



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL APPEAL NO.734 OF 2007**

**JOHN MWONJU NJENGA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From the original conviction and sentence in Criminal Case No. 7637 of 2007 of the Chief Magistrate's Court at Kibera**

**by Mr. Kiarie - Senior Principal Magistrate**

**JUDGEMENT**

The appellant was charged with four counts of robbery with violence contrary to section 296(2) of the Penal Code. In the 1<sup>st</sup> count, it is alleged that on 4<sup>th</sup> October 2007 at Goodmark Security services in Kangemi area jointly with others not before court while armed with dangerous weapons namely pistols robbed James Ahutu Okello of Kshs.10,800/= and a mobile phone and at or after the time of robbery threatened or used personal violence to the said James Ahutu Okello. In count 2, it is alleged the appellant robbed Robert Ngola of cash 1,500/= and two mobile phones and at the time or immediately before or immediately after the time of the said robbery threatened to use personal violence to the said Robert Ngola. In count 3 it is alleged the appellant robbed AP Kanaisa of cash 1,500/= and a mobile phone and at or immediately before or immediately after the time of the said robbery threatened to use personal violence to the said AP Kanaisa. In count 4 the particulars of the offence are that on the same place jointly with others not before court while armed with pistols robbed Purity Kageni of cash 300/= and a mobile phone.

It is the case of the prosecution that after the complainants were robbed their properties, the robbers escaped by jumping down from the storeyed building. It is alleged that after jumping from the building one of the robbers broke his leg and was arrested. It is contended that the appellant is the one who broke his leg and who could not move from the scene.

In his defence the appellant contended that he was a victim of robbery and that his leg was injured by the robbers using an iron bar. The evidence of PW1 is that before they were ordered to lie down, two men went to the offices and engaged them in a conversation. He initially thought that they were good people and as a result he observed the identity and the physical features of the said persons. It is the evidence of PW1 that the appellant had worn leather a jacket and a cap. He had also a scar on his face which made him unique from the other robbers. It is contended that the appellant left his jacket before jumping out from the building.

PW2 Robert Ngola testified that the appellant was wearing a leather jacket and a cap and that he was the one who was doing the most of the talking. PW2 testified that the appellant inquired as to who Robert was and when they failed to respond, he pulled out a pistol. He then asked them for the money for the income tax. After failing to produce the money for the income tax, they were ordered to lie down and robbed of the items mentioned in the charge sheet. He also contended that the incident happened during broad daylight and that the robbers took about 10 minutes. PW2 further contended that the robbers jumped out of the building after they found the door leading to the stairs had been locked.

PW3 AP Kanaisa testified that while she was going to open her place of work, the appellant held her hand and asked her to keep quiet. She was then told to sit on a chair before being robbed the items in count 2.

The evidence of PW4 was also similar to that of PW1, PW2 and PW3.

PW5 Maria Wanjiku testified that while she was washing some towels on the ground floor, some four men greeted her and climbed the stairs. She confirmed that the appellant was wearing a leather jacket and a blue cap. When she learnt of the robbery, she went and locked the door at the downstairs. She then heard the robbers running down but when they found the door locked, they ran upstairs. It is the evidence of PW5 that they went and jumped down from the rear where there is a high wall. She then went to the rear of the building and found the appellant who was unable to walk. At that time, he did not have his jacket and the cap. She contended that the leather jacket and the cap was recovered from where the robbers had jumped down from. When she questioned the appellant, he claimed he was pushed down by other robbers.

The evidence of PW6 is that on the material day, some two men told him to take the appellant to Westlands. He then found the appellant who appeared to have been injured on his legs. While on his way to Westlands he was called and told to return the appellant from where he had taken him from. Since he was a taxi man, he returned the appellant to the scene where he found police officers waiting for him.

The defence of the appellant is that on the material day he was accosted by three armed robbers who robbed him of Kshs.40,000/=. He contended that prior to being robbed he attempted to run away but he was hit with an iron bar. Secondly, he contended that he was framed up by a police officer whom he named as Sgt. Muinde. He contended that the said officer was his sister's lover and the two were plotting to dispose of a family property.

The question for our determination therefore is whether the prosecution proved its case beyond reasonable doubt. It is important to understand that it is always the duty of the prosecution to tender evidence which clearly places the accused person as the one who committed the subject robbery. In this

case, the incident took place early in the day when there was ample light to enable the victims to clearly observe and recognize the attackers. From the evidence on record there was no attempt by the robbers to disguise their appearances in any manner to raise an issue of difficult or improper recognition of the assailants. It is clear from the evidence on record that the appellant was the one who was doing most of the talking with the witnesses at a close range. In essence, there was ample time and opportunity for the witnesses to recognize the attackers. No doubt the appellant and others jumped down from the premises where the robbery took place. The appellant broke his leg and could not move from the scene. According to PW1, on the material day a group of four men appeared and engaged them in a conversation. The appellant was the most vocal and had a scar on his face. PW1 was then ordered to lie down and the four men started ransacking the place. PW2 also gave a description of the appellant as having been wearing a leather jacket and a blue cap. It is contended by PW1 and PW2 that the appellant is the one who pulled out a pistol and demanded to be given money. The incident took place in a storey building and the attackers jumped after they found the main door locked. It is also clear that the appellant left behind his jacket and the cap before jumping from the building.

In our view, the evidence of PW1 and PW2 was clearly and consistently corroborated by the evidence of PW3, PW4 and PW5 in all material aspects. It is alleged that the appellant had broken his leg and upon being confronted by PW5 he told her that he had been pushed down by some robbers. During cross examination the appellant did not challenge the evidence of PW4 and PW5. The appellant did not work at the building, he did not give an explanation as to why he was found outside the building minutes after the robbery. We think, the appellant was one of the robbers who robbed the complainants and who was subsequently injured after jumping from the building.

We have noted that the appellant gave two different versions in his defence. We appreciate that it is not the responsibility of the appellant to prove his innocence, however, the fact that he had given two contradictory pieces of evidence is a clear testimony that the evidence tendered against him is the true reflection of what transpired. As was rightly pointed out by the trial court, we agree that the defence was a clear afterthought made out by the appellant.

The appellant was properly recognized by the complainants as one of the robbers who robbed them a few minutes before he was arrested outside the building having broken his leg. We think there is no basis to disturb the verdict of the trial court since the prosecution proved its case against the appellant in all the four counts beyond any reasonable doubt. Consequently, we think the appeal against conviction is without merit.

On sentence, the trial court sentenced the appellant to suffer death in a manner prescribed by the law. It is not clear whether the appellant will suffer death in all the four counts. As a matter of practical implication, it is not possible and/or foreseeable for the appellant to suffer death in all the four counts. The prudent thing to do, was for the trial court to order that the appellant to suffer death in count 1 and the sentence in the other three counts to be remain in abeyance. We so order. Consequently, we uphold the conviction as entered by the trial court in all the four counts and affirm the sentence as hereinabove.

Dated, signed and delivered at Nairobi this 19<sup>th</sup> day of May 2011.

**J. KHAMINWA**  
**JUDGE**

**M. WARSAME**  
**JUDGE**