



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO.150 OF 2009

LUCY WANGUI WANJIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An Appeal from original conviction and sentence in Nyahururu P.M.CR.C.NO.137/2007 by Hon S.M. Mungai,, Ag. Senior Principal Magistrate, dated 17th August, 2007]

JUDGMENT

The appellant was charged in the main count with **robbery** contrary to **section 296(1)** of the **Penal Code**. It is stated in the charge sheet that on 7th January, 2007 at Nyahururu Bus Stage, jointly with others not before court, the appellant robbed Peris Mumbi Maina of Kshs.10,000.00, 2 pairs of shoes and a bag containing assorted clothes all valued at Kshs.15,000.00 and at or immediately before or immediately after the time of such robbery, threatened to use actual violence. The prosecution called only two witnesses, the complainant, Peris Mumbi Maina and a police officer, P.C. Kalem Chandayi.

The complainant recalled that she got to Nyahururu Bus Stage from Nairobi at about 7p.m. Two young men confronted her, pulling her to a secluded *mutumba banda*. Shortly the two young men were joined by the appellant and another lady. The assailants threw the complainant down, snatched her bag and Kshs.10,000.00 in cash meant for her school fees. The complainant screamed attracting matatu drivers and conductors from the bus stage, who gave chase but only managed to catch up with the appellant who could not run as fast as her accomplices as she had a child strapped on her back. She was arrested but denied robbing the complainant or being part of the robbers. She explained that she was only responding to the complainant's screams. The drivers and conductors who had arrested her appeared convinced by this account and released her.

The next day, the complainant reported the robbery to the police. Three days later, the complainant saw the appellant wearing a pair of trousers which had been stolen from her. She returned to the police station, made a report and the appellant was arrested and charged.

The appellant in her unsworn evidence denied robbing the complainant and asserted that she returned from the hospital with her baby, met the complainant who insisted that the trousers she (the appellant) was wearing belonged to her (the complainant).

That constitutes the evidence on record. The trial magistrate found that that evidence implicated the appellant and upon conviction, sentenced her to four (4) years imprisonments. Aggrieved, she has

preferred this appeal, which although was admitted, has 5 grounds consisting only of mitigation. The only question this appeal raises is whether the complainant was able to positively identify the appellant.

It is now well established that the evidence of a single witness respecting identification, especially when the conditions favouring a correct identification are difficult, must be treated with the greatest care. See **Abdalla bin Wendo & Another Vs. Republic** (1953) 20 EACA 166. The identification must be positive and free from the possibility of any error.

There is evidence that the complainant was robbed at 7p.m. in the process of which she lost cash and other personal items. The complainant was the only eye witness. The robbery was near the bus stage and committed by four people. The complainant also stated that the appellant had been known to her for about one year. She further stated that it was partially dark; that there was security light; and that three days after the robbery, the appellant was arrested wearing the complainant's trousers.

If the appellant was known to the complainant prior to the robbery, then it was a case of recognition. It must be remembered that recognition is a better form of identification. Evidence of recognition must equally be subjected to strict scrutiny in order to ensure there is no error as mistaken identity even of a close relative can occur.

It was partially dark, the distance of the lights from the scene and its intensity was not indicated; in her report to the police, the complainant did not disclose the name, or description of the appellant; pair of long trousers claimed by the complainant had no special marks and certainly not the only one in the market and; that the drivers and conductors who arrested the appellant immediately after the incident were convinced she was not involved setting her free. All these go to show the conditions for positive identification were not favourable.

The learned magistrate failed to analyse the evidence and fell into error by convicting on evidence that did not meet the requisite standard of proof. For these reasons, the appeal is allowed, conviction quashed and sentence set aside. The appellant shall be set at liberty forthwith unless lawfully held.

Dated, Delivered and signed at Nakuru this 23rd day of May, 2011.

**W. OUKO
JUDGE**