REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

Criminal Appeal 394 of 2007

RODGERS ABIKA OBIERO .....APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(From the original conviction and sentence in Criminal Case No.1548 of 2007 of the Chief Magistrate's Court at Kibera by Kiarie W. Kiarie – Senior Principal Magistrate)

JUDGMENT

The appellant, **RODGERS ABIKA OBIERO**, was convicted on one count of Robbery with Violence **contrary to section 296 (2) of the Penal Code.** He was then sentenced to suffer death as by law provided.

The particulars of the offence were that on 27th February 2007 along Ring Road Kilimani in Nairobi, the appellant jointly with others not before the court robbed ALISON LIPINA of her handbag, ATM Card, a Nokia 3310 Mobile Phone and cash KShs.1,200/-. The robbers are said to have used actual violence during the incident.

The learned advocate for the appellant, Mrs. Betty Rashid, submitted that the complainant did not testify at the trial.

In her considered opinion ALISON CATHERINE LIPINA was not one and the same person as ALISON LIPINA.

Furthermore, as the witnesses listed on the charge sheet included AARON LIPINA, the appellant submitted that the evidence on record did not support the charge.

Secondly, because the incident took place at about 7.00p.m, the appellant argues that it must have been dark, considering that the complainant was walking along a road. In those circumstances, there was a possibility of mistaken identification, because **PW 1** did not indicate that there was any lighting at the scene.

The third issue raised by the appellant was that his evidence was plausible, yet it was rejected for no good reason. He was walking home when he was attacked by a mob, which then arrested him. He insisted that he played no role in the robbery.

The appellant also contended that the evidence tendered by the alleged victim was incredible. He believes that it was not possible for one man who was stabbed with a knife on his buttocks, and

whose head was pushed between his legs, after he had been hit severally on the head, could have continued to hold onto one of the persons who had just robbed him. We were therefore invited to find the evidence to be incapable of belief.

The appellant also pointed out that even though the victim allegedly recovered the Identity Card of the appellant from his wallet, the said Identity Card was never produced in evidence.

In any event, the said evidence of recovery was not consistent with that of the only other witness, who said that there were no recoveries.

In a nutshell, the appellant submitted that the prosecution did not discharge the burden of proof.

In answer to the appeal, Mr. Mulati, learned state counsel, conceded it. He noted that the case was not investigated beyond the interrogation of the appellant.

We have re-evaluated all the evidence on record and drawn our own conclusions.

But first, it is important to make it clear that the charge sheet contained two counts. In Count 1, the complainant was AARON LIPINA, whilst in Count 2, the complainant was ALISON LIPINA.

From the evidence of **PW 1**, **ALISON CATHERINE LIPINA**, it is clear that she is a sister to AARON LIPINA. Therefore, there was no confusion in the names of the two complainants.

We also find no merit at all in the appellant's contention that ALISON LIPINA is a different person from ALISON CATHERINE LIPINA. By citing two out of the witness's three names, the charge sheet did not alter her identity at all.

It is also clear that the charge sheet lists three witnesses, namely AARON LIPINA, ALISON LIPINA and PC JACKSON LANGAT. Out of those three witnesses, it is only Aaron Lipina who did not testify. And as he was the complainant in count 1, the learned trial magistrate acquitted the appellant in that regard.

The two witnesses who testified gave evidence that was directly relevant to the offence for which the appellant was convicted. We find no evidence which can be said to be anything other than supportive of the charge.

PW 1 testified that she was in the company of three other persons on the material evening. The others were Aaron Lipina, Mary Konya and Judy. They were walking from Yaya Centre, along Ring Road Kilimani, towards Prestige.

Her brother, Aaron, crossed the road. Immediately thereafter, Aaron was surrounded by a group of men. One of them jumped on Aaron's back. The person who did so is said to be the appellant.

PW 1 had not known the appellant before that day. But when Aaron pinned down the robber who had jumped on his back, **PW 1** got a wallet from the robber, and read his name from the Identity Card.

Regrettably, however, the wallet and the Identity Card were never produced before the trial court.

If anything, **PW 2** testified that there was no recovery at all. That evidence would appear to contradict the testimony of **PW 1**, regarding the recovery of a wallet containing the appellant's Identity Card.

PW 1 said that the Identity Card was given, by her, to the police officer who recorded her statement. As the wallet and the Identity card were not produced as exhibits before the court, we wonder what became of them.

