



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 33 of 2005

PETER MBAO MUTHONI APPELLANT

Versus

REPUBLIC RESPONDENT

(Being appeal against the conviction and sentence by G. K. MWAURA Principal Magistrate, in the Principal Magistrate's Criminal Case No. 468 of 2004 at Muranga)

JUDGMENT

The appellant **PETER MBAO MUTHONI** was charged with robbery with violence contrary to **Section 296(2)** of the Penal Code. He faced two counts under that section in the lower court but was only convicted on one count because the complainant in the second count by the time the case came for trial had died. On being convicted the appellant preferred this appeal. This court is duty bound to re-evaluate the evidence of the lower court and in this regard the case of **OKENO vs REPUBLIC 1972 EA 32** is relevant. It was stated in that case as follows:-

“an appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya VS R., (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs R.(1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post (1958) E.A. 424.”

In keeping with that requirement we shall proceed to re-evaluate the lower courts evidence. PW 1 the complainant herein was a metal fabrication businessman. On the 27th February 2004 at about 8.30 a.m. while he was opening his shop he saw a group of young men. He knew them well and as a consequence he did not suspect any mischief from them. He said that he used to see them at sabasaba town engaging in various occupations. Some of them he gave casual employment. One of the young men in that group told him that they had been sent by a person called John **“to get what they had been sent for”**. PW 1 did not respond to them and immediately one of them attacked him with an iron bar on his chest which caused him to fall down. He still did not speak with them. The group then began to beat him but he managed to escape from them. They ran after him and caught up with him and beat him and in the

process stole from him kshs. 600. Again he ran away from them towards Sabasaba Police Post. On arrival he found someone else called John Ndegwa who was lying in the report office in the police post injured and bleeding. In the meantime one of the assailants was still following PW 1 while armed with a panga. He identified that person as the appellant. The appellant on reaching at Sabasaba Police Post in the chase of PW 1 was arrested. PW 2 was the Clinical Officer who examined the complainant and filled the P3 form. The Clinical Officer noted that the Complainant's clothes were blood stained due to that attack on 27th February 2004. She also noted that he was wounded on the head by sharp or blunt objects. His injuries were assessed as harm. PW 3 was a police officer who on that material date was based at Sabasaba Police Post. On 27th February 2004 at 8.15 a.m. he saw a commotion at the door of police post. He noted that they were two people who were severely injured in the police post. There was a group of people chasing them. One of them entered in the police post and attempted to cut the complainant but was restrained and arrested. That person was the appellant. PW 3 disarmed the appellant by taking away a very sharp panga from him. The officer said that the money stolen from PW 1 was not recovered from the appellant. PW 4 also a police officer saw the complainant being chased and noted that the appellant was amongst the people chasing him. He noted that the appellant was holding a panga but was disarmed by PW 3. PW 5 also a police officer witnessed the appellant chasing PW 1 into the Sabasaba Police Post. He noted that he was holding a panga. He witnessed the appellant being arrested by PW 3. At close of the prosecutions case the trial court found the appellant had a case to answer. The appellant in defence said that on 26th February 2004 he had lost his national identity card. On 27th February 2004 he went to report that loss at Sabasaba Police Post. It was at that time that three (3) police officers arrested him on suspicion of being a robber. The learned magistrate in her judgment found the appellant guilty of the charge of robbery with violence and sentenced him to death. In his written submission the appellant amongst other issues stated that the lower court failed to indicate who the interpreter was. Further the appellant submitted that the prosecution failed to state in the charge sheet that he had a panga. Finally he argued that the date given by PW1 as the date of the robbery that is 17th March 2004 did not correspond with the date in the charge sheet. The state represented by the learned state counsel Miss Ngalyuka opposed the appeal. The learned state counsel submitted that the appellant was arrested as he ran after PW 1 at the police post. Further that PW1 gave evidence of the attack and the robbery.

We confirm that we have looked at the lower court's proceedings and the language in which each witness gave evidence in is clearly stated in those proceedings. We find that there is no basis in the argument raised by the appellant in this respect. We have also looked at the charge sheet and noted that the date stated as the date when the offence occurred was 27th February 2004. This was the date given by PW 1 in evidence. Again there is no basis for that argument raised by the appellant. In respect of the submissions that the charge sheet did not state that the appellant had a panga for clarity we hereby reproduce the particulars of that offence.

“ on the 27th day of February, 2004 at Sabasaba Township in Maragua district of the Central Province, jointly with others not before court robbed one David Mbau Njoroge kshs. 600 and at or immediately after the time of such robbery wounded the said David Mbau Njoroge.”

Bearing in mind those particulars we are of the view that the same does specify the essential ingredients of the offence under Section 296(2) of the Penal Code. The Court of Appeal in the case of **JUMA vs REPUBLIC (2002)2 EA** considered what particulars should inform the charge under that section and stated as follow:-

“Under section 296(2) of the penal code the charge must state the accused was armed with dangerous or offensive weapon or instrument, or was in the company of one or more other person or persons or at or immediately before or immediately after the time of the robbery the accused wounds, beats or strikes or uses any other personal violence to any person.”

We have examined the lower courts evidence. The complainant in his evidence said that the appellant was in the crowd that attacked and robbed him. Further the appellant chased the complainant to the police post where he was arrested with a panga and that arrest was witnessed by two other police officers other than the one who made the arrest. We are however not satisfied that the prosecution proved a

charge of robbery with violence. We entertain doubt whether a robber after robbing a person as the complainant alleged would follow his victim armed with a panga all the way to a Police Post. Ordinarily a robber would make every attempt not to be arrested. Hence would not deliberately run to a Police Post as the appellant did. We are of the view that from the evidence tendered in court that there is '**more than meets the eyes.**' In other words we doubt that it was a case of robbery with violence. The words uttered to the complainant give a clue in this regard. One of the people who attacked the complainant said that they had been sent by John to get something from the complainant. Could it be that there was a debt dispute between the complainant and the person called John? We entertain doubt that the complainant suffered robbery. He suffered injuries but no more. The injuries were said by the Clinical officer to have been rated as harm. The complainant had a wound on his head which the Clinical Officer said had been caused by sharp or blunt objects. The offence which is proved by the evidence adduced at the lower court against the appellant, in our view, is of grievous harm. We find that there was sufficient evidence to prove this offence and therefore find that the appellant is guilty of that offence.

Accordingly the Appellant's appeal succeeds and we do hereby quash the lower court's conviction of robbery with violence and do set aside the lower court's sentence of death. We do hereby convict the appellant of the offence of grievous bodily harm contrary to section 234 of the Penal code. We sentence the appellant to 4 (four) years imprisonment. That sentence will begin to run from the date of the Appellant's conviction in the lower court.

DATED AND DELIVERED ON 30TH DAY OF APRIL 2008

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE