



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL 155 OF 2010

*(An Appeal against both conviction and sentence from the
Chief Magistrate's Court at Kakamega in Criminal
Case No. 1966 of 2009 [H. I. ONG'UDI, CM])*

MARGARET NECHESA WAMWOMA
APPELLANT

VERSUS

REPUBLIC
RESPONDENT

JUDGMENT

The appellant, **MARGARET NECHESA WAMWOMA**, was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

The particulars of the offence were that on the 6th day of October 2009 at Bukhura village, South Butso Location in Kakamega Central District within Western Province, jointly with another not before the court being armed with a dangerous or offensive weapon namely a kitchen knife, a rope and rungu robbed **FANUEL WAKA MUKHOLIA** his motor cycle Reg. No. KMC 855B make TVS Star valued at Kshs.87,000/=, a mobile phone make Motorola C117 valued Kshs.3,000/=, one safaricom wallet containing Kshs.420/=, all to the value of Kshs.90,420/= and during the time of robbery used actual violence to the said **Fanuel Waka Mukholia**.

The appellant pleaded not guilty to the charge. After a full trial, the appellant was convicted and sentenced to death. Aggrieved by the sentence, the appellant appealed to this court.

In her Petition of Appeal, the appellant raised several grounds of appeal as follows:-

“1. The learned trial magistrate erred in convicting the appellant when the evidence on the record did not support the charges.

2. The learned trial magistrate erred in convicting the appellant when the prosecution had not proved its case beyond reasonable doubt.
3. The learned trial magistrate erred in convicting the appellant when the appellant had not been positively identified by the prosecution witness.
4. The learned trial magistrate erred in convicting the appellant on uncorroborated evidence.
5. The learned trial magistrate erred in convicting the appellant basing on a defective charge sheet.
6. The learned trial magistrate erred in shifting the burden of proof to the appellant contrary to the well established rules of evidence.
7. The learned trial magistrate based on circumstantial evidence in erroneously convicting rules of evidence.
8. The learned trial magistrate erred in dismissing the appellant's defence."

The appellant relied on her grounds of appeal and denied the offence. She also stated that she is a mother and the sentence is harsh.

Mr. Orinda for the State opposed the appeal. He stated that the conviction was safe as the appellant was known to the complainant and that the complainant's evidence is corroborated.

This being a first appeal, it is the duty of this court to re-evaluate the evidence and draw its own conclusions (*see OKENO V R. [1972] EA 32*).

We have carefully re-evaluated the evidence that was adduced before the trial magistrate and also considered the submissions made.

The facts of the Prosecution were that the complainant, **FANUEL WAKA** (PW1) operated a "boda boda" motor cycle business in SHIBULI-BUKURA area. On 6.10.2009 at about 4.00 p.m., the complainant was in Bukura area when the appellant approached him to be ferried to SHIBULI AREA. The complainant agreed to transport the appellant together with another young man who the appellant came with at a fee of Kshs.40/= each. That the appellant requested for the complainant's telephone number so that she could telephone him when they were ready for the return trip. The complainant gave out his telephone number. The appellant telephoned him at about 8.00 p.m. and he picked the two from SHIBULI to return them to Bukura at a fare of Ksh.100/= each. The appellant and the young man she was with requested to be dropped further ahead for an extra amount of Kshs.60/=. The complainant obliged. When they reached the junction to Star Secondary School the appellant tied the complainant with a rope on the neck. The young man hit him with a hammer on the head. The complainant fell down and lost consciousness. He regained consciousness after 5 days while in hospital. He found his upper and lower teeth missing, his left eye was damaged and he had stab wounds on the face. The complainant had also lost his telephone set make Motorola, cash Kshs.340/= and the motor cycle.

The complainant was discharged from hospital after three weeks. He made a report to the police and recorded a statement. He was also issued with a P3 form which was filled in by a Clinical Officer, PW3 **FRANCIS ETIANA**. The P3 form showed that the complainant had suffered "grievous harm".

On 9.10.2009, motor cycle operators in Bukura area gave information to PW4 APC **ASHERI IMBYAKHA** that led to the arrest of the appellant from a bar. The appellant was escorted to Kakamega Police Station. After investigations, the appellant was charged with the present offence.

In her defence, the appellant gave unsworn evidence. She stated that she was going on with her work at a bar in Bukura area when she was arrested by the Administration Police Officer. That the Administration Police Officer invited her to his table and he entertained her with drinks and food. That the

Administration Police Officer made sexual advances to her which she resisted. The Administration Police Officer then started threatening her and beating her up. The appellant ran to Bukura Police Post but The Administration Police Officer followed her there and had her placed in the cells. The Administration Police officer was demanding a refund of the money he had used to buy her the food and drinks. After five days in police custody, the appellant was questioned about a missing motor cycle, phone and money.

After re-evaluating the evidence of the complainant, we are satisfied that the trial magistrate arrived at that finding based on sound evidence. PW1, the complainant in his evidence told the court that he knew the appellant before the material date. The complainant gave out the time the appellant approached him for transportation at 4.00 p.m. According to the complainant, it was the appellant who negotiated the fare with her before she called the young man. It was the complainant's evidence that he was attacked by the appellant and the young man during the return trip at about 8.00 p.m. Although the time of the attack was 8.00 p.m., the complainant had given his telephone number to the appellant who telephoned him to go and pick them.

PW2, **WELLINGTON SAUL ATIRA** gave evidence that corroborated the complainant's. According to PW2, he saw the complainant ferry the appellant and a man on the motor cycle. The following day PW2 heard that the complainant had been robbed. According to PW2, the appellant was the last person who had been seen with the complainant prior to the attack. It was PW2's evidence that he led the complainant's relatives to the bar where he used to see the appellant in BUKURA but she was not there.

The evidence of the complainant (PW1) and PW2 is that of recognition. ***"A case of recognition, not identification of assailants, is more satisfactory, more assuring, and more reliable than that of identification of a stranger."*** (See **ANJONI AND ANOR. V. r [1980] KLR**).

The medical evidence adduced by PW3, the Clinical Officer confirms that the complainant sustained grievous injuries.

PW4 was an Administration Police Officer who arrested the appellant. We have weighed the defence raised by the appellant that the said Administration Police officer wanted to get sexual favours from her after buying her food and drinks. We do not find the defence plausible. None of the issues raised in the statement of defence were put before the said police officer when he testified. The said issues appear to have cropped up during the defence case as an afterthought.

The evidence of the complainant (PW1), PW2 and the Clinical Officer (PW3) leaves no doubt that the complainant was robbed. There is no possible reason given why those other witnesses (PW1, PW2 and PW3) would frame up the appellant.

We are satisfied that the Prosecution case was proved beyond reasonable doubts. The appeal has no merit and is dismissed and the judgment of the trial magistrate upheld.

Delivered, dated and signed at Kakamega this 28th day of June, 2012

SAID J. CHITEMBWE
J U D G E

B. THURANIRA JADEN
J U D G E