



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KISUMU**

**Criminal Appeal 84 of 2008**

**HANNINGTON OTIENO .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From Original Conviction and Sentence of Winam SRM's Court**

**in**

**Criminal Case No.2691 of 2007.)**

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**CORAM**

**MWERA, KARANJA J.J**

**MUSAU FOR STATE**

**MWAMU FOR APPELLANT**

**COURT CLERK GEORGE/LABAN-INTER/KISW/ENG/LUO**

## JUDGEMENT

This appeal arose from the decision of the learned Senior Resident Magistrate (Winam) who tried, convicted and sentenced the appellant to the mandatory death sentence on a charge brought under section 296(2) of Penal Code. It was therein alleged that on 6<sup>th</sup> December 2007 at Konya Sub-location Kisumu jointly with others not before court the appellant robbed **Joseph Orot Jeremiah** of shs.30,000/= wounding the said **Joseph Orot** in the incident. Five prosecution witnesses were heard and that closed the trial because the appellant chose not to be heard in defence or call witnesses.

Mr. Mwamu filed a 7-point appeal. When it came for hearing Mr. D. Musau, the learned Senior Principal State Counsel conceded it on the ground that evidence before the lower court should have sufficed for the offence of assault and not violent robbery. He urged us to so find.

On his part Mr. Mwamu said that if we agreed with Mr. Musau, we should address the discrepancies in medical aspects whether the complainant was treated/admitted at Nyanza Provincial Hospital (Russia) or at Kisumu District Hospital. Further counsel urged us, in the event again if we tended to Mr. Musau's position, not to award a custodial sentence to the appellant but take the time so far served in prison as sufficient punishment of an offence of assault. Thus with Mr. Musau's position Mr. Mwamu had put aside the petition of appeal herein and submitted that evidence adduced indeed tended towards a lesser offence than robbery with violence as charged.

Now we turn to re-evaluate the evidence laid before the learned trial magistrate and come to our conclusion, even as we did not see and hear the witnesses in the way the learned trial magistrate did.

The complainant (PW1) told the lower court that on 6<sup>th</sup> December 2007 at 10 a.m. he went to Opollo shopping centre. Then the appellant came with a group of people, armed with clubs. He beat PW1 who fell down. PW1's pockets were searched and his wallet was taken by this group which ran away. PW1 was taken to **Nyanza Provincial General Hospital** treated and discharged. A P3 was issued and produced in court. PW1 knew the appellant before.

In cross-examination PW1 said that shs.30,000/= was stolen from him. It was never recovered. He did not know who specifically took that money which was in the wallet. That a doctor who treated PW1 filled the P3.

**Samson Omonge (PW2)** was building PW1's house at Opollo when at 10 a.m. PW1 and the appellant quarreled and then fought. PW1 fell down, and cried out that his wallet had been taken. PW2 called a taxi and took PW1 to **Kisumu District Hospital** for treatment – not Russia i.e. Nyanza Provincial General Hospital PW1 claimed he was taken to. The learned trial magistrate heard in cross-examination that as the appellant and PW1 fought, the former armed with a large stick, a group of 5 people surrendered them but did not take part in attacking PW1. The appellant left with PW1's brown wallet having shs.30,000/= in it. PW2 did not however see that money. Nobody chased the appellant as he fled.

According to **Jacob Abiro Kwach (PW3)** on this day he went to take tea with PW2. PW1 was outside the eatery. He began to speak loudly and when PW3 went to see what the matter was, he found the appellant hitting PW1 with a stick. PW1 was injured. He was surrounded by 7 people. The appellant took PW1's wallet with shs.30,000/= and the group left. The complainant was taken to **Kisumu District Hospital** for treatment. The witness knew the appellant before. PW1's wallet that was stolen was brown in colour; PW3 did not know its contents.

**P.C. Joanes Omariba (PW4)**, of Kondele Police Station was on duty on 6<sup>th</sup> December 2007 when the complainant reported that the appellant with a group of people had robbed him of his belongings – shs.30,000/=. A P3 form was issued to him and later the appellant was arrested and charged. PW4 did not know either, the complainant or the appellant.

PW1 took eyewitnesses to PW4 who claimed that they saw him being robbed. Property was stolen and force was used in the process.

**Rodah Ogao (PW5)**, a clinical officer at Nyanza Provincial General Hospital came before the learned trial magistrate to produce a P3 form a certain Dr. Okioma she had worked with before, filled regarding PW1. PW1 had a cut wound on the head and other injuries on his limbs. They were assessed as harm (Exh.P1). As said earlier, the appellant did not say anything in his defence or call witnesses.

In the view of the evidence placed before the learned trial magistrate while PW1 claimed that the appellant attacked him with a group of 7 armed men, and the appellant hit him with a club, PW2 and 3 who were at a nearby eating house heard PW1 speaking loudly outside and when they got out to see, PW1 was fighting with the appellant or the appellant was beating him with a big stick. A group of 5 to 7 stood by surrounding the two without participating in the fighting. While PW1 said that he did not see specifically who took his wallet, PW2 and 3 claimed that they saw the appellant taking it. Although they said that it contained shs.30,000/= they did not look in it to determine this. If PW2 said:

**“We saw PW1 fighting with a man with a big**

**jembe stick {the accused} (and) we came**

**for his rescue..... I don't know the**

**cause of the fight”,**

and PW3 said:

**“We came out and found Hanningtone**

**(Accused) beating him (PW1) using a stick,”**

then it would be safe to conclude that these two men whom PW3 knew before were fighting in public. Those people surrounding them who did not join in the fight or stealing PW1's wallet were not of the common intention either with the complainant or the appellant. Our conclusion is that the two were fighting over a matter better known between themselves and that is it. Whoever was injured whether treated at Kisumu District Hospital or Nyanza Provincial General Hospital was no matter. He was injured and treated. But the evidence adduced was not sufficient to support a charge of violent robbery. Quite probably an assault or at best, affray.

In the circumstances, we allow this appeal. The conviction is quashed and the sentence set aside. The appellant to be set free forthwith unless otherwise lawfully held.

Judgement accordingly

Delivered on 10<sup>th</sup> November, 2009.

**J. W. MWERA**

**J. R. KARANJA**

**JUDGE**

**JUDGE**

**JWM/mk.**

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