



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

**Criminal Appeal 95 of 2008**

**JAMES MWANGI NJERI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An Appeal from original conviction and sentence in Molo SNR.R.M.CR.C.NO.2355/2006 by Hon J.O. Oseko,  
Senior Principal Magistrate, dated 8<sup>th</sup> May, 2008)*

**JUDGMENT**

The appellant was sentenced to death upon conviction of the offence of **robbery with violence** contrary to **section 296(2)** of the **Penal Code**. According to the particulars of the offence, it is alleged that on 24<sup>th</sup> October, 2006 at Kasarani Estate Elburgon, jointly with others not before court, the appellant robbed **Margaret Wambui Mburu** (the complainant) of cooking fat, sugar, sweets, salt, sugarcane and Kshs.3,000/= in cash, all totaling to Kshs.4,060/= and at or immediately before or immediately after the time of such robbery, they threatened to use actual violence to the complainant.

The complainant testified that at about 6.30a.m. on the day in question, she was in her kiosk when she saw three (3) men. The appellant entered her house/kiosk. Without saying anything to the complainant, the appellant held her and covered her face with his palms. One of the men who were in the appellant's company threatened the complainant with a knife, telling her not to scream. It was only after they had left that the complainant screamed. It is also at that time that she discovered the items listed in the charge sheet had been stolen. Her screams attracted a neighbour, **P.W.2 William Otieno Okoth** (William). William gave evidence that on hearing the complainant scream, he saw the appellant carrying sugarcane in the company of another man who was carrying a green paper bag coming from the complainant's kiosk. A report was made to Elburgon Police Station and **P.W.3, P.C. Peter Kiilu** arrested the appellant and recovered some sugarcane which the complainant alleged had been stolen from her.

In his unsworn defence, the appellant attributed his arrest to a disagreement between him and the complainant's husband over a mobile phone which the latter had sold to him. The phone was defective and the appellant returned it and the complainant's husband who refunded the purchase price.

The trial court considered this evidence and found that it met the threshold of beyond any reasonable doubt.

I have stated that the appellant was convicted and sentence to suffer death in accordance with the law. The appellant was aggrieved, hence this appeal. He has challenged the conviction on the grounds that the circumstances of identification were not

favourable; that his defence was not considered; and generally that the evidence fell below the required standard of

proof. This matter

coming to us as the first appellate court, must be subjected to fresh scrutiny of the evidence recorded by the trial court, where the witnesses were seen by that court as they testified.

The whole appeal revolves around the question of identification or recognition. It is common ground that the appellant and the complainant knew each other. It is also not in dispute that the incident took place in the early hours of the morning, between 6.00-6.30a.m. The appellant has submitted that the complainant must have been mistaken over the identification of the robbers as the circumstances were unfavourable.

This is the evidence of the complainant:

**“On 24/10/2006 at 6.30a.m., I was at home. The door was open..... I saw 3 people. This man (accused identified) entered the house. I know the accused. He lives in the neighbourhood. He did not speak. He held me and covered my face with his palms. I know his name as “Zangi.” He held me for some time. .... After he removed his hand from my face, again I looked at him when he was leaving. .... I told “fundi” that it was the accused who stole the items.”**

William on the other hand stated as follows:

**“I had gone to the toilet. I heard P.W.1 screaming that she has been robbed. She lives next door. I went to her house. I saw this man (Accused identified) and another. The other was carrying a green paper bag. The accused carrying sugarcane. They were coming from the complainant’s shop – (kiosk in the original record). I know the accused. He is always in the neighbourhood. I did not know his friend. I went to the complainant. She told me that she had been robbed.”**

In cross-examination, he continued:

**“I saw you leave. My house is 20 steps from the complainant (sic). I was outside.”**

Therefore the appellant was seen by two people who knew him. That is evidence of recognition in contradistinction with that of identification.

