on the day he was arrested. That was definitely curious, bearing in mind that the appellant was arrested within the complainant's compound. **PW 9** said;

"I never did a search that time. I took him to his house and ensured that the house was locked. I could not do a search immediately because I got information that the 1st accused had assisted in taking the deceased into the motor vehicle.

I can't tell why the 1st accused waited for 3 days in that residence for the police to arrest him. Yes, it is because of the honest belief that he may not have been involved."

In our re-evaluation of all the evidence on record, we find that there was not a single person who testified that he or she saw the appellant committing the offence.

The first person to raise suspicion about the appellant was named George Onyango, who did not testify. He told **PW 7** that the appellant had directed the robbery. But even then, the appellant was not arrested immediately.

Possibly, it is because the police were aware that the source of the incriminating information was himself not an upright man. George Onyango had escaped from the Kennedy's home after stealing Kshs.100,000/- from Peter Kennedy.

Thereafter, **PW 9** arrested the appellant on 3rd February 2006, but still, he did not search the appellant's house. He only conducted the search 3 days later.

Even though many of the stolen items were recovered from the appellant's house, the search that yielded the said items was conducted 3 days after the appellant had been placed in custody.

Considering that the complainant had another key to the appellant's house, it cannot be ruled out that the items found their way into the appellant's house after the appellant had been arrested.

For those reasons, we find that the decision of Mr. Mulati, learned state counsel, to concede the appeal, was proper.

Accordingly, we do now allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 23rd day of April, 2012.

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FRED A. OCHIENG

JUDGE

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L.A. ACHODE

JUDGE