



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 213 of 2005

**GREGORY WAINGWE..... APPELLANT**

**-AND-**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the Judgment of Principal Magistrate, Ms. H.N. Ndung'u dated 25<sup>th</sup> October, 2005 in Criminal Case No. 243 of 2004 at Mombasa Law Courts)*

### **JUDGMENT**

The appellant was arraigned in Court on a charge of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). It was alleged that the appellant, on **18<sup>th</sup> January, 2004** at Mama Ngina Drive in Mombasa, while armed with a dangerous weapon, namely a knife, robbed **Aisha Hamisi Sangano** of her ladies' purse, a Siemens C45 cellphone, and cash in the sum of Kshs.2,200/= – all valued at Kshs.13,600/= – and at or immediately before or immediately after the time of such robbery, threatened to use actual violence against the said **Aisha Hamisi Sangano**.

This case turned on the subject of **identification** at the **locus in quo**, and it is the learned Magistrate's finding on this question that led to the mode of determination which is now questioned on appeal; the relevant passage in the Judgment thus reads:

***“During cross-examination she [the complainant] even told the Court she turned and saw [the] accused with his eyes wide open (actually, in Court the accused appeared to be opening his eyes very wide). I believed her, that she saw him well. She said it was a Sunday. There weren't many people on the road and she had followed him, screaming. She had ample time to observe and see him well. I caution myself that this is the evidence of a lone witness and also that between the place of the robbery and the place where the accused was caught at the gate, she appears to have lost sight of him. However, I was satisfied beyond any doubt that, moments later when she found him [appellant] caught in the perimeter wall of Mombasa Primary School, she recognized him as the same man who had robbed her earlier. Her bag was also at the scene, clearly having fallen off the accused's hands when he got caught by the wall's metal bars. There was also a kitchen knife fallen below him which I believe is the same one he had armed himself with, to commit this offence. The evidence is simply overwhelming. On the evidence before me I am satisfied beyond [any] reasonable doubt, the accused is guilty as charged.”***

After treating the appellant herein as a first offender, and hearing his statement in mitigation, the Court applied s.296(2) of the Penal Code, and sentenced him to death.

In the appellants grounds of appeal, filed in the form of an amended petition dated **14<sup>th</sup> June, 2010** by *M/s. Opulu & Co. Advocates* it is stated (in summary) as follows:

***(i) the trial Court erred in law and fact by allowing the appellant to undergo trial, when he “had been illegally confined in custody for more than the constitutionally stipulated period of 14 days contrary to the express provisions of s.72(3)(b) of the Constitution.”;***

***(ii) the trial Court erred in law and fact in accepting the visual identification of a single witness, without a proper finding that the prevailing circumstances were not favourable to proper identification;***

***(iii) the trial Court erred in law and fact in relying on a single witness to identify the appellant as the alleged robber;***

***(iv) the origin of the arrest was not shown to be related to the offence in question;***

***(v) the Prosecution failed to prove the particulars of the charge;***

***(vi) the complainant’s evidence had contradictions;***

***(vii) the Prosecution evidence was insufficient as a basis for arriving at a conviction;***

***(viii) the Prosecution failed to summon essential witnesses;***

***(ix) the trial Court failed to take into account the defence case;***

***(x) the sentence imposed was “manifestly harsh and excessive.”***

Learned counsel, **Mr. Opulu** first contested the validity of the trial as conducted – on the ground that plea-taking had been done repeatedly; but in this regard, this Court was not given clear appreciation that there was cause for sparing the appellant herein from a trial process founded on the charge which forms the background to this appeal. This ground, therefore, should not detain us as we focus our attention on the merits of the appeal.

The merits turn on **evidence**, in respect of which counsel first objected, on the ground that the appellant had been convicted on the evidence of a single witness, evidence which, it was contended, was **“not evaluated to the degree and standard required by law.”** That evidence was contested because, when the complainant testified that her attacker had escaped towards Mombasa Primary School, there had been no description of the man who so escaped. In the words of learned counsel: **“She says the person escaped; so there’s time in-between; she was not seeing the man throughout; she arrived there when somebody was hanging on a fence.”**

**Mr. Opulu** submitted that the evidence relied on by the trial Court **“was not overwhelming”, “it left lots of gaps”, “that evidence does not amount to guilt.”**

For the respondent, learned counsel **Mr. Onserio** urged that visual perceptions at the **locus in quo** did not present any difficulty, as the offence in question took place at 7.00 a.m., and the suspect had not concealed his identity by means of any disguises; and in those conditions, the complainant had turned and set her eyes upon the appellant, and thus, she was in a position to identify him as the suspect. Moreover, counsel urged from the evidence, the attacker had placed a knife against the complainant’s shoulders, and so they stood face-to-face, and it is at this stage the complainant let go of her handbag; thereupon, the complainant screamed for help, and the suspect fled. The complainant observed the suspect as he fled towards Mombasa Primary School, and it is at the School’s fence that he was found, incapacitated and unable to escape. At that very locus were found a knife, and a wallet that belonged to the complainant. Counsel submitted that, at the place where the arrest took place, there was a recovery of an item which the complainant identified as hers; and that this confirmed the connection between the appellant herein, and

the theft which had taken place. This evidence, counsel urged, was safe, considering in particular, that the prevailing environment was favourable to a positive identification.

