



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAKURU

Criminal Appeal 217 of 2010

JOSEPH MWANGI MUMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.2934 of 2009

by Hon T.W.C. Wamae Senior Principal Magistrate dated 22nd June, 2010]

JUDGMENT

The appellant was charged in the court below with:

- i) two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**;
- ii) **personating a public officer** contrary to **Section 105(b)** of the **Penal Code**

According to the particulars of the offence, it is alleged that on 24th day of June, 2009 at Gilgil township in Naivasha District within the Rift Valley Province, the appellant jointly with another not before court separately robbed Joyce Wanjiku Mburu and Benson Njuguna Ruhiu of cash and assorted personal effects. That at or immediately before the robbery, they used violence on the two complainants. It was further alleged the appellant and his confederate introduced themselves as police officers.

According to the complainants, they were able to identify their assailants with the aid of electricity light. **P.W. 1 Joyce Wanjiku Mburu (Joyce)** recalled that it was the appellant who attacked her and her husband while his (appellant's) colleague kept vigil. Joyce testified that she was able to identify the appellant from a brown velvet cap that he was wearing, his brown teeth and a vein on his head.

P.W.2, Benson Njuguna also maintained he was able to identify the appellant with the aid of electricity light, his brown stained teeth, brown cap and a blue jacket.

The matter was reported to the police and recorded in the Occurrence Book of 19/20/11/09. Five months later, (on 20th November, 2009) the appellant was arrested within Gilgil town, wearing a brown cap.

The appellant in his sworn evidence said he was arrested at Gilgil where he had gone to inform his uncle of the sickness of his mother. That he was arrested because of the cap and the jacket which were claimed to be similar to those worn by the people who had robbed the complainants. He denied being involved in any robbery.

The learned trial magistrate considered that evidence and was convinced that the case against the

appellant was proved to the required standard. Upon conviction of the appellant on all the three counts, she sentenced him to death in count 1 and held the rest of the counts in abeyance.

The appellant was aggrieved and preferred this appeal on the following summarized ground contained both in the petition and in the written submissions:

- i) the prosecution did not prove their case beyond all reasonable doubt;
- ii) the complainants did not give the description of the appellant as their assailant when making a report to the police
- iii) the case against the appellant was brought as an afterthought.
- iv) there was no proper identification by the complainants;
- v) the appellant's defence was not considered;

Being the first appeal, it is the duty of this court to look at the evidence afresh in order to make independent conclusion bearing in mind that only the trial court had the opportunity to see and hear the witnesses.

The complainants were attacked separately by two men who were not known to them before this day. The attack was at night, around 2a.m. Both complainants testified that they were able to identify the appellant with the aid of electricity lights; that he had brown stained teeth and was wearing a brown cap and a blue jacket. Joyce also noted that when the appellant spoke a vein would appear on the face.

It turned out however, that when the two complainants made the initial report to the police, they did not supply any description of their assailants. Secondly, it was also confirmed that the name of Joyce and indeed her report was not recorded in the Occurrence Book (O.B.). In view of these facts and the attack having occurred at night and given that the attackers were strangers to the complainants were wearing caps. We also considered that the only thing that made the complainants identify the appellant after nearly five months is the brown cap. We come to the conclusion that it was unsafe for the trial magistrate to have based a conviction on such evidence.

Benson was categorical that:

“It is very true that you were arrested because you were wearing the brown cap.”

Yet it was conceded by the prosecution side that there was nothing unique about the cap.

In the result, this appeal is allowed. The conviction is quashed, sentence set aside and the appellant set at liberty unless lawfully held.

Dated, Signed and Delivered at Nakuru this 30th day of July, 2012.

W. OUKO

H. A. OMONDI

JUDGE

JUDGE