



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU

Criminal Appeal 264 of 2007

EVANS NDONGANI KAGIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(An Appeal from original conviction and sentence in Nyahururu P.M.C.R.C.NO.5048/2006 by Hon. S. M. Mungai, Ag. Senior Principal Magistrate, dated 16<sup>th</sup> November, 2007)*

JUDGMENT

The appellant who was charged with **robbery with violence** contrary to **section 296(2)** of the **Penal Code** was found guilty and upon conviction was sentenced to the mandatory death sentence.

Being aggrieved, he has preferred this appeal arguing that the learned trial magistrate erred in relying on the blood-stained knife without evidence of the blood group; that there was no evidence to link him with the offence; that there was no evidence from the investigating officer.

Learned counsel for the respondent opposed the appeal and urged the court to uphold the conviction and sentence. He submitted that the offence was committed in broad daylight and the victims were able to positively identify the appellant; that the appellant was pursued by members of the public and arrested and; that a blood stained knife linked to the robbery was recovered from him shortly after the robbery.

The facts of the case are that on 10<sup>th</sup> December, 2006 at about 3p.m. the complainant and his wife, P.W.2 Phillis Wangari Muchemi (Phillis) were walking towards a place called Mangu from Nyahururu town. Upon reaching the town sewerage, they were confronted by four men, one of whom was armed with a knife. The gang demanded to be given a mobile phone. When they realized that the complainant did not have a phone, they took Kshs.300/=, stabbed him and ran away. Members of the public were attracted to the scene by screams from Phillis. They chased the suspects and arrested the appellant, beat him up and nearly lynched him but for the intervention of P.W.3, P.C. Kelamu Chedaya. It was P.C. Chedaya's evidence that upon arriving at the scene he rescued the appellant and on searching him he found a blood stained knife tucked away between his belt and trouser.

The complainant was rushed to Nyahururu District hospital for treatment. The appellant was also taken to the same hospital by the police for treatment and he was identified by the complainant. One month later, the complainant was examined at Nyahururu District Hospital by P.W.4, Peter M. Muthee, who classified the injury as "harm".

In his unsworn defence the appellant denied involvement in the robbery stating that while walking home from work he was confronted by four (4) people who wanted to know if he had seen some robbers. When he told them that he had not seen any robber, they attacked him and detained him until the police arrived. The police took him to the hospital and subsequently charged him.

In his written submissions, the appellant challenges the conviction on the ground that there was no sufficient evidence of identification to warrant a conviction. He has also questioned the manner of his arrest, the language of the trial court and the qualification of the prosecutor. Of course the last two grounds were not set out in the petition hence by dint of **section 350** of the **Criminal Procedure Code**, we are not bound to consider them.

We have, however considered the appeal, written submissions of the appellant, the oral submissions by counsel for the respondent as well as the authorities cited most of which are not reported and we have not been able to obtain copies.

This being the first appeal, we are bound to revisit the evidence, re-evaluate the same and arrive at our own independent conclusion.

From the evidence we are convinced that the complainant and his wife were robbed at around 3p.m. on 10<sup>th</sup> December, 2006; that they were robbed by a group of four men, who were armed with a knife; that in the course of the robbery, the robbers stole Kshs.300/= from the complainant and; that they wounded the complainant.

That being so, the only question falling for our determination is that of the identity of the robbers. In other words, was the appellant positively identified as one of those who robbed the complainant?

Both the complainant and Phyllis were categorical that they were able to identify the appellant.

First, the attack was at around 3p.m. – in broad daylight. The complainant and Phillis confirmed in their evidence that of the four (4) robbers, it is the appellant who was armed with a knife; that it is the appellant who held Phillis while the other three frisked the complainant; that the appellant released Phillis, went to where the complainant was, stabbed him and took Kshs.300/=. Phillis was emphatic that she able to identify the appellant and summarized it thus:

**“He is the one who held me by the neck and stabbed my husband. .... He held me and stood very close to me as it was daytime. He had not concealed his face. He held me for about thirty seconds.”**

Both the complainant and Phillis confirmed in their evidence and to the police that they could identify the robbers. According to the complainant, one hour after the robbery, he saw the appellant at the hospital where he (the complainant) had been taken following the attack with a knife and the appellant for treatment of injuries inflicted by the mob.

In Anjononi & Others Vs. Republic (1980) KLR 59 the Court of Appeal observed that:

**“The proper identification of robbers is always an important issue in a case of capital robbery emphatically so in a case like the present one where no stolen property is found in possession of the accused.”**

On the question of identification, in the circumstances of this case, we come to the conclusion that the conditions for free and positive identification of the robbers were good and that the appellant was one of the robbers. His defence has been displaced by the overwhelming prosecution evidence.

In conclusion, we note the discrepancy pointed out by the appellant, that the P.3 form bears the name of Zablun Nganga Kimathi yet the complainant gave his name as Zablun Nganga Kimani. While we are of the view that that may be a typographical error, we find that nothing turns on that point as **section 296(2)** of the **Penal Code** does not require that the victim be wounded, to constitute the offence punishable by death under that section. The offence is committed where the offender:

- i) is armed with a dangerous or offensive weapon or instrument or
- ii) is in company with one or more other person or persons or
- iii) if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.

See Oluoch Vs. Republic (1985) KLR 549.

Regarding failure to call the investigating officer, we hold that in view of the prosecution evidence, that failure was not fatal.

In the result, we find no merit in this appeal which we dismiss.

**Dated, Signed and Delivered at Nakuru this 7<sup>th</sup> day of May, 2010.**

**M. G. MUGO**  
**JUDGE**

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