



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

Criminal Appeal 188 of 2006

DANIEL WYCLIFFE NAMAI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged with robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the 27th day of April, 2007 at Wuoth Ogik estate within Migori Township of Migori District in Nyanza Province, the appellant jointly with others not before court, while armed with a dangerous weapon namely a firearm, robbed **Florence Akinyi Odongo** of cash Kshs. 7,000/=, a lady's handbag, four gold rings, two chains, two ear rings, a mobile phone and other items all valued at Kshs. 74,000/= and at or immediately before or immediately after the time of the robbery used personal violence to the said **Florence Akinyi Odongo**.

The prosecution called six witnesses. Their evidence may be summarized as follows. On the material day at about 7.40 p.m., **Florence Akinyi Odongo, PW1**, was serving her children with food in her house. Suddenly two people who were armed with a gun and dressed in police uniform entered the house and ordered her to lie down. She complied. There was electric light in the house. The robbers demanded money and PW1 was forced to go with them upstairs where her husband was. The husband had locked himself inside the room and he refused to open. PW1 was beaten up and she gave out Kshs. 5,000/= which she had. The robbers also stole the other items as stated in the charge sheet. PW1 was able to recognize the appellant who is their neighbour.

After the robbers left PW1 and others in the house screamed and her husband called the police. PW1 told the police that one of the robbers was the appellant. On the following day the police arrested the appellant and recovered from him the handbag belonging to PW1.

Linnet Achieng Odongo, PW2, and **Leonard Ogwanda, PW3**, who were also in the house together with PW1 stated that they also recognized the appellant who was well known to them. PW3 said that the robbery lasted for about one hour.

Duncan Otieno, PW4, stated that on 27th April, 2005, at about 9.30 p.m., at Odia lodge where he was working as an attendant he sold room number seven to the appellant who was accompanied by a lady. On the morning of 28th April 2007, C.I.D. Officers went to the lodge together with the appellant and they searched the room. They recovered a bicycle belonging to the appellant and a handbag that belonged to the complainant. Inside the handbag was a receipt issued in the business name of Marowa Hardware which belongs to the complainant.

In his defence, the appellant testified that he operates a bicycle rental business commonly known as “**boda boda**”. On the material day he had a lady visitor from Nairobi. After supper he booked a room at Odia lodge where he kept his bicycle. His lady visitor had her own luggage. He woke up at about 6.00 a.m. and shortly thereafter he was confronted by two police officers who took him to room No. 7. His bicycle was not in the room. His girlfriend was also not there. Later on he found his bicycle and his girlfriend known as **Jenifer** at the police station. He denied having committed the offence.

The learned trial magistrate held that there was sufficient evidence of identification by recognition of the appellant as well as recovery of the handbag belonging to PW1 and proceeded to convict the appellant. He was sentenced to death as by law prescribed.

The appellant was aggrieved by the said conviction and sentence and preferred this appeal. He stated that there was insufficient evidence of recognition to warrant the conviction. He also faulted the learned trial magistrate for holding that he was found in possession of the complainant’s bag that had been recently stolen.

Mr. Mutai, Senior State Counsel, opposed the appeal and submitted that there was sufficient evidence of recognition of the appellant by PW1, PW2 and PW3. He further submitted that the evidence of PW4 left no doubt that the appellant had rented a room in which a bicycle that belonged to the appellant and a handbag that had been stolen from the complainant were recovered. The said evidence left no doubt that the appellant was one of the people who had robbed the complainant.

The robbery in question took place at about 7.30 p.m. and there was bright electric light in the complainant’s house. PW1, PW2 and PW3 saw and recognized the appellant as one of the robbers. Immediately after the robbery a report was made to the police by PW1, PW2 and PW3. They gave the name of the appellant. On the following day the police arrested the appellant after they were informed that he had spent a night at Odia lodge. When they took him to room No. 7 which he admitted to have checked into the previous night, his bicycle was found there as well as the complaint’s handbag that had been stolen the previous night.

The appellant was well known to the complainant as well as to PW1 and PW2. In the case of **ANJONONI & OTHERS –VS- REPUBLIC** [1980] KLR 59, it was held that the evidence of recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger. In addition to the evidence of recognition of the appellant there was also evidence of recovery of the complainant’s handbag a few hours after the robbery. The

recovery confirmed his participation in the robbery.

In our view, the appellant's conviction was well founded. The only sentence that is prescribed for anyone convicted on robbery with violence is death. We find no merit in this appeal and dismiss the same in its entirety.

DATED, SIGNED AND DELIVERED AT KISII THIS 2ND DAY OF FEBRUARY, 2010.

D. K. MUSINGA
JUDGE.

A.O. MUCHELULE
JUDGE.

2/2/2010

A.O. Muchelule, J.

C/i - Bibu

Appellant present

Mr. Kemo for state

Court: Judgment in open court.

A.O. MUCHELULE
JUDGE.