



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO.736 OF 2007

ERICK KAMAU NYAMBURAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No.1365 of 2006 of the Chief Magistrate's Court at Nairobi by M. W. Murage (Mrs.) – Senior Principal Magistrate

JUDGEMENT

The appellant was charged with robbery with violence contrary to section 296(2) of the Penal Code. The particulars are that on the 21st day of July 2006 along Kenyatta Avenue in Nairobi jointly with others not before court while armed with dangerous weapons namely pistols robbed Stella Njoki Olwete cash Kshs.111,736/=, 10 cheques, a bunch of keys, identity card, a bag and a cell phone all valued at Kshs.439,727/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Stella Njoki Olwete. After full trial the appellant was convicted and sentenced to death hence this appeal.

The appellant raised the following grounds;

- (1) That the learned trial magistrate made crucial errors both in law and facts and totally misdirected herself by holding the appellant was arrested being in possession of the complainant's stolen bag whereas the evidence adduced failed to prove this aspect to the required standard needed in law.**
- (2) The learned trial magistrate made an error both in law and facts by relying on the evidence of PW3, PW4 and PW5, failing to observe that there was need for corroborative evidence from an independent source as they were all police officers who had neither witnessed the robbery upon PW1 nor the events which started the shooting.**

It is clear that the prosecution called five witnesses in support of the charge against the appellant. It is the evidence of the complainant that as she was trying to bank money and cheques given to her by her employer, she was confronted by a group of men who placed a gun on her neck and immediately ran away with her bag containing the cash and other items as indicated in the charge sheet. She screamed for help and pointed the robbers to the members of the public who started shouting thieves! thieves! According to PW1 she immediately heard gunshots and she saw the robbers run towards Nation Centre. She confirmed that she found two persons who were shot by police officers. It is the contention of

the complainant the appellant was shot as he was trying to escape with the loot. PW3, PW4 and PW5 who are police officers testified that on the material day they heard two gunshots from the direction of 680 hotel and immediately found three men running towards them. The three witnesses confirmed that the appellant was carrying a bag and they shot him after he refused their orders to stop. PW3 and PW4 testified that they aimed and shot at the appellant who immediately fell down together with the handbag. The three police officers identified the appellant as the person who was running away and who was found in possession of a handbag stolen from PW1.

The question for our determination is whether the appellant was one of the robbers who attacked PW1 and was shot a few metres away from the scene by PW3, PW4 and PW5 as he was trying to escape together with his colleagues. In our re-assessment of the lower court evidence, we are satisfied the appellant was one of the robbers who attacked the complainant and robbed her of the items stated in the charge sheet. He together with his colleagues accosted the complainant on the material day and robbed her of the items mentioned in the charge sheet. The complainant raised alarm and attracted members of the public to the robbery committed against her by the appellant and others. Members of the public pursued the robbers and also attracted the attention of PW3, PW4 and PW5 who were on routine patrol within the town.

The appellant and others were ordered to stop but they defied the order given to them by lawful police officers executing their mandate. After the robbers failed to stop, and after they started shooting in the direction of the police officers, a gun battle ensued wherein the appellant was felled by several bullets from PW3, PW4 and PW5. Next to the appellant was found a bag earlier robbed from PW1. The complainant clearly identified the bag and all the items that were found therein. We are therefore satisfied that the learned trial magistrate correctly analyzed all the evidence and came to a firm conclusion that the evidence clearly placed the appellant as one of the robbers who robbed PW1.

The appellant was found in possession of a bag stolen from the complainant and did not give any reasonable explanation as to how he was found in possession of the bag earlier stolen from the complainant. We find the evidence tendered by the prosecution as overwhelming and that the story given by the appellant is so weak not worthy of any credit. The defence tendered by the appellant did not succeed in casting any doubt on the prosecution case. Consequently, we are satisfied that the appellant was convicted on sound and credible evidence tendered by the prosecution.

In our view the prosecution proved its case beyond reasonable doubt and the trial court properly convicted the appellant for the subject robbery. The appeal against conviction is without merit. We uphold conviction and affirm the sentence meted out by the trial court.

Dated, signed and delivered at Nairobi this 16th day of May, 2011.

J. KHAMINWA
JUDGE

M. WARSAME
JUDGE