



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Criminal Appeal 271 of 2006**

**DANIEL WAITHAKA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An Appeal from original conviction and sentence in Nyahururu  
P.M.CR.C.NO.5274/2004 by Hon S. M. Mungai, Ag. Senior Principal Magistrate, dated 8<sup>th</sup> November, 2006)*

**JUDGMENT**

The appellant was charged jointly with another person who was acquitted under **section 210** of the **Criminal Procedure Code**, with the offence of **robbery with violence** contrary to **section 296(2)** of the **Penal Code**. The appellant faced an alternative charge of **handling stolen property** contrary to **section 322(2)** of the **Penal Code**.

At the close of his trial, the court below found him guilty of the offence of **robbery with violence** contrary to **section 296(2)** of the **Penal Code** and upon conviction sentenced him to death. He has challenged that finding in this appeal relying on the following grounds:

- i) that the learned magistrate erred in relying on the evidence of P.W.8 who had been arrested with some of the stolen items
- ii) that there was no evidence to confirm that the appellant had left the exhibits with P.W.8
- iii) that the bar (Side Ways) alleged to belong to P.W.8 does not exist in Nakuru or anywhere else in the country
- iv) that the receipt produced in proof of the fact that the appellant had taken drinks which he could not pay for and left the stolen items as security had no details linking it with the appellant.

The appellant also raised the following grounds in his written submissions;

- i) that the language used when his plea was taken is not clear from the record.
- ii) that the learned trial magistrate shifted the burden of proof to the appellant
- iii) that the lower court's judgment did not comply with the law.

These grounds, not being those set out in the petition cannot, by dint of **section 350(2)** of the **Criminal Procedure Code** be relied on and we reject them. We understand the appellant to complain in this appeal that the prosecution failed to prove the case of robbery with violence contrary to **section 296(2)** of the **Penal Code**.

This being the first appeal, we are alive to the duty imposed on this court to re-evaluate the evidence on record afresh with a view to arriving at its independent decision.

The evidence by the prosecution was to the effect that the deceased, **Mary Wanjiku Macharia** who was an employee of **P.W.1, John Kiiru Kigo** (John) was on duty in John's bar, Wood Cafe Bar (in Ol Joro Orok) where she worked as a bar maid on the night of 2<sup>nd</sup> December, 2004. John who was also at the bar retired at 9p.m., leaving behind the deceased, the accused person and six other customers. There is also evidence from prosecution witnesses that the deceased was the accused person's girlfriend.

That night **P.W.1, Peter Muchiri Musa** (Peter) who was guarding the adjacent building saw a person on the wall of the adjoining building. When he rushed to the building to find out what was happening, he did not see the person.

It was the evidence of **P.W.3, Mohamed Mwangi** (Mohammed) John's farm hand, that he was also at the bar on the night in question. That he also left the bar at 9p.m. At the time he left only the appellant and the deceased were in the bar. The morning following, Mohammed discovered the lifeless body of the deceased lying on the ground. The witnesses confirmed that the bar was ransacked and items including Kshs. 13,000.00 stolen.

The incident was reported to the police and investigations launched. In the course of investigations which took the police to Nakuru and Njoro, some items allegedly stolen from the John's bar were recovered in a bar/lodging in Nakuru. The appellant was arrested at Njoro and his co-accused in Ol Joro Orok. The owner of the bar at Nakuru, **P.W.8 John Kibithe Githunga** (Githunga) told the court that the appellant who had worked for him as a cook in his business but left his employment in 2001, returned on 3<sup>rd</sup> December, 2004, the day following the incident at Ol Joro Orok and bought drinks to friends. That the appellant spent the night in the bar in one of the rooms. Being unable to pay Kshs.350/= for his drinks the appellant pledged his bag and its contents to one Waringa, the bar maid.

It is this bag that is alleged to have been found to contain some of the items stolen from John's bar in Ol Joro Orok. The appellant was presented to a magistrate at Nyahururu who recorded his confession. Post mortem results on the body of the deceased revealed that she suffered cardiac arrest due to strangulation. In his sworn evidence, the appellant confirmed that he was employed in a butchery in Ol Joro Orok. That on 3<sup>rd</sup> December, 2004 he was granted permission by his employer to go home in Nakuru. His brother who was sick passed away and while engaged in his funeral arrangements he was arrested. He was transferred to Ol Joro Orok police station where he was joined by his co-accused, who was unknown to him. While in the police cells, he was beaten and taken before a magistrate twice to confess. He disowned the items recovered at Nakuru and Githunga. He accused **P.C. Kabutu (P.W.5)** of framing him up due to a misunderstanding arising from a debt he (the appellant) owed him.

We have most anxiously considered the evidence on record, findings of the learned trial magistrate and the grounds of this appeal. The respondent's counsel supported the conviction arguing that the circumstantial evidence adduced linked the appellant to the death of the deceased as it was him who was last seen with the deceased before her body was discovered. That by disappearing after the death of the deceased, the appellant's conduct became relevant. We, with respect, agree with the learned counsel for the respondent that this appeal is to be decided on circumstantial evidence since no one saw how the deceased sustain the fatal injuries.

