



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 416 of 2006

JAMES MACHARIA ANUMBIAPPELLANT

- AND -

REPUBLICRESPONDENT

(An appeal from the Judgment of Principal Magistrate Mrs. Wasilwa dated 31st July, 2006 in

Criminal Case No. 3844 of 2005 at Kibera Law Courts)

JUDGEMENT OF THE COURT

The appellant faced the charge of robbery with violence contrary to s. 296 (2) of the Penal Code (Cap. 63, Laws of Kenya).

The particulars were that the appellant, on 13th May, 2005 at Kabiria Village in Riruta within Nairobi, jointly with others not before the Court, being armed with dangerous weapons, namely pistols, robbed **Daniel Nyadieka Nyachuba** of his shop keys, and cash in the sum of Kshs.1,500/= and at or immediately before the time of such robbery, used actual violence upon the said **Daniel Nyandieka Nyachuba**.

It was the complainant's evidence that he was on his way home at 9.30 p.m. on 13th May, 2005 just after locking up the doors of his business premises. While walking towards his Kabiria Village home in the company of two others, they met three men coming towards them; and these men ordered the complainant and his companions to lie down, on the pain of being shot in case of defiance. The intruders were brandishing a metal which resembled a pistol; and the complainant and his companions complied, and lay down, whereupon a search was conducted on their persons, and money was demanded from them with menaces. One of the attackers hit the complainant (PW1) on the head when he attempted to raise his head, and this irritated PW1 who fought back. The attackers grabbed PW1's money, Kshs.1,500/=, and his shop keys. Scared by an alarm raised by one of the PW1's colleagues, two of the attackers ran away, but one of them, the appellant herein, was arrested as he too, ran away, some 100m from the *locus in quo*. It was PW1's testimony that it was the appellant herein who had been keeping guard over the three men forced to lie down.

On cross-examination, PW1 said the material night was not dark, and he and his colleagues had chased the appellant herein as he ran away, following the commission of the offence. PW1 said the appellant who was wearing a red jacket, had been running right in the middle of the road, whereas the appellant's fellow-attackers branched out into the bushes; and the complainant and his colleagues had given chase as they raised alarm, and the police soon came to the scene.

PW2, **Lawrence Odera Owuor**, had been in the company of PW1 at the material time; they came from PW1's shop and, as they proceeded towards Kabiria village, three men emerged from the dark, accosted them and demanded they lie down. After the intruders conducted a search on PW1, PW2 and one **Jeremano Kalaru** (PW3) they hit PW1 on the head and began fleeing, whereupon the three victims gave chase, especially after the appellant herein who was running straight along the road. The three gave chase while raising alarm; and the appellant herein was arrested soon thereafter. Two minutes later, Police officers on patrol came along. It was PW2's testimony that, from the time of the assault to that of arrest, the three victims did not lose sight of the appellant herein; and the appellant was arrested and handed over to the Police.

On cross-examination, PW2 said that during the attack, the appellant herein had a torch and a pistol, and that the appellant had been arrested when he fell behind his fleeing companions. PW2 had not met the appellant before, but said he clearly saw the appellant at the material time, dressed in a corduroy jacket and a T-shirt.

Jeremano Kalare (PW3) was in the company of PW1 and PW2 when the attack on them took place. One of the attackers gave the command that their victims be shot, though this did not happen. According to PW3, the attackers were armed with a metal, and their attack was carried out over a period of 30 minutes. At the time the attackers ran away, one of them who kept to the centre of the road, the appellant herein, was arrested and handed over to the Police; the other two escaped into the bushes. It was PW3's testimony that the appellant herein did not at any time escape from their sight, and he (PW3) and his colleagues, while raising alarm and giving chase, arrested the appellant, only some 100m from the *locus in quo*. PW3 said he was able to see the appellant well in the *moonlight*, and he also had a *torch which he flashed*; and this showed the appellant to have been wearing a *maroon pair of trousers*.

