



CRIMINAL

Failure of prosecution to call witnesses who assisted complainant

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 123 OF 2009

JOHN MUTUMA ARUNGA
APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal against the judgment of S.M. Githiji SRM in SRM Court at Nkubu in Criminal Case No. 2231 of 2006 delivered on 19th June 2009)

JUDGMENT

The appellant was charged before the Senior Principal Magistrate Nkubu with the offence of robbery contrary to section 296 (2) of the Criminal Code. He was convicted by that court and was sentenced to the mandatory sentence of death. He was aggrieved by that conviction and sentence and has appealed against both. This is the first appellate court. To that end, we are guided by the principles enunciated by the case of **Gabriel Njoroge Vrs. Republic (1982 – 88) 1KAR 1134** where it was held:-

*“As this court has constantly explained it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see **Pandya Vrs. R. [1957] E.A. 336, Ruwala Vrs. Republic [1957] EA 570.**)”*

PW1 on 14th October 2006 at 10pm, was on his way to his home from Nkubu. When he reached an area called “keep Left” he met four men who ordered him to stop. He thought they were police men. They asked him for cigarettes and he gave them four sticks of cigarettes. They asked him for money and he gave them Kshs. 500/=. They asked him to give them all the money and at that point, one of them came in front of him with an axe. PW1 said that there was electric light at a gate of the polytechnic which was about 2 metres away. He managed to wrestle down one of the assailants and as they were wrestling, he screamed. The rest run away. As they continued to wrestle, the police came and arrested him. PW1 said that he had been hit with an axe. He stated that the one who was arrested was called Mutuma. PW2, a

police officer stationed at Nkubu Police station in evidence stated that on the material day at 11pm he was at that police station. He was told by the OCS who had received the complaint of PW1 to investigate the complaint. PW1 related to him what had happened. He told him that the appellant had an axe. That it is when they wrestled down that the other suspects run away. The complainant told him that members of public assisted him to arrest the appellant and the police came to the scene soon after. Those were the only two witnesses called by the prosecution in this case. The appellant stated in his defence under oath that on the material date he had taken milk to sell at a hotel called Mali Café. When he sold the milk he purchased a kilo of sugar, loaf of bread and tea leaves. He placed those items in the milk container and walked towards his place of employment. When he reached near the Methodist Church, he met four persons. They asked him where he was from and where he was going. He explained to them. He then was taken to Nkubu Police station and placed in the cells. He was not aware why he was arrested. He however was taken back to the café where he had sold the milk and the police carried out a search of that place. They also arrested people that were at the hotel which people were the appellant's co-accused. With that evidence, the learned trial magistrate convicted the appellant. When the appellant appeal came up for hearing, it was not a surprise that the learned state counsel Mr. Kimathi conceded to the appeal. In his view was that although the offence was serious, he said that it had been prosecuted casually. He faulted the prosecution for failing to call the members of public that came to the aid of PW1 and also failed to call the police officers who re-arrested the appellant. It is for that reason that he conceded the appeal. Indeed we are in total agreement with that concession by Mr. Kimathi, the learned state counsel. Bearing in mind of that failure by the prosecution, the officer who first received the complaint at Nkubu Police Station, PW2 also seem to have given an impression that PW1 appeared at the Police Station in the company of the appellant alone. Bearing in mind the defence raised by the appellant, there is doubt in our minds whether the appellant was amongst the men that robbed PW1. The prosecution evidence was indeed very weak to sustain a conviction. It is for that reason that we find that the appellant's appeal has merit and we hereby quash the lower court's conviction and set aside its sentence and order that the appellant be set free unless he is otherwise lawfully held.

Dated and delivered at Meru this 28th Jan 2011.

**LESIT, J.
JUDGE**

**KASANGO, M.
JUDGE**

Read, signed and delivered at Meru this 2011.

In The Presence Of:

Kirimi/Mwonjuru Court Clerks

Appellant Present

Mr. Kimathi For the State

**LESIT, J.
JUDGE**

**KASANGO, M.
JUDGE**