



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 218 of 2009

EVANS SAKAWA OCHUANG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from original conviction and sentence in Narok
C.M.CR.C.NO.158/2008 by Hon A. G. Kibiru, Senior Resident
Magistrate, dated 10th July, 2009)

JUDGMENT

The facts in this matter are fairly straight forward and largely uncontroverted. They may be stated briefly as follows. The appellant was charged with **robbery with violence** contrary to **section 296(2)** of the **Penal Code**.

According to the charge sheet, the appellant is alleged to have jointly with others not before court robbed **Rose Atieno Odhiambo (Rose)** of Kshs.3000/= on the morning of 17th March, 2008 at Lenana Estate, Narok North District and that during the robbery, he was armed with a dangerous weapon, namely, a *panga* and at or immediately before or immediately after the time of such robbery wounded the said **Rose Atieno Odhiambo**.

The prosecution evidence was that on the morning in question at about 5a.m., after the complainant, Rose had bid goodbye to her husband, **P.W.4, Ag. Ip. Odhiambo Makori (Odhiambo)**, one of her sons and other relatives, who were traveling to Nairobi, she returned to bed but did not lock the door since it was already day break. Shortly after, she was joined in the bedroom by a stranger, armed with a *panga* and wearing a mask. There was no electricity or any other form of lighting in the house, except the torch which the intruder had.

The complainant reached out for the *panga* which the intruder had and a struggle ensued between them. In the process, the complainant's left wrist was cut. She, was all along screaming and calling out the son, **P.W.2, Briton Omondi (Omondi)** who responded and found the two struggling in the sitting room. He joined in and was bitten on the finger by the stranger. In the cause of the struggle, the mask fell off and the stranger was identified as the appellant. Neighbours too responded and the appellant was arrested. The complainant's husband (Odhiambo) was called before he could leave Narok for Nairobi. He returned home and found the appellant being held by his family and neighbours. The police were called in and the appellant arrested. But since he had been beaten by the mob, he was taken to the hospital. The complainant too was taken to the hospital for treatment of the injured wrist. Nearly two months later, the complainant was examined by a clinical officer, **P.W.3 Hosea Kemei**, who assessed the injuries sustained by her as harm.

The appellant in his sworn statement maintained that he had a love affair with the complainant; that they had arranged for a meeting that morning; that she called him and he went to her house immediately her husband (Odhiambo) left. Omondi saw the appellant and alerted another brother who began to cry. A certain teacher responded but was told by the complainant that there was nothing to worry about. She gave the appellant a dress to wear in order to disguise himself. As he tried to leave, the complainant's son hit him and he became unconscious. He was subsequently charged with the offence of **robbery with violence** contrary to **section 296(2)** of the **Penal Code**.

The learned trial magistrate considered the evidence presented by both sides and believed the prosecution witnesses. He was however, of the view that the evidence did not disclose an offence of robbery contrary to **section 296(2)** of the **Penal Code**. He therefore, found the appellant guilty of **robbery** contrary to **section 296(1)** of the **Penal Code** and sentenced him to eight (8) years imprisonment.

There is no doubt that the appellant was found in the complainant's house at about 5a.m. It is also not in dispute that the appellant was known to the complainant and also the complainant's children. The only question for determination is whether the

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appellant was present in the complainant's house to commit a robbery or whether it was an adulterous expedition gone awry?

The appellant has particularly complained that essential witnesses were not called; that the stolen Kshs.3,000/= was not recovered from him; that the evidence was fabricated against him; that his defence was improperly rejected and that the sentence was harsh.

I have set out the two versions advanced by the prosecution and the defence. From the exhibits which were produced and the testimonies of the complainant, Odhiambo and Omondi, I am persuaded by the prosecution version. I need to point out that there is no law that bars relatives from being the only witnesses to the commission of a crime. The appellant, it would appear was alone, even though the charge sheet is to the effect that he was with others when he went into the complainant's house. He was armed. His intention was to steal and indeed stole Kshs.3,000/= which was not recovered. It was suggested that he either swallowed or threw the same away as he was being pursued. The complainant was injured during the robbery. To amount to **robbery with violence**, contrary to **section 296(2)** of the **Penal Code**, three sets of circumstances must be satisfied. They are:

1. if the offender is armed with any dangerous or offensive weapon or instrument; or
2. if he is in company with one or more person or persons; or
3. if at or immediately before or immediately after the time of the robbery wounds, or beats, strikes or uses any other violence to any person.

See **Ajode Vs. Republic** (2004) 2KLR 81.

In the matter before me, the appellant was armed with a dangerous weapon, namely a *panga*; at the time of the robbery he used violence on the complainant. Proof of any one of the above was sufficient to bring the facts within **section 296(2)** of the **Penal Code**. In my mind therefore it was a misdirection on the part of the trial magistrate to hold that there was no evidence that the appellant attacked the complainant and thereby reducing the charge. The fact that he was armed with a *panga* was enough.

The defence raised by the appellant would have been credible if it was raised consistently during the trial. Indeed no questions were put to the complainant regarding this alleged love affair. The only time a fiddle attempt was made was when Odhiambo was being cross-examined on who took the appellant's mobile phone. The focus was more on the mobile phone and not the alleged relationship between the complainant and the appellant. If indeed there was a relationship, why was the appellant armed; why was he hiding behind a mask and why did he injure the complainant? The defence was clearly an afterthought as was correctly found by the learned trial magistrate.

The appellant must consider himself lucky to have escaped death twice; at the complainant's house and before the trial court.

This appeal fails and is dismissed accordingly.

Dated, Signed and Delivered at Nakuru this

30th April, 2010.

W. OUKO
JUDGE