



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 293 OF 2009**

*(From original conviction and sentence in criminal case No.2581 of the Principal Magistrate's Court at Nyahururu - M. T. Kariuki {Ag. SRM} dated 28<sup>th</sup> September, 2009)*

**ALEX MWANGI WAWERU.....**

**APPELLANT  
VERSUS**

**REPUBLIC.....**

**RESPONDENT**

**JUDGMENT**

The Appellant was charged and convicted of the offence of robbery with violence and sentenced to the mandatory death sentence. Being aggrieved both with conviction and sentence, he has appealed to this court on basically one ground, namely, there was no evidence upon which to base his conviction and sentence.

In his nine page written submissions the Appellant argued that there was contradictory evidence which the trial court failed to note. The appellant argued that whereas PW1, the complainant claimed before court that he saved himself from the robbers, and ran to PW4, PW4 on his part claimed in court that it was he who saved the complainant; that the complainant claimed he was attacked at 10.00 p.m., whereas PW4 claimed that he saved the complainant at 1.00 a.m.

The Appellant also submitted that there was further contradiction in the prosecution's evidence. The complainant claimed that he was attacked by somebody who had a knife, and further claimed he was arrested immediately and yet no knife was recovered from him. The Appellant further attacked the prosecution's evidence that despite the claims by PW1 he was arrested by members of the public, no member of the public was called to give evidence as to his arrest.

For those reasons, the Appellant prayed that his appeal be allowed, that the sentence was excessive, and beseeched the court to direct otherwise.

Mr. Nyakundi learned State Counsel saw the matter differently. He opposed the appeal. In his view the question raised by the appeal was one of identification of the Appellant. Counsel submitted that although the offence was committed at night the evidence showed that PW1 and PW2 were walking together on their way home when the Appellant overtook them, and asked the other witnesses (PW2 and PW3) to remain behind while he and the complainant walked ahead of them. It was while the Appellant and the complainant were ahead and alone that the Appellant attacked PW1, the complainant who raised an alarm, and had the Appellant arrested and marched to the Police Station.

It is the duty of this court being the first appellate court to examine the evidence before the trial court and to arrive at its own findings and conclusions.

Whether we look at the appeal from the point of view whether there was evidence enough to convict and sentence the appellant (*as contended by the appellant*), or from the view of the State Counsel whether the Appellant was identified as the robber and therefore there was enough evidence to convict him, we are of the firm view that there was enough evidence to convict the appellant of the offence of robbery with violence.

The ingredients of robbery with violence are constituted under Section 296(2) of the Penal Code (*Cap. 63, Laws of Kenya*). The ingredients are -

- (a) the offender is armed with any dangerous or offensive weapon or instrument; or**
- (b) or is in company with one or more other persons;**
- (c) threatens at or immediately before or after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.**

These ingredients are disjunctive and not conjunctive. In this case clear evidence was led first by PW1, how he and PWIII after a hard day's job went into a local bar called "*Karuma*" and had a few drinks. There they found PWII who narrated to them that the Appellant had taken away from his pocket, Shs 400/= being the balance of the sum of Kshs 500/= he had given the bar man to pay for his soft drink worth Shs 100/=.

Because they, PW1, PWII & PWIII and the appellant were neighbours they decided to walk home together. However along the way, PWII and PWIII fell behind because the Appellant had requested PW1 (*the complainant*) to walk ahead with him, he had something he wanted to discuss with him. According to the evidence of PWIII, the Appellant and PW1 left them behind by about 3 km. So PWII and PWIII did not actually witness the attack on PW1 by the Appellant.

That was however a safe distance for the Appellant to attack PW1, by jumping on, and trying to strangle PW1, and succeeded in wrestling PW1 to the ground while demanding to be given all that PW1 had in his possession. The Appellant removed Kshs 80/= from PW1, together with a mobile phone Motorola C117 given to him for safe keeping by PWIII, because the Appellant had threatened to take it away from him.

After overpowering PW1, the Appellant ordered PW1 to remove his trousers, and the Appellant after removing his trouser, was in the process of sodomising him, when PW1 screamed causing fright to the Appellant who fled into a maize plantation.

PWIV, a watchman came to the rescue and found PW1 with his trousers down to his knees, while the appellant fled to a maize plantation. PWIV reiterated the information from PW1 that the Appellant wanted to sodomise him. The same information was given to and was reiterated by PWII and PWIII in their evidence.

PWIV knew the Appellant from his childhood. The evidence of PWII and PWIII as to their meeting at "*Karuma Bar*" and walk home corroborated that of PW1. The evidence of PW1, PWII and PWIII was also one that after being rescued by PWIV, they met the Appellant armed with a panga which he hurled at PWIII but missed him, and had the Appellant chased and arrested with the assistance of the public.

PWV, the Investigating Officer summed up the evidence of PWI-PWIV, and noted particularly how the Appellant had observed the handing over of the cell-phone that PW2 gave his cellphone to PW3 who in turn gave it to PW1 to avoid the Appellant from snatching it from PW3. The Appellant was obviously a calculating and shrewd operator. He isolated PW1 and snatched the cell-phone from him.

In his unsworn statement, the Appellant made no reference to the evidence of PW1-PWV inclusive. The Appellant suggested that he was charged by PWIV because he had no money to give to the Police, despite stating in his unsworn statement that he had left Kshs 7,700/- with the Police which he had for purchase of goats at Manguo Village. The suggestion by the Appellant that he was with PWII during the material day is not borne out by any independent evidence. It is clear to us that the Appellant had no plausible defence. Discrepancies in the evidence of PWV as to time of the incident are obviously minor mistakes which do not affect the material and consistent evidence of PWI-PWIV that the incident took place at 10.00 p.m., and not 10.00 a.m. as stated by PWIV.

In our view, the prosecution proved its case beyond reasonable doubt. We have no cause to interfere either with the lower court's finding, and conclusion. This appeal has no merit, and we dismiss it.

**Dated, signed and delivered at Nakuru this 5<sup>th</sup> day of November 2010**

**M. J. ANYARA EMUKULE**

**JUDGE**

**W. OUKO**

**JUDGE**