Police Constable David Wachira (PW4) who carried out investigations, took the statements of witnesses, and formed the impression that the appellant herein had been in the company of two others at the material time.

Dr. Zephaniah Kamau (PW6) of the Police Surgery examined the complainant on 16th May, 2005 and found him to have a wound on the left side of the head, and bruises on his fingers – *three days* after the material incident. He concluded that the injuries may have been caused by a blunt object; and he assessed the degree of injury as harm.

The appellant gave sworn testimony in which he said he had been walking to his house at Kabiria Village when he came upon a crowd standing by the road; and those in the crowd just started beating him up, and then handed him over to the Police. On cross-examination, the appellant said he had been caught as he walked home at a leisurely pace, and that he did not at any time hear alarm-screams in that neighbourhood.

Reviewing the evidence, the learned Magistrate remarked as follows:

“I have examined [the] evidence on record. PW1, PW2 and PW3 all say they were attacked by three men who they initially thought were Police officers. [The three men] robbed PW1 of money, Kshs.1,500/= and shop keys The [three witnesses] are corroborative as to the events of the night ...[on] how [two attackers escaped] but they chased one, never losing sight of him, and [arrested] him about 100m away. The Evidence of [these three witnesses] is ... corroborative and believable and not contradictory....”

The trial Court went on to hold:

“Considering the evidence of the [first three] witnesses, ... there was moonlight, and it is the accused they chased and caught about 100m from the scene of the robbery. Though there were a few people on the road, they say they chased him at close range until they caught him, never losing sight of him.”

The learned Magistrate differed with the contentions of the appellant; in her words: “I do not believe this was a case of mistaken arrest and I believe there was an offence of robbery committed.” She concluded that the prosecution had established their case against the appellant herein, beyond any reasonable doubt. She found the appellant guilty as charged, convicted him, and sentenced him to death as required by law.

The appellant comes before this Court contending that the offence charged had not been proved against him; that the evidence adduced against him had been inconsistent and contradictory; that his defence had not been accorded due weight; that there were some essential witnesses not called by the prosecution; that proper identification of the suspect did not take place.

In his oral submissions, the appellant urged that witnesses had given different distances from the *locus in quo* to the place where he had been arrested; and that there had been a mob at the scene of arrest, yet those of the mob were not called as witnesses. He contended that the failing which he invokes, “means [he] had nothing to do with the offence”.

Learned counsel **Mr. Mulati**, for the respondent, urged that the arrest of the appellant following the commission of the offence, had been effected in circumstances of hot-pursuit, and hence there was no danger of the appellant’s identity getting mixed up with that of anyone else who happened to be along the road, or to be part of the crowd that formed at the scene of arrest; those who arrested him had moved with him (appellant) pace-to-pace; and so he had been rightly perceived, identified and arrested. Counsel urged that the attackers of the material night had used a metal-weapon that resembled a pistol, and they had caused injury as they robbed. Counsel submitted that the evidence of the six prosecution witnesses was entirely consistent, and went to show the appellant as the offender, leaving no doubts at all.

We have considered all the evidence, and come to the conclusion that the mutually-corroborative evidence of PW1, PW2 and PW3, is not at all dented by the appellant’s defence; we have concluded that there was no time-lag during which the appellant was out of the glare of the witnesses; there could not have been a mistake in nabbing the appellant who was in flight from the *locus in quo*. We do not find the appellant’s defence to stand up, in the face of such a straightforward and overwhelming turn of the prosecution case.

Accordingly, we dismiss this appeal. We uphold the conviction; and we affirm the sentence imposed by the trial Court.

It is so ordered.

DATED and DELIVERED at Nairobi this 28th day of January 2009.

J. B. OJWANG M. WARSAME

JUDGE JUDGE

Coram: Ojwang & Warsame, JJ.

Court clerk: Huka & Erick

For the Appellant: Mr. Mulati

Appellant in person