



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL NO.15 OF 2010**

**IBRAHIM NGANGA NJOROGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

[An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.2862 of 2007 by Hon W. Kagendo, Senior Resident Magistrate, dated 21<sup>st</sup> January, 2010]

**JUDGMENT**

The appellant, Ibrahim Nganga Njoroge, was charged before the court below with the following offences:

Counts 1 and 2 **robbery with violence** contrary to **section 296(2)** of the **Penal Code**.

Count 3 – **being in possession of an imitation of firearm without a firearm certificate** contrary to **section 34(1)(a)** as read with **section 34(3)** of the **Firearms Act**.

It was the prosecution case that on 2<sup>nd</sup> August, 2007 at about 8/9p.m., the appellant in the company of three others while armed with an imitation firearm and a pistol robbed Salim Ndonga (complainant in count 1) (Salim) and Mary Muriuki (complainant in count II) (Mary); that they used actual violence on the complainants in the course of the robbery.

In count III the appellant was charged that on the day of the robbery he was found in possession of an imitation firearm. Salim testified that on the fateful night as he drove to visit a friend, the lights of his motor vehicle suddenly failed. He alighted, opened the bonnet of the motor vehicle adjusted the battery terminals and the lights were restored. Immediately four men appeared and pushed him into the boot. One assailant sat in the front while two sat with him in the boot. The one in the front seat demanded and he, Salim gave out Kshs.26,000/=, an ATM card, driving licence and a mobile phone. One robber tried to start the engine of the motor vehicle but failed.

In the meantime, Mary who was passing by talking on her mobile phone was pursued, caught up and brought to the motor vehicle by a gang member. She was bundled in the boot with Salim. After the motor vehicle failed to start, the gang members abandoned it and the two complainants in the boot. As the robbers walked away, Salim took to the driver's seat, started the motor vehicle and drove it towards the four gang members who split into 2 groups one running to the left and the other to the right. Salim drove towards the two who had ran to the left and ran over both, killing one instantly and seriously injuring

another. The deceased member of the gang had an imitation firearm and a mobile phone which they had just stolen from Mary. The suspect who was injured was not traced immediately. Salim went to the police station and reported the incident. Upon returning to the scene with police officers, the deceased suspect was lying dead where he had been hit. The police with the help of police dogs tracked down the injured suspect to a kei-apple fence some 100m from the scene where the robbers had been hit. Salim identified him as a member of the gang that had robbed them.

On her part, Mary was categorical that she was not able to identify any of the robbers. The appellant in his unsworn statement explained that on the fateful day he had gone for *chang'aa* on Kanu Street. A lady who had joined him for a drink stole Kshs.5,000/= from him. In order to extract it from her he beat her up infuriating some young men who attacked him viciously. His efforts to make a report of this attack at Bondeni Police Station were frustrated as he was chased away for the reason that he was too drunk. While walking to Central Police Station, he came by what he thought was a normal accident. Upon seeing him, the police officers at the scene arrested him claiming that he was part of the gang that had robbed the complainants.

In view of the foregoing evidence, the only question for determination before the court below and in this appeal is whether the appellant was one of the four men who robbed the complainants on the night of 2<sup>nd</sup> August, 2007.

In her judgment, the learned trial magistrate (W. Kagendo, Senior Resident Magistrate) was persuaded that Salim spent considerable time with the appellant during the robbery and hence was duly identified. She found that in the circumstances of the case, the offence of **robbery with violence** contrary to **section 296(2)** of the **Penal Code** was proved beyond any doubt and proceeded to sentence the appellant to death in count 1 while suspending the sentence in respect of count II. She, however, found no evidence to support the charge of **being in possession of imitation of firearm** in count III and accordingly acquitted the appellant.

The above finding and sentence aggrieved the appellant who has challenged the same in this appeal on the grounds that:

- i) the evidence of identification was not satisfactory;
- ii) the trial court ignored the appellant's defence;
- iii) the evidence presented by the prosecution did not prove the offence charged

Learned counsel for the respondent supported the conviction stating that the prosecution evidence placed the appellant at the scene of the crime.

We have considered these submissions and those of the appellant. We reiterate that the sole question in this appeal is that of identification. The attack on the complainants occurred at night (between 8 and 9p.m.). According to Salim, the only witness who maintained that he identified the appellant, he spent between 10 and 15 minutes with the robbers; that the appellant was wearing a cream T-shirt and was armed with a *simi*; that there were streetlights; that the appellant was slim and short, although at the time of the hearing Salim thought he had added some weight; that Salim was also able to see the robbers with the aid of headlights of passing motor vehicle; that with his motor vehicle, he hit the appellant and an accomplice; that while the latter died, the appellant was apprehended about 100m from the scene.

It is further the case for the prosecution that the T-shirt recovered from the appellant was subjected scientific analysis and confirmed to belong to the appellant. This last piece of evidence, in our view was superfluous as on its own or even together with other evidence it is incapable of linking the appellant with the robbery, particularly considering the appellant's defence that he had been attacked in a fight over his stolen money.

Having disposed of that preliminary matter, we must subject the rest of the evidence to fresh evaluation in order to arrive at our own independent conclusion. The evidence of Salim must be treated with the greatest care, being evidence of a single witness, the alleged robbery having taken place at night and the

fact that none of the four robbers were known to Salim.

See **Abdallah Bin Wendo Vs. Republic**, (1953) 20 EACA 160. There were four robbers. Salim was matched to the rear of the motor vehicle and confined to the boot. In his (Salim's) evidence, one of the robbers sat in the front seat while two sat with him in the boot. He did not specify where the appellant was. It must be remembered that this was in darkness. The lights from passing cars could not have been sufficient to enable Salim to see the features of the robbers, in the absence of evidence of the distance of the passing cars in relation to Salim's motor vehicle. Although Salim maintained that there were street lights, P.W.5, P.C. Andres Kimutai who visited the scene shortly after the incident was categorical that there were no street lights at the scene.

We also think that the evidence of the appellant having been knocked down and injured by Salim's car is far-fetched and incredible. The appellant was not arrested immediately after the two (2) robbers were hit. After hitting the two, Salim confirmed that one was dead but the second robber, although also hit had disappeared into the bushes. He left the scene, went to the police station and returned with police officers. It is when they returned that the appellant was arrested. There is no evidence as to how long he was away at the police station. While it was Salim's contention that the appellant was seriously injured with cuts all over and could not even walk, P.C. Kimutai only noted that the appellant was bleeding from the head and was generally well. The witness further confirmed that the appellant was not taken to the hospital for treatment of the injuries.

When he was finally taken for mental status assessment, one month later, Dr. Kamau noted that he had no injuries. It was necessary to link the injuries on the appellant to being run over by a motor vehicle in view of the appellant's consistent assertion throughout the trial that he had been attacked by some young men over the loss of his money.

In our view, the evidence presented by the prosecution witnesses did not place the appellant at the scene beyond any doubt. In the result we allow this appeal and order that the conviction is quashed, death sentence imposed set aside and the appellant set at liberty unless held for any other lawful reason.

**Dated, Delivered and Signed at Nakuru this 6<sup>th</sup> day of May, 2011.**

**M. J. ANYARA EMUKULE  
JUDGE**

**W. OUKO**

**JUDGE**