



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUSIA**  
**CRIMINAL APPEAL NO.89B OF 2006**

**K.O.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

*[From the conviction and sentence of W.N. NYARIMA, P.M,  
in Busia Criminal Case No.2252 of 2005]*

**J U D G E M E N T**

The appellant K.O., was originally charged with the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code. He was convicted after a full trial, and sentenced to be detained at the pleasure of the President because he was a minor. He appealed against the conviction and sentence.

The summary of facts is as follows:-

The complainant, Robert Omondi, PW1, was returning home from visiting his in-laws on 12.9.2005. He was in company of two other persons, PW2, Victor Ochieng and PW6, Thomas Warinda. On the way, they were attacked by three people who demanded money. The attackers cut the complainant with a panga and stole his leather jacket, a cap and about 600/=. However, the complainant managed to hold the appellant until rescue came.

It is in evidence that PW3, Fransisca Adhiambo Wanga, found the complainant being robbed by the appellant, K.O. and two others. The two however fled before PW3 could identify them. Fransisca Adhiambo then persuaded PW1 to release the appellant on the ground that she knew him.

The evidence of other prosecution witnesses is that PW4, Michael Ogola, a clan elder, received a report of the robbery the next day on 13.9.2005. He ordered the appellant to come to his presence and requested him to return the stolen items to the complainant. However, when on the appellant showed defiance, the clan elder returned to his home and ordered for appellant's arrest. The appellant was accordingly arrested and charged with this offence.

There is finally the evidence that the complainant had injuries likely to have been caused by a sharp weapon just like a panga.

The appellant in his defence testified that he did not rob from the complainant. Rather, he asserted, the three people attacked him with his mother at their home at about 8.00p.m on the material day of

12.9.2005. That when his mother screamed, two of the attackers fled but one of them cut the appellant with a panga. They identified him as an in-law. However, when the appellant reported the matter to the clan elder Ogona, he did nothing, each time postponing the issue while on other hand he continued dealing with the robbery report made by the complainant's side. The appellant further testified, on oath, that PW3, Adhiambo, was one of the neighbours who answered his mother's screams and found that the appellant had been injured and was lying on the ground. The appellant further testified that both the clan elder and Adhiambo, decided to side with and give evidence for the prosecution.

The appellant called his mother as a witness. She confirmed her son's evidence and further stated that she was herself injured by the attackers who took away Kshs2000/= from her. The appellant and her mother who gave evidence as DW2, produced PW3s to prove that they were indeed attacked and injured on 12.9.2005, although the mother who was shown to be illiterate was occasionally confused by dates.

The honourable trial Magistrate considered and decided the identity of the attackers. He also considered whether the robbery charged was proved, and whether on the other hand, the robbery alleged by the appellant on him by the complainant's side took place. He concluded that the appellant took part in the robbery against the complainant. He also however, concluded that their evidence revealed clearly that there was confrontation between the complainant's group and the appellant's group during which the complainant lost his property, the subject of the charged robbery. The honourable trial Magistrate later concluded in his Judgement that the robbery on the appellant, if it took place, was staged later than the robbery on the complainant. He accordingly convicted the appellant while ignoring the evidence of robbery against the appellant.

We have carefully perused and considered the evidence, on the record. The complainant's evidence is to the effect that PW3, Francisca Adhiambo was the eye witness who found the complainant still holding the appellant before he successfully asked him to release the appellant. We find that evidence incredible. If Adhiambo found a robber still held, why would they release him especially if they were going to report the robbery to the clan elder straight away as they claimed they did?

Furthermore, Adhiambo PW3, claimed that she identified the appellant by voice, which suggests that she never recognized the appellant visually. We are also persuaded to believe that the complainant's and Adhiambo's report the next morning after deliberately releasing the appellant, is a second thought deliberately designed, if indeed Adhiambo had seen the appellant that night at all.

Thirdly, we find it surprising that PW2 Victor Ochieng, who is the brother of the complainant, did not see his brother arrive home after leaving him being attacked by the appellant. In his evidence he only stated that it was the next day he again met the complainant on the way to hospital and saw that he had been beaten. It is also strange that then is when the complainant claimed he had lost money. It is also not lost to us that the complainant stated in his evidence, that at various stages, several women took part in the fight, particularly in beating him during the robbery. That piece of evidence is not asserted by any of his witnesses.

The appellant's defence was that he and his mother were attacked at his home at the same hour of 8.00 p.m when the complainant claims he was being attacked by the appellant.. They were both injured and went to hospital and produced P3. The appellant was a minor and his mother an illiterate woman. The appellant during cross-examination raised his defence that complainant and others attacked the appellant at his home. The appellant's and his mother's story, in their defence, was a likely story. In our view it raised a defence which was preferable, to start with, and in the alternative, one which raised a serious doubt in the prosecution evidence. That conclusion is strengthened when we take into account the fact that the appellant was a minor and his witness an illiterate woman who could not easily spin a defence like that.

We agree with the trial Magistrate's conclusion, at one stage, that the two groups did fight or confront each other. Once that was recorded, the likelihood of robbery with violence receded. We also felt from the evidence that PW3, Francisca Adhiambo and PW4, the clan elder Michael Ogola Ondiri, took sides instead of standing in the middle to be impartial. That is why no action was taken by the clan elder

on receiving appellant's and his mother's report, even while accompanied with medical evidence to show they had been attacked.

Last but not least, we observe that the language in which the trial was conducted and whether the evidence recorded was interpreted to the accused in a language he could understand well, was not indicated or recorded. We cannot be assured therefore that the appellant properly understood the trial proceedings. That renders the trial null and void.

For the above reasons we cannot let the conviction and sentence herein stand. We quash it and set aside the sentence. We order that appellant be released from jail forthwith, unless otherwise lawfully detained. Orders are made accordingly.

Dated and delivered at Busia the 29<sup>th</sup> day of June 2011.

D.A. ONYANCHA  
JUDGE.

F. MUCHEMI  
JUDGE.