We also note that **PW 1** did not indicate whether or not there was any lighting at the scene of crime. We therefore do not know whether or not **PW 1** was able to clearly see the appellant. In fact, **PW 1** did not even testify that she was able to see and identify the appellant's face, physical appearance or any other features.

This is what she said in her evidence;

"My brother had just crossed the road when I looked at my right. I saw a group of men surround him. I then saw Rodgers jump on my brother's back. Rodgers is the accused in the dock. I had not known him before, but when my brother pinned him down, I got his wallet and from it got his identity card and read his name."

Of course, that means that if it were not for the Identity Card, **PW 1** had not otherwise identified the assailant. If she had identified him by his facial appearance, she could have said so.

But we also note that Aaron continued to pin down Rodgers until members of the public came to the scene. That would imply that the appellant was literally caught in the act, and was never let off the hook until he was handed over to the police.

Does that make the evidence tendered by the prosecution water-right?

To answer that question, we must revert to the evidence on record.

Aaron was surrounded by several men. One jumped on his back, whilst another one hit him on the forehead, severally.

Then, when Aaron pinned down one of the men, they stabbed him on the right buttock, using a knife. They also pushed his head to the ground.

PW 1 went to the assistance of her brother. She used her umbrella to hit one of the men on his head.

At that stage, one man went towards **PW 1**, and he grabbed **PW 1's** bag. Inside the bag **PW 1** had a cell phone and KShs.1,000/- cash.

Clearly, therefore, **PW 1** was not an idle bystander, observing the happenings from a detached position. She was involved in hitting one of the several robbers on the head. In return, one of the said robbers approached her and grabbed her bag.

In the circumstances, it is possible that when **PW 1** was being robbed, she did not keep a constant watch over what was happening between Aaron and the other robbers. We so find because **PW 1** was not even able to tell the exact number of persons who were involved in the incident, save to say that they were several.

Perhaps if Aaron had testified, we could have known what happened between him and the person he was grappling with during the time that **PW 1** was faced with her own immediate emergency. But Aaron did not testify because he had gone off to America.

The situation was not helped at all by the police officer who investigated this case. **PW 2** was the said Investigating Officer. After being assigned that responsibility, he preferred charges against the appellant after interrogating him. That was the sum total of the investigations!

He did not even get the wallet or the Identity Card which **PW 1** had allegedly handed over to the police officer who had recorded her statement. His work does not engender any confidence at all in his decision to charge the appellant.

As the complainants were both present when the appellant was escorted to the police station; and

because the complainants were also accompanied by other members of the public, the Investigating officer should have interrogated the said complainants and one or two other witnesses. The following words of Lesiit and Makhandia JJ., in the case of **BOB OWINO WERE Vs REPUBLIC, CRIMINAL APPEAL No. 1035 of 2004**, mirror our views on that issue;

"The evidence on record also shows that the case was never investigated at all. The prosecution did not bother to procure the evidence of crucial witnesses. Robbery with violence is a serious offence, for it carries with it a mandatory death sentence upon conviction. This being the case, it behoves the police preferring such charges to conduct thorough investigations. In our view this case was treated as though it was a minor traffic offence. Once the appellants were handed over to *PW 4* ***by members of the public and were identified by*** *PW 1* ***and*** *PW 2,* ***no other investigations were carried out. What PW 4 did was merely to prefer the charge."***

In conclusion, we find that Mr. Mulati, the learned state counsel, was right to have conceded the appeal.

We also note that the charge sheet has the following particulars;

"CHARGE

Count 1 ROBBERY CONTRARY TO SECTION 296 (2) OF THE PENAL CODE".

The offence in Count 2 was also for the offence of ROBBERY.

In effect, the appellant was not charged with the offence of ROBBERY WITH VIOLENCE.

In those circumstances, although the particulars cited in the charge sheet suggest that the offence committed was one of Robbery with violence, and even though the statutory provision cited also is for the offence of Robbery with violence, we find that it was wrong to convict the appellant for an offence that he had not been charged with.

By convicting him for an offence that was more serious than the one the appellant was charged with, the trial court erred.

For all those reasons the conviction cannot be sustained. We therefore 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 25th day of September, 2012

..... **.....**
FRED A. OCHIENG **LYDIA A. ACHODE**

JUDGE **JUDGE**