REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

ATNAIROBI MILIMANI LAW COURT'S

CRIMINAL APPEAL NO.226 of 2008

PETER MWAI KIBOI...APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(From original conviction and sentence in criminal case Number 796 of 2007 in the Senior Resident Magistrate's Court at Githunguri – L. K. Mutai (SRM) on 30/06/2008)

JUDGMENT

1. **Peter Mwai Kiboi,** the appellant herein was tried and convicted for the offence of robbery with violence, contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to death as by law required.

2. It had been alleged that on the 27th day of June 2007 at Githunguri Village in Kiambu District within the Central Province, being armed with dangerous weapon namely simis (panga) he robbed Ann Wangui Njuguna of her bag containing one mobile phone make Sonic Erickson valued Kshs.5,500/-, one covering scarf valued Kshs.600/=, bunches of keys and medicine, and at, or immediately before, or immediately after the time of such robbery threatened to kill the said Ann Wangui Njuguna.

3. The appellant filed an appeal on grounds that the conditions under which he was identified were not conducive, and that the charges were trumped up due to a pre-existing grudge between him and **PW1**. He also submitted that the prosecution witnesses lacked credibility, the evidence was contradictory, and that no recoveries were made from him. Lastly that the prosecution's case was not proved beyond reasonable doubt, and that his defence was not adequately considered.

4. The state opposed the appeal through Mr. Mulati learned State Counsel. Mr. Mulati submitted that the incident occurred at 2.00 p.m. in broad daylight, and the witnesses knew the complainant before that day. Further that the prosecution's evidence was in harmony, and that **Section 143** of the **Evidence Act** allowed a trial court to rely on the evidence of a single witness, which, however was not the situation in the case before court. Mr. Mulati therefore, urged the court to find the appeal untenable and dismiss it.

5. Being the court of 1st appeal we have scrutinized and re-evaluated the evidence afresh to make our own findings, and draw our own conclusions as is our duty. In so doing however we bore in mind that we did not have the advantage that the trial court had, of seeing and hearing witnesses as they testified.

6. On the ground of identification: we guided ourselves with the decision of the Court of Appeal in the

case of **<u>JOSEPH NGUMBAU NZALO VS. REPUBLIC (1991) 2KAR Pg 212</u>**, and carefully directed ourselves regarding the conditions prevailing at the time of identification, and the length of time for which the witness had the accused person under observation, to exclude the possibility of error.

7. The offence occurred at 2.p.m. in broad daylight as stated by the learned state counsel. **PW1** and her 8 years old daughter **PW3,** saw the Appellant well when he emerged from a gate just ahead of them, and stood beside the road where they passed him by. **PW1** saw him again when she turned back and noticed that he was following them. She saw him again when he finally attacked her. There were no impediments at the scene to interfere with her observation of the appellant.

8. **PW2** saw what transpired from a distance. He identified the complainant as his sister and the appellant as a person known to him as hand cart pusher. He ran towards them but the appellant ran into a footpath and disappeared before he could catch up with him. Both **PW1** and **PW2** therefore, identified the attacker as someone they knew prior to that day as a hand cart pusher at Githunguri market, and whose hand cart services **PW1** had employed before.

9. **Section 296(2)** requires that the offender be armed with any dangerous or offensive weapon or instrument, or be in company with one or more other person or persons, or that, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.

10. The appellant was alone at the time of the attack, but according to particulars in the charge sheet and the evidence adduced, he was armed with “simi (panga)”, with which he threatened to kill **PW1**.During the attack he robbed her of the property listed in the charge sheet.

11. We were alive to the fact that, this being a criminal case the appellant was under no obligation to prove his innocence or indeed to defend himself. He however opted to give a defence which was a mere denial, and which was considered and discarded by the learned trial magistrate, as having failed to cast any doubt on the prosecution’s case.

12. Upon re-evaluation of the record we find no evidence of the alleged pre-existing grudge between him and **PW1**. The appellant did raise the issue of pre-existing bad blood between him and **PW1** in his defence as a result of a alleged destruction of **PW1**’s camera by the appellant. **PW1** was steadfast in her answer that there had been no such thing. The appellant then abandoned that line of cross-examination. We too find, after adequately re-evaluating the defence that it has not managed to dislodge the prosecution’s evidence, at all.

12. We are therefore satisfied that the appellant, while armed with a “simi (panga)”, did attack **PW1** and rob her of the items listed in the charged sheet. We respectfully agree with the learned state counsel Mr. Mulati that the evidence of the three eye witnesses was in harmony, and the prosecution’s case was therefore proved beyond reasonable doubt against the appellant.

For those reasons we find that the appeal is lacking in merit and dismiss it accordingly.

SIGNED DATED and **DELIVERED** in open court this **15th** day of **October** 2012.

F. A. OCHIENG **<u>JUDGE</u>**	**L. A. ACHODE** **<u>JUDGE</u>**