



REPUBLIC OF KENYA
AT THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL 16 OF 2008

NAHASON OBIERO:.....APPEALANT

VERSUS

REPUBLIC:.....RESPONDENT

JUDGMENT

((Appeal from the decision of Hon. H.M. Nyaga, ESQ. Senior Resident Magistrate delivered on 8th April, 2008 at the Senior Resident Magistrate's Court at Kabarnet in Kabarnet SRM No. 16 of 2008 on conviction and sentence)

Introduction

1. The Appellant Nahason Otieno was Originally charged with the offence of:-
Robbery with Violence Contrary to Section 296(1) of the Penal code.

The Particulars of offence being:

That on the 28th June 2007 at about 19.00 hours at Kabarnet town in Baringo District within the Rift Valley Province jointly with another not before Court robbed Julia Rotich

(of):---

- (i) Loaf of bread**
- (ii) Seven (7) kilograms of sugar**
- (iii) One litre of milk**
- (iv) One umbrella**

All valued at Kshs 390/= and at immediately before or immediately after the time of such Robbery struck and wounded the said Julia Rotich.

- 2. A Plea of not guilty was entered on the 2nd August 2007 before the Magistrates Court.
- 3. The Appellant was convicted and sentenced to a term of 5 years imprisonment. Being dissatisfied with this decision he appealed to this High

Court of Kenya at Eldoret.

4. The Appeal came for hearing before Osiemo J and was fully argued by the Appellant and the State. Hon. Osiemo J was not available to complete the Judgment. The Appellant informed this Court that he wished to rely on the submissions given to Osiemo J on his appeal. The State, likewise.
5. Section 354(1) of the Criminal

Procedure Code (CPC) refers.

II. Facts

6. The Complainant stated she knew the Appellant and was familiar with his voice. On the evening of 28th June 2009, at about 7.00 p.m. she left her business carrying assorted amount of shopping in a way when the Appellant and another merged from a bush and walked in front of her. She turned around and came towards her threatening that she should not scream. She ran screaming towards the forest department building. The Appellant caught up with her and hit her on the head till she bled. They stole her bag and assorted shopping as stated in the charge sheet, valued at Kshs 390/= . The forest guard came after she was robbed.
8. Unknown to the Appellant P.W.2, a deaf and dumb witness knew and had seen the incident well. He too knew the Appellant and of his character. He was afraid to assist the Complainant but he did go to the Police to make a report.
9. The Trial Magistrate found the Appellant guilty and convicted him on the said Count. A sentence of 5 years imprisonment was then passed. Being dissatisfied with this the Appellant filed an appeal.

III. Petition of Appeal

10. In his Petition of Appeal in summery, the Appellant stated:-

- (i) There was a miscarriage of justice as there was no corroboration to the evidence on material facts and procedure.
- (ii) The Trial Magistrate erred in relying on the prosecution evidence that was contradictory
- (iii) There was no identification parade
- (iv) There was no evidence of an arresting officer

- (v) There was proposition or supposition instead of facts proved beyond reasonable doubt
 - (vi) The defence must be considered in the light of all evidence
 - (vii) There was no ingredient of Robbery with Violence that that had been established
11. The state in reply argued that there was sufficient evidence and that the conviction and sentence be upheld.

III. Opinion

12. The issue before this Court is not that of whether an identification parade was conducted but that of recognition. The complainant recognized the Appellant as someone she knew. P.W.2 – the deaf and dumb physically challenged witness also recognized him as someone he knew well. It was indeed P.W.2 who corroborated the evidence of P.W.1 the Complainant and how he had seen and witnessed the attack. Both the Appellant and another had walked very close to him prior to the attack and he recognized the Appellant.
13. It was further noted that the Appellant was arrested by P.W. 4 P.C. David Musyimi of the Kabarnet Police Station on the 30th July 2007. The Appellant was arrested at a home.
14. This Court is therefore disturbed that the Complainant having been knocked on the head bled deeply. (The violence inflicted on her was brutal) that the police preferred a charge of simple robbery. This is indeed injustice. The trial Magistrate convicted for simple robbery.
15. Evidence of violence was given through a police form that had been issued to the Complainant but was not taken into account by the trial Court. It was tendered in evidence by P.W.3 by Michael Cheburet A Clinical Officer at Kabarnet District Hospital filled on 29th June 2007.
16. The Appellant indeed ought to have charged with Robbery with Violence Contrary to Section 296(2) of the Penal Code.
17. I hereby uphold the conviction before Court.

18. As to the sentence it was not in order for the prosecution to utter words such as “ ... **the accused has another case in another Court coming for sentencing**” nor state prior to sentencing of his case,

“the accused was convicted yesterday in another Court awaiting sentencing”

19. This means that the Trial Magistrate is influenced in a biased manner. The only proof of previous conviction is by the production of the Police Registration of previous conviction forms. Other information ought not to be relied on.

20. The sentence would not nonetheless be interfered with due to the charge that had been preferred.

21. I dismiss the appeal on conviction and sentence.

Dated this 27th day of July 2010 at Eldoret

M.A. ANG’AWA
JUDGE

Advocate

(i)	J.K. Chirchir instructed by the office of the Attorney General for the State	-	Present/Absent
(ii)	Nahason Otieno (Appellant in person)	-	Present/Absent