



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.245 OF 2009

JANE MUGURE NYAKARURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.29/2009 by Hon W. Juma, Chief Magistrate, dated 10th August, 2009

JUDGMENT

The appellant, **Jane Mugure Nyakarura**, was charged with the offence of **robbery with violence** contrary to **section 296(2)** of the **Penal Code**. Upon conviction, she was sentenced to death. She was aggrieved and brought this appeal challenging the finding of the court below on the following condensed grounds:

- i) that the evidence did not support the conviction;
- ii) that the trial court shifted the burden of proof to the appellant;
- iii) that the sentence was improper.

Learned counsel for the respondent opposed the appeal submitting that the appellant participated in the robbery and was clearly identified by the complainant.

It was the prosecution's case that on 24th December, 2008 at about 5.45a.m., the complainant, Simon Nganga Ndungu, motor cycle taxi operator was called by a man we shall call the deceased, to Gituamba Bar where he met the deceased and the appellant. The deceased asked him to take the two of them to Njoro. On the way, they detoured into a road leading to a certain farm. The complainant was asked by the deceased to stop as the latter had dropped his hat. The deceased alighted and instead switched off the motor cycle and ordered the complainant to dismount the motor cycle and give it to him.

The deceased removed a rope from his pocket with which he tied the complainant's hands and legs. As he did so, the appellant was holding the motorcycle. The appellant also removed a mobile phone from the complainant's pocket. Both the deceased and the appellant mounted the motor cycle but it could not start. After completely failing, they decided to push it away. The complainant screamed attracting **P.W.3, Lawi Monkong**, who with others gave chase and arrested the appellant and the deceased. Members of the

public descended upon them and administered mob justice before they were rescued by a police officer. The rescue came late as the deceased had sustained very serious injuries from which he died a few days later.

In her unsworn defence, the appellant stated that as she worked at Gitumba Bar, on 23rd December, 2008, she met the deceased who expressed his love towards her and requested her to accompany him to his home in Njoro. On the way, he turned out to be a robber and the complainant and herself became victims. When the man and the complainant rode away, she ran to a nearby home seeking assistance. As she walked towards the scene of the robbery in the company of people from the home, they met the complainant who claimed she was with the robber. After a brief search, the robber was also arrested.

The learned trial magistrate found that the evidence presented proved the charge of robbery with violence as charged. This court is enjoined to re-evaluate the evidence on record in order to arrive at an independent conclusion but bearing in mind that we have neither seen nor heard the witnesses.

It is common ground that the complainant was transporting the appellant and her friend towards Njoro when the robbery took place. The complainant did not know the appellant prior to this date, although the appellant's companion was known to him. There is also no doubt that the incident took place in the early hours of the morning. The only broad question falling for determination is whether the appellant participated in the robbery, that is, whether the appellant and the robber had a common intention in terms of **section 21** of the **Penal Code**.

We start with the question whether or not the events of the fateful morning amounted to **robbery with violence** under **section 296(2)** of the **Penal Code**. The essential ingredients of **robbery with violence** under **section 296(2)** of the **Penal Code** were fully examined in the case of **Johana Ndungu Vs. Republic**, Criminal Appeal No.116 of 1995.

There is no evidence that the appellant and her colleague were armed with any form of dangerous or offensive weapon or instrument. But the appellant was in the company of her companion (the deceased). There is also evidence that the deceased tied up the complainant at the time of the robbery. That in our view constituted to "*use of any violence to any person*" in terms of **section 296(2)** of the Before we make our conclusion on this point, we ask a further question; was there robbery in the first place? Robbery is defined in **section 295** of the **Penal Code** as follows:

"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to us actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

Stealing on the other hand is defined in **section 268** of the **Penal Code** to mean the fraudulent taking of anything capable of being stolen without any claim of right or the fraudulent conversion of any property to one's use other than the owner thereof.

One is deemed to have converted or fraudulently taken any property if one intends, among other things, to permanently deprive the owner of the stolen property.

Evidence on record is to the effect that after the motorcycle failed to start and as the appellant and the deceased were pushing it, they abandoned it when they were interrupted by members of the public. It is therefore our considered view that the evidence presented only disclosed the offence of **attempted robbery with violence** contrary to **section 297(2)** of the **Penal Code**.

The offence of **attempted robbery with violence** contrary to **section 297(2)** of the **Penal Code**, like the principal offence of **robbery with violence** under **section 296(2)** of the **Penal Code** is punishable by death, yet by dint of **section 389** of the **Penal Code** an attempted capital offence can only attract an imprisonment term not exceeding seven (7) years. This anomaly was the subject in the recent (delivered on 10th December, 2010) Court of Appeal decision in the case of **Evanson Muiruri Gichane Vs.**

Republic, Criminal Appeal No.277 of 2007, where the court after observing that there is apparent conflict in law in this regard which can only be addressed by Parliament, held that the appellant before their Lordships having been found guilty and convicted of attempted robbery with violence, was entitled to the less punitive of the two sentences. The appellant in that appeal was therefore sentenced to six years, which he had served.

We revert, finally to the question of whether the appellant and the deceased had common intention. We are, to begin with, not convinced that the appellant was an innocent passenger who also became a victim of the deceased person. For instance, there is evidence that the appellant was holding the motor vehicle as the deceased was tying the complainant. It was her who retrieved the mobile phone from the complainant's pocket. When confronted by members of the public, the appellant, like the deceased, ran away abandoning the motor cycle. Her conduct and even the conduct of the deceased towards her were not consistent with that of a victim, but rather an accomplice.

We are satisfied that the appellant in the company of the deceased, used actual violence to the complainant by tying him in order to steal his motorcycle.

For the reasons stated, we conclude that the appeal against conviction is unmeritorious while the appeal against the legality of the sentence has merit. Accordingly the appeal is dismissed as regards the conviction of the appellant but we allow the appeal against the sentence to the extent that we substitute the death sentence with five (5) years imprisonment from the date of her conviction and sentence, i.e. 10th August, 2009.

Dated, Delivered and Signed at Nakuru this 11^h day of February, 2011.

R.V. WENDOH
JUDGE

W. OUKO
JUDGE