It was the complainant's evidence that, on the material date, as she walked near Mama Ngina Golf Club in Mombasa, at about 7.00 a.m., somebody held her from behind and demanded that she surrender her handbag. The complainant turned, and saw the attacker position a knife against her shoulder, threatening to kill her; she released the handbag which contained money and a cellphone. The complainant (PW1) raised alarm, following the attacker as he escaped towards Mombasa Primary School; people converged in pursuit, ahead of PW1, and she soon heard that the suspect had been arrested. When PW1 reached the perimeter wall of the School, she found the suspect hanging upside-down, shouting for help, with PW1's handbag lying on the ground. Surrounding the suspect were members of the public, who came, arrested the suspect, and took away the knife and the handbag.

The complainant's evidence is to be seen in the context of the evidence of **Cpl. Boniface Jakar** of the Central Police Station (PW2). This witness was on duty at 11.00 a.m. on the material date, when he received a message from the Police Control Room, requiring him to proceed to Mombasa Primary School, where the complainant stood in need of assistance. PW2 visited the scene by motor vehicle, in which he was accompanied by **Police Constable Richard Kamau** (PW3); and his evidence is that: "**on arrival at Mombasa Primary [School] opposite the School compound we found the accused hanging on a gate facing downwards and his left foot pierced by [the] metal rod of the gate.**" PW2 and PW3 found the accused surrounded by members of the public; the complainant (PW1) was also present.

Responding to cross-examination, PW2 said he had been given the handbag and the knife said to have fallen from the appellant herein who was in distress. This evidence was supported by that of PW3, who said the complainant had confirmed the said handbag to be hers. Responding to cross-examination, PW3 said the handbag in question was found on the ground, just where the appellant was hanging upside down, from the top of the gate pillars.

In his unsworn evidence, the appellant said there were ten people who had attacked him without cause, as he walked past Mombasa Primary School; and he denied all knowledge of the criminal incident which led to a charge being brought against him.

Has the prosecution proved their case beyond all reasonable doubts? Although the appellant contends that the trial Court ought not to have convicted on the basis of evidence of identification given by a single witness, such a position is not ordained by law. It is for the Court to consider all the evidence, and to determine whether or not the suspect had been, in fact, identified with certainty. In this case, we have considered all the **evidence**, and followed the chain in the learned **Magistrate's reasoning**, in her analysis of the same. The incident took place **in broad daylight**; there was **no obstacle to visibility**; the complainant was all alone as she walked along, and the **scene was not clouded** by numbers of people milling around. In these circumstances, the complainant avers that she had a clear opportunity to observe the suspect, who after the incident, took a particular direction leading towards Mombasa Primary School; she followed in the said direction, screaming out for help; and indeed, numbers of people came along, and gave chase; the chase, of course, occasioned a brief break of view, during which the complainant did not have the suspect in sight; but she followed, and found the suspect stopped by gate-metal stuck in his foot, so that he was held upside-down, with the crowd of pursuers surrounding him; she saw him, and **recognized** him as the suspect; and she says her stolen effect was found at the arrest-scene. **This consistent line of evidence** is not squarely controverted, save contested by a claim of alibi which is not set well enough to cast doubt upon the line of evidence. The learned Magistrate who had the opportunity to observe **witness demeanour**, thus pronounces herself: "**The evidence is simply overwhelming.**"

In our view, there is only one conclusion to be arrived at, on the basis of all the evidence: the task of proof has been discharged beyond all reasonable doubts; and the appellant was unable to make any dent on the evidence, or to raise any doubts at all such as would benefit his case.

Accordingly, we dismiss the appeal; uphold conviction; and affirm sentence.

*Orders accordingly.*

**SIGNED:** ..... ..

**J.B. OJWANG**

**M.A. ODERO**

**JUDGE**

**JUDGE**

**DATED and DELIVERED at MOMBASA** this 26<sup>th</sup> day of August, 2011.

**M.A. ODERO**

**JUDGE**