



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 427 of 2006**

**HENRY MWAURA KAMAU .....APPELLANT**

**- AND -**

**REPUBLIC .....RESPONDENT**

***(An appeal from the Judgment of Principal Magistrate Mr. K. W. Kiarie dated 2<sup>nd</sup>***

***August, 2006 in Criminal Case No. 1027 of 2006 at Kiambu Law Courts)***

**JUDGEMENT**

The appellant faced two substantive charges of robbery with violence, and a third count, as well as an alternative charge. The particulars on the first count were that the appellant, on 4<sup>th</sup> January, 2006 at Kamiti Prison compound, Kahawa West, within Nairobi, jointly with others not before the Court, robbed **Lee Ambwogi** of one cellphone, Siemens C35 by make, a pair of sports shoes, a wallet, and cash in the sum of Kshs.100 – all valued at Kshs.6250/= – and at or immediately before or immediately after the time of such robbery, used actual violence upon the said **Lee Ambwogi** – contrary to s. 296 (2) of the Penal Code (Cap. 63, Laws of Kenya).

It was charged in the second count that the appellant, on 4<sup>th</sup> January, 2006 at Kamiti Prison compound aforesaid, jointly with others not before the Court, robbed **Frida Kagwiria** of one handbag and cash – all valued at Kshs.500/= – and at or immediately before or immediately after the time of such robbery, used actual violence upon the said **Frida Kagwiria**.

In the third count, the appellant was charged with being in possession of an imitation firearm contrary to s. 34 (3) as read with s. 1 of the Firearms Act (Cap. 114, Laws of Kenya). The particulars were that the appellant, on 4<sup>th</sup> January, 2006 at 10.45 p.m., at Kamiti Prison compound aforesaid, was found being in possession of an imitation firearm with intent to commit a felony namely robbery with violence.

In the alternative charge, that of handling stolen goods contrary to s. 322 (2) of the Penal Code, the particulars were that on 5<sup>th</sup> January, 2006 at Kamiti Prison compound aforesaid, the appellant, otherwise than in the course of stealing, dishonestly received or retained a cellphone, Siemens C35, a pair of sports shoes, and a handbag – all valued at Kshs.6,300/= – knowing or having reason to believe them to be stolen goods.

After hearing the testimonies of the five prosecution witnesses and the defence case, the learned Magistrate framed the issues for determination as follows:

- (a) *whether or not the accused was identified as one of the robbers;*
- (b) *whether or not the accused was victimized by a drunken warder;*
- (c) *whether or not the accused committed the offences he is charged with.*

The two complainants testified that as soon as they entered Kamiti Prison compound, they were accosted by robbers: PW

1 was robbed of a pair of shoes, a Siemens C35 cellphone, and money; while PW2 was robbed of a handbag and Kshs.200/=. PW2 was ordered to go away after being robbed; and, as she walked away, she heard the crack of gunshots. PW1 remained in a lying position at the *locus in quo*; and when the shooting stopped he stood up, and now realized that two of the robbers had been shot, and had been immobilized. PW1 testified that the appellant herein was arrested with his shoes and cellphone. When PW2 returned to the scene, she found the appellant herein injured, and her handbag still hanging from his shoulders; and it was her testimony that the appellant herein, who had been wearing a yellow T-shirt, was the one who had taken her handbag.

PW3, **Wilson Muthwa Mwithambo**, a warder had heard noises coming from the front, as he did his patrol duties. When he got to the quarry, PW3 was ordered to stop by a man who demanded money and mobile phone, with menaces. The man issuing the orders was soon joined by another who was dressed in a yellow T-shirt; and he saw this man in the yellow T-shirt with the help of flood-lights. The man in the yellow T-shirt called out to PW3 by insulting epithets, and demanded money and cellphone. Pw3 for a short while, pretended to go along with the menacing demands, but then turned on the intruders, shot them and incapacitated them. The appellant who fell on the ground, had next to him a pair of white shoes, a handbag, and a Siemens cellphone. Warder **Charles Njuki Wambugu** (PW4) came to the scene, and found in a prostrate position the appellant herein, wearing a yellow T-shirt and lying on a handbag, and a toy pistol had fallen close to his right hand, and close to the appellant was a pair of sports shoes and a cellphone.

The appellant gave sworn evidence in which he said that he had been going to his home when he was robbed at Kamiti Prison's gate – robbed of a cellphone, money (Kshs.500/=), a watch, a cap, and children's clothing. He said he was taken into the prison compound *after* the robbery, and he was ordered to lie down. The appellant said there was shooting after the complainants were robbed; and that when gunfire ceased, he went to the prison warders and told them that he had been robbed; and that at that point, one drunken officer shot him in the leg.

The learned Magistrate, in his assessment of the evidence, did not believe the account being given by the appellant herein; in his words:

**“Had [the appellant herein] been a victim and therefore his identity mistaken, his items allegedly robbed [from] him would have been recovered at the scene and he would not have been injured [while clutching] the handbag of Fridah Kagwiria .... The evidence of the recovery of the other items next to where he ran to, just before he was shot, leaves no doubt in my mind that the issue of mistaken identity could not arise. His contention that he was shot by a drunken officer is [an] afterthought, for he never challenged the officer who shot him with such evidence. This is a contention without a basis and which I dismiss.”**

The trial Court found that the prosecution had proved its case beyond any reasonable doubts, in respect of counts 1, 2 and 3 of the charge. On those counts, the appellant was convicted and sentenced as follows: (i) mandatory death sentence in court 1; (ii) mandatory death sentence in count 2; (iii) imprisonment for two years in respect of count 3.

In his grounds of appeal, the appellant contended that: he had not been identified at the *locus in quo*; the exhibits produced in Court were not dusted for finger-prints; that he himself had been a robbery victim and not a participant in crime; that the prosecution case was not proved beyond reasonable doubts. On the occasion of hearing the appeal, the appellant came into Court with a set of written submissions, which were prefaced by a document bearing the heading: “Amended Grounds of Appeal”. In these new grounds it was contended that: the trial Court erred in fact and in law by rejecting the appellant's defence; that the trial Court had not assessed the truthfulness of the prosecution witnesses; that the charge-sheet had been defective; that the Investigating Officer was not duly qualified to conduct the investigations into the offence in question.

In the oral submission, the appellant contended that he was not the culprit, but the victim, in the incident which gave rise to the criminal case. He said he is a plumber, and was coming from Kahawa West when he was arrested by two men at gun-point, and was then battered.

Learned respondent's counsel, **Mr. Makura** contested the appeal, and supported both conviction and sentences. He urged that there was overwhelming evidence on record, as the basis for the appellant's conviction. Counsel remarked that the appellant on the material night, after committing the offence charged, did not manage to escape, and was arrested at the *locus in quo* after alarm had been raised. The appellant's accomplices who were shot, were able to escape, whereas the appellant was immobilized and arrested; and the appellant when arrested was found with the very items that had been stolen, and he was also found with a toy pistol in his possession. With the aid of floodlights at the Kamiti Prison compound, witnesses (notably PW1 and PW2) had identified the appellant at the *locus in quo*; and the appellant had been caught with the very items which had been robbed from the complainants. The evidence of the complainants, counsel urged, was well corroborated by that of PW3, the prison warder who shot and immobilized the appellant herein.

Learned counsel urged that the trial Court had fully considered the appellant's defence, but found it wanting on merits.

We have carefully considered all the evidence; and we find the testimonies by the complainants to be well corroborated by the evidence of PW3, PW4 and PW5 – and all this evidence interlocks to establish that the appellant was on the party of robbers-with-violence at the *locus in quo*, on the material night. We find nothing to subtract from the evidence that floodlights at the Kamiti Prison compound enabled PW1, PW2 and PW3 to perceive the appellant herein as he executed his depredations. The fact that the very items that had just been stolen were recovered from the appellant, right at the *locus in quo*, is ultimate circumstantial proof and corroboration of the direct evidence, that he was one of the robbers on that night.

We are unable to believe the appellant's evidence on record; he has made statements that do not show veracity, and do not go any length in denting the water-tight prosecution case.

We dismiss the appellant's appeal. We uphold both conviction and sentence, as determined by the trial Court. But we order that execution of sentence in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> counts shall abide execution of the sentence in respect of 1<sup>st</sup> count.

Orders accordingly.

DATED and DELIVERED at Nairobi this 3<sup>rd</sup> day of February, 2009.

**J. B. OJWANG**                      **M. WARSAME**

**JUDGE**                              **JUDGE**

Coram: Ojwang & Warsame, JJ.

Court clerk: Huka & Erick

For the Respondent: Mr. Makura

Appellant in person