



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Criminal Appeal 132, 134 & 135 of 2004

(An appeal from original conviction and sentence in Migori SRM's Criminal Case No. 362 of 2003 by S.O. Atenga, S.R.M, delivered on 31st May, 2004)

ATTORNEY-GENERAL APPELLANT

VERSUS

1. JOHN OUMA ORUNGO

2. JAMES MUNGAI KAMAU

3. PHILIP NYERERE OCHICH..... RESPONDENTS

JUDGMENT

The respondents herein together with Kennedy Otieno Adera and Elija Omolo Amayo were charged with robbery with violence contrary to **section 296 (2)** of the **Penal Code**.

The particulars of the offence were that on the 17th day of February 2003, at Migori Wholesalers, in Migori District within Nyanza Province, the respondents, jointly with others not before court and while armed with a dangerous weapon namely, AK 47 rifle, robbed **Mohammed Jamah Salah** of Kshs. 3,704,000/= and at or immediately before or immediately after the time of such robbery used personal violence to the said Mohammed Jamah Salah.

The respondents were tried and convicted of a lesser charge of robbery with violence contrary to **section 296 (1)** of the **Penal Code**. Each was sentenced to six years' imprisonment. They were dissatisfied with the said conviction and sentence and each preferred an appeal to this court.

The Attorney-General, (now the appellant), was also dissatisfied with the said conviction and sentence and preferred an appeal to this court. The Attorney-General listed two grounds of appeal as hereunder.

"1. The learned trial magistrate erred and misdirected himself in law in failing to convict the suspect on a charge of robbery with violence contrary to section 296 (2) when the prosecution evidence proved the charge beyond any shadow of doubt.

2. The learned trial magistrate erred in law in failing to interpret the provisions of section

179 (1) of the Criminal Procedure Code and therefore arrived at an unjustified decision.”

The Attorney-General urged the court to set aside the said conviction and sentence and in place convict the respondents for robbery with violence contrary to section 296 (2) of the Penal Code and proceed to sentence them accordingly.

When the appeals came up for hearing, each of the respondents withdrew their appeals but the Attorney-General decided to proceed with his. Elijah Omolo Amayo, who was one of the accused persons before the trial court was said to be sick and admitted at Kendu Adventist Hospital. The court decided to proceed with the appeals in respect of the three respondents aforesaid and the appeal against the said Elijah Omolo Amayo to be heard at a later date.

Even in an appeal by the Attorney-General, this court as the first appellate, court is obliged to reconsider and re-evaluate the evidence that was adduced before the trial court and reach its own conclusion as was held in **OKENO –VS- REPUBLIC** [1972] EA 32.

The prosecution evidence briefly stated was that on 17th February 2003 at about 9.00 a.m. the complainant, Mohammed Jomah Salah, PW1, was in his wholesale shop known as Migori wholesalers when he was called by a person working for South Nyanza Sugar Company Limited demanding payment of Kshs. 3,704,000/= for sugar which had been delivered to his shop by the said company. PW1 ordered his cashier to arrange the said amount so that they could deliver the money to Kenya Commercial Bank, Migori Branch. The cashier put together the said sum in a carton and they called a taxi to escort them to the bank. The taxi that was called belonged to Kennedy Otieno Odera, one of the accused before the trial court. The taxi arrived but it had two other occupants. The car boot was open when it arrived. The money was still in the shop. Before it was put in the boot, PW1 sat on the front seat. He demanded that the other occupants do leave the motor vehicle but the driver refused to drop them out. Suddenly some people appeared with an AK 47 rifle and started firing. They went into the shop and took all the money. They drove away in the taxi. PW1 and others raised an alarm and some police officers responded and chased the taxi. The taxi was being driven by Elijah Omolo Amayo, the respondents’ co-accused who is currently admitted in a hospital, and was owned by Kennedy Otieno Adera, who was acquitted by the trial court.

The police managed to arrest the taxi driver and the owner and further investigations led to the arrest of the respondents herein.

After considering all the evidence that was adduced by seventeen prosecution witnesses as well as the defence of the respondents, the trial court was satisfied that the respondents took part in the said robbery. The court stated as follows:

“I hereby convict the aforesaid 4 accused persons under section 215 of the Criminal Procedure Code for the offence of robbery with violence contrary to section 296 (1) of the Penal Code since Section 179 (2) of the Criminal Procedure Code allows the same.”

He did not state why he did not proceed to convict them under **section 296 (2)** of the **Penal Code** as stated in the charge sheet.

Mr. Kemo, Senior Principal State Counsel, submitted that all the constitutive elements of robbery with violence were proved in that the robbers were more than one and were armed with an offensive weapon namely an AK 47 rifle, and at the time of the robbery threatened to shoot the complainant and other people. He urged the court to change the conviction of the respondents from **section 296 (1)** and convict them under **section 296 (2)** and proceed to sentence each of them to death as by law prescribed. He cited the Court of Appeal decision in **WILSON MWANGI KINYUA –VS- REPUBLIC**, Criminal Appeal No. 188 of 2002. In that decision the court cited **OLUOCH –VS- REPUBLIC** [1985] KLR 549 where the provisions of section 296 (2) of the Penal Code were reproduced and the court went on to state as follows:

“The above will show that even if the question of being armed with weapons – dangerous or offensive –were left out of the charge, if the charge shows that the offender was in company of one or more persons or that he wounded or beat or used other personal violence to any person, and if the same ingredient, which needs only be one is proved, then the conviction will still stand.”

We entirely agree with that decision which, in any event, is binding upon this court.

The respondents had already withdrawn their appeals, saying that they were satisfied with the sentences that were passed against them. That being the case, this court cannot consider whether their conviction and sentence was lawful as there is no appeal against the same. We are only considering the appeal by the Attorney-General on the two grounds as stated herein above.

From the evidence on record, it is clear that all the ingredients of robbery with violence under **section 296 (2)** of the **Penal Code** were proved. The learned trial magistrate was therefore plainly in error in convicting the respondents under **section 296 (1)** of the **Penal Code**. He ought to have convicted them under **section 296 (2)** of the **Penal Code**. Being so satisfied, we quash the conviction of the respondents under **section 296 (1)** of the **Penal Code** and set aside the sentence of six years’ imprisonment that was passed by the trial court. We substitute therefor an order convicting each of the respondents for the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code** and proceed to sentence each of them to death as by law prescribed. It is so ordered.

DATED, SIGNED AND DELIVERED AT KISII THIS 23RD DAY OF JULY, 2009.

D.K. MUSINGA

A.O. MUCHELULE

JUDGE.

JUDGE.