The principles to be considered before circumstantial evidence may be used as a basis for a conviction have been settled since the decisions in **Republic Vs. Kipkering Arap Koske & Another** (1949) 16 E.A.C.A. and **Simeon Musoke Vs. Republic** (1959) E.A. 715. Briefly stated, those principles are that a conviction can only be founded on circumstantial evidence if that evidence irresistibly points to the suspect's guilt to the exclusion of any other person; and that there are no co-existing factors or circumstances that may weaken or destroy the inference of the suspect's guilt.

In this appeal we have identified the following sets of facts which the prosecution relied on as circumstantial evidence to prove that it must have been the appellant who committed the offence in question:

- i) that the appellant was the deceased person's boyfriend
- ii) that they had been together the night preceding the day the deceased's body was discovered
- iii) that indeed he was the last person to be seen with her
- iv) that he disappeared from Ol Joro Orok after the incident
- v) that he led the police to the discovery of the items stolen from John's bar
- vi) that he made confessions to the police and to a magistrate.

As we consider these facts, we bear in mind the defence of the appellant that he was at Ol Joro Orok until the day the deceased person's body was found on 3<sup>rd</sup> December, 2004. When he travelled to Nakuru. Although he did not categorically state his relationship with the deceased, the appellant confirmed that he knew her as a bar maid. Is the summary of evidence outlined above constituted of circumstantial evidence pointing irresistibly to the guilt of the appellant and are there factors or circumstances that tend to weaken the inference of his guilt? We have no reason to doubt that the appellant was a boy friend to the deceased and we so accordingly find. We also are persuaded by the evidence on record that the appellant was at John's bar with the deceased on the night of 2<sup>nd</sup> December, 2004.

John and Mohamed left at 9p.m. What they did not say is whether or not they left together. It is John's evidence that as he left, there were six customers in the bar but Mohammed maintained that he left only the appellant and the deceased. Mohamed said the following in cross-examination by the appellant:

**"I left the bar at 9.00p.m. The bar was closed. You went to the rear part of the plot. I left the deceased in the bar."**

We understand Mohammed to be saying here that at the time he was leaving, the deceased and the appellant were not together. The former remained in the bar while the latter went outside the bar through the rear door. There is also evidence that the appellant lived elsewhere and the deceased lived within the precincts of the bar. That the appellant would sometimes spend the night with the deceased and jump over the fence to go to his house. In view of all these, we are of the opinion that the attempt to link the appellant with the death of the deceased on account of being the last person to be seen with the deceased before her death has failed. John and Mohammed left at more or less the same time (9p.m.). John left six customers, Mohammed left only the deceased and the appellant. The question whose answer we do not have is what happened to the six customers?

Secondly, at the time Mohammed was leaving, the appellant also left through the rear door leaving the deceased in the bar. It is not true from this that it is the appellant who was the last person to be with the deceased. Then there is evidence of rooms at the rear part of the bar. Was the appellant the only person who had the opportunity to commit the offence? We say no, in view of the presence of other people in the vicinity of the scene.

The evidence of recovery of the stolen items is said to link the appellant with the offence in the following way. He traveled to Nakuru the day the body of the deceased was recovered. That he led the police to Githunga's bar in Nakuru after confessing to **Corporal Patrick Macharia (P.W.4)** and to a magistrate. That following these confessions, the items were recovered from one Waringa, a bar attendant in Githunga's bar with whom they had been pledged by the appellant.

We note the following three issues arising from this evidence. The alleged confession to Cpl. Macharia was contrary to the law given his rank and the manner it was received was inadmissible. The magistrate who is alleged to have recorded the appellant's confession did not testify. This was important because the appellant having been detained for over one

week and having been taken before her two times before the alleged confession was recorded and further bearing in mind the appellants allegation that he was tortured, the magistrate concerned ought to have presented herself for cross-examination. The production of the statement by Cpl. Macharia was irregular.

The second issue is that the only link between the items recovered from Githunga's bar and the appellant is the bar attendant, Waringa. Without her testimony, the chain is incomplete. Thirdly, it was John's testimony that the only reason he suspected the appellant is the fact that he disappeared and left his place of work suddenly. The appellant has averred that he obtained permission from his employer to go home. That he had a sick brother who passed away a few days after. This evidence has not been rebutted. As was stated in the case of Sawe Vs. Republic, Criminal Appeal No.2 of 2002, suspicious alone, however strong cannot be a basis of inferring guilt.

We have come to the conclusion that the ingredients of **robbery with violence** contrary to **section 296(2)** of the **Penal Code** were not proved by the prosecution to the standard imposed in criminal law. Indeed we are at a loss, given the circumstances of this case, why the appellant was charged with the offence of robbery with violence and not murder.

We allow this appeal, quash the conviction and set aside the sentence of death. We order the release of the appellant forthwith unless he is detained for some other lawful reason.

**Dated, signed and Delivered at Nakuru this 19<sup>th</sup> day of February, 2010.**

**D. K. MARAGA**  
**JUDGE**

**W. OUKO**  
**JUDGE**