The court in Anjononi & others Vs. Republic (1980) LKR 59 stated:

**“The proper identification of robbers is always an important issue in a case of capital robbery.....This was, however, a case of recognition, not identification of the assailants; recognition of assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.....”**

An earlier English decision on this issue established that:

**“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”**

See Republic Vs. Turnbull (1976) 3 All ER 519 at Pg. 522. The incident took place between 6 and 6.30a.m., the appellant was seen with another man by the complainant approaching the complainant’s kiosk; the accused entered the house and held the complainant while covering her face with his palms, he was known to the complainant, she saw him before he covered her face and as he left; he covered her face for sometime.

The first person who responded to the complainant’s screams was William. We suppose that William is the person the complainant referred to in her evidence as “fundi”. She told him that she had been robbed by the appellant. At the police station, the complainant repeated that it was the appellant and others who had attacked her. Further it was the evidence of P.C. Kiilu that when the complainant went to the police station to report the robbery, she asserted that

she could identify one of the robbers, who she said lived at Kasarani estate and she (recorded as he) led the police to his house.

Then there is the evidence of William. At the time of the incident, the court below was told there were not many people in the vicinity given that it was early in the morning. William saw and also recognized the appellant and another person coming from the complainant's kiosk. The appellant was a common figure in the neighbourhood. When he saw the appellant, William was only twenty (20) paces from him. Of the items stolen, only sugarcane was recovered. The prosecution evidence is that the appellant took away sugarcane while his colleague carried a green paper bag.

We repeat for the third time that the incident took place, between 6 and 6.30a.m. It was not until 8p.m. when the police raided the appellant's house and six pieces of sugarcane recovered. The complainant testified that the sugarcane were hers; that she selected them at Molo where she purchased them. From his cross-examination of the witnesses, the appellant appeared to be claiming ownership of the sugarcane. However, in his defence, he stated that the police came with the sugarcane suggesting that they were, so to speak, planted on him.

In presenting the evidence of the recovery of sugarcane, the prosecution intended to prove that it was the appellant who must have robbed the complainant relying on the doctrine of recent possession. A conviction can only be based on this doctrine if the

following conditions are satisfied:

- i) if the property was found with the suspect;
- ii) if the property is positively identified as belonging to the complainant;
- iii) if the property was stolen from the complainant, and
- iv) if the property was recently stolen from the complainant

See **Isaac Ng'ang'a Kahiga Alias Peter Nganga Kahiga Vs. Republic**, Criminal Appeal No.272 of 2005.

That case also held that the question whether the items were recently stolen will depend on the easiness with which the stolen property can move from one person to the other. Although several hours had passed between the time of the robbery and the time the sugarcane were recovered, we are satisfied that they belonged to the complainant. In view of the number (six pieces) and the evidence that the appellant was not selling sugarcane in his shop, we are equally persuaded that they were the same ones that had been stolen from the complainant. They were found in the appellant's house a few hours after they were stolen. His explanation that they were planted on him is incredible. On the issue that he was framed up over a mobile phone transaction gone sour, we cannot see why the complainant's husband would nurse a grudge if indeed the phone was returned and money refunded. If the complainant was biased against the appellant over this, although she denied any grudge, we are satisfied William was an independent witness.

Finally, the appellant has raised in his written submissions and not in the petition a ground that he did not understand the language of the trial. By dint of **section 350 (2)** of the **Criminal Procedure Code**, the appellant cannot rely on that ground as it was not one of those stated in the petition. Secondly from the totality of the evidence on record, we cannot see anything to suggest that the appellant faced any difficulty with the language used. His cross-examination was focused and related to the evidence adduced in chief.

Finally, we are satisfied that the learned trial magistrate gave considerable attention to the appellant's defence in the judgment. For these reasons, this appeal fails and we accordingly dismiss it.

**Dates, Signed and Delivered at Nakuru this 12<sup>th</sup> day of March, 2010.**

**M. J. ANYARA EMUKULE**  
**JUDGE**

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