



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

Criminal Appeal 61 of 2005

LOMJERAT LEURA DIRA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Nanyuki in Criminal Case No. 1185 of 2004 by P. C. Tororey – SRM)

J U D G M E N T

Lomjerat Leura Dira, the appellant herein was arraigned before the Senior Resident Magistrate's Court, Nanyuki on 16th August 2002 over one count of robbery with violence contrary to section 296 (2) of the Penal Code. He pleaded not guilty to the charge and his trial ensued before **P. C. Tororey Esq.**, Senior Resident Magistrate. A total of three witnesses were availed by the prosecution in support of the charge. The prosecution having closed its case, the learned magistrate found that a prima facie case had been established against the appellant and put him on his defence. The appellant gave unsworn statement of defence and called no witness. Having evaluated the evidence tendered by the prosecution as well as the defence, the learned magistrate found for the prosecution, proceeded to convict the appellant and thereafter sentenced him to death as required under the law.

That conviction and sentence provoked this appeal. In a home made Petition of appeal, the appellant faults his conviction by the learned magistrate on the following four broad grounds; that the ingredients for the offence of robbery with violence were not met, that the case was poorly investigated, shifting of the burden of proof to the appellant and finally failure to consider the appellant's defence.

It is necessary to give the background facts of the case albeit in a summary manner. On 13th March, 2003 the complainant, **John Gitonga Thurairia** (PW1) and his friend **Joseph Gitobu** (PW2) were walking towards Doldol Centre at about 6.30 p.m. when they came across the appellant and his friend one **Kuraru**. The two, that is, the appellant and his friend were all well known to both PW1 and PW2. Suddenly the appellant attacked both PW1 and PW2 with a club and knife. PW1 was beaten unconscious and was left for dead. PW2 however managed to escape. PW1 remained at the scene until 1 a.m. when he came to and managed to crawl to his house and was assisted to the police station by PW2. He realised that he had in the process been robbed of Kshs.10,000/=. At the police station he made a report and gave the names of the appellant and his friend **Kuraru** as suspects. PW1 later sought treatment in the hospital. Thereafter he had the P3 form completed which showed that he had sustained a deep cut on his head and a fracture of left knee joint. It was not until 13th August, 2004 that the appellant was arrested

and subsequently charged.

Put on his defence, the appellant in unsworn statement of defence alleged that PW1 had a grudge with him over his wife. That PW1 had over the years been eyeing his wife. That PW1 had on 20th January 2003 also caused the arrest of the appellant over a tramped up charge of house breaking. He was locked up but was later released for lack of evidence. Thereafter PW1 swore to teach the appellant a lesson.

During the hearing of the appeal, the appellant made oral submissions in support of his appeal. He submitted that there was a grudge between him and the complainant over his wife. That PW2 was not a truthful witness as his evidence was contradictory. That PW2 never sought assistance from neighbouring boma. Instead he went all the way to town and later on came back to the scene. The appellant further submitted that although PW1 claimed to have been assaulted, seriously injured and could not walk, PW2 never found it necessary to take him to hospital. He simply allowed him into the house and then slept. It was also incredible that PW1 having been seriously injured during the incident (sustained a fracture of the left knee- joint) could have walked to his house one kilometre away. Finally, the appellant submitted that the P3 form was introduced in evidence in contravention of the provisions of section 77 of the Evidence Act.

Ms Ngalyuka, learned state counsel; supported both the conviction and sentence imposed on the appellant. She heavily relied on the evidence of PW1 & PW2. As both witnesses knew the appellant very well, the issue of mistaken identity cannot be entertained. On the question of the grudge between the appellant and PW1, counsel submitted that the evidence of PW1 was well corroborated by the evidence of PW2. There was no grudge between the appellant and PW2. He knew the appellant and saw him as he tried to attack PW1. As regards P3 form counsel conceded that it was wrongly admitted in evidence. She however submitted that even if the evidence of the P3 was disregarded, a conviction for the offence charged was still sustainable on account of the fact that in committing the offence, the appellant was in the company of another person and was armed.

This being a first appeal we are obliged to re-evaluate the evidence, analyse it and come to our conclusion, without of course overlooking the conclusion of the trial court which, not only saw and heard the witnesses testify but was also better placed to draw inferences on credibility of witnesses. **(See Okeno v/s Republic (1972) E.A. 32.)**

From the evidence on record, we entertain some doubts as to whether the offence of robbery was ever committed on PW1. Throughout his testimony nowhere does PW1 state that he had on his person Kshs.10,000/= that was stolen or taken from him during the incident. The charge sheet is clear in its particulars. It is stated therein that **“..... On the 13th March 2003 at Doldol trading centre in Laikipia District of the Rift Valley Province, jointly with another not before court and being armed with dangerous or offensive weapons namely nut – rungus, robbed John Gitonga Thurania of Kshs.10,000/= and immediately before or immediately after the time of such robbery wounded the said John Gitonga Thurania.....”** One would therefore have expected that in his evidence in Chief PW1 would state that he had in his possession Kshs.10,000/= and that during the incident the appellant and or his colleague, **Kuraru** took the money. The evidence of PW1 both in Chief and in cross-examination is silent on this aspect of the matter. The only reference to Kshs.10,000/= having been stolen from PW1 comes through the evidence of PW2 who conceded that he never saw the appellant and his colleague take PW1’s Kshs.10,000/= as had ran away but was so told by PW1. We do not understand why PW1 could not himself have raised the issue in his evidence and left it to PW2 to do so. Perhaps it is for this reason that the appellant laments that he was convicted for an offence whose ingredients had not been met by evidence.

A capital robbery, i.e. robbery carrying with it the death penalty upon conviction is committed if in pursuit of theft the offender is:

(a) armed with a dangerous or offensive weapon or instrument

OR in company with one or other person or persons

OR at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to the victim of the robbery.

Any of these three alternatives or a combination of them would be sufficient for a charge under section 296(2) of the Penal Code. However the overriding consideration is that any of the three alternatives must be committed in pursuit of robbery or theft. In the instant case there is absolutely no evidence that the appellant and his friend robbed PW1. Further it is doubtful whether a rungu would pass for a dangerous or offensive weapon or instrument considering that the appellant being a member of the Masai Community, having a rungu is part of their daily regalia.

Yes, the appellant may have been accompanied by another person during the incident. However, on the evidence on record it is not clear what role the said **Kuraru** played. It is not stated anywhere in evidence that he participated in assaulting both PW1 & PW2 or any one of them. Nor did he rob PW2. There is no evidence that the appellant and **Kuraru** had formed common intention to attack PW1. **Kuraru** could thus have been an innocent bystander. This being the case, it cannot be said therefore that in attacking PW1, the appellant was in the company of another person.

We have no doubt at all that PW1 was injured in the incident. However as we have already stated, it was not in pursuit of robbery. It may have been for other reasons. All in all therefore the ingredients of robbery with violence set out section 296(2) of the Penal Code were not met in the circumstances of this case.

From the evidence on record, it would appear that the appellant and PW1 had a misunderstanding dating back to 2000 when PW1 filed a complaint with the police that he appellant had broken into his house. The appellant was arrested and locked up. As it turned out this report was false and the appellant was released. PW1 did admit as much under cross-examination by the appellant. The appellant did raise the issue of the grudge between him and PW1 right from the word go. He cross-examined both PW1 and PW2 on the issue. It seems also to us that there was an unresolved issue involving a child between the PW1, one **Njamin Lepernice** and the appellant. Details of this dispute are however scanty from the evidence on record. Finally the appellant raised in his defence the issue that PW1 had been eyeing and trying to seduce his wife. It was for this reason that he was forced to take his wife to Ngong far away from PW1. The learned magistrate never revisited these issues in her rather short and terse judgment.

The offence facing the appellant carries a mandatory death sentence. It therefore behoves a trial court to be careful before entering a conviction. It must subject the evidence tendered to exhaustive analysis and evaluation. In the instant case, the learned magistrate made no efforts at all to evaluate and analyse the evidence tendered as well as the defence. In fact all that the learned magistrate did was to regurgitate and indeed summarise the evidence tendered by the witnesses together with the defence and thereafter in four lines entered the conviction. This is what she said “..... **The accused gave alibi defence stating that on the 13th March 2003 he was away in Ngong having gone there on the 30/2/2003. He however did not call any witness in support of this. Consideringly (sic) I do find that the prosecution has proved their case beyond all reasonable doubt and I do convict the accused U/S 215 of the CPC.....**” Clearly this judgment flies in the face of the provisions of section 169 of the Criminal Procedure Code. It is a pedestrian judgment which should not be allowed to stand. There is also gross misdirection in law with regard to the treatment of Alibi defence. A person setting up an alibi does not assume the responsibility of proving it. It is upto the prosecution to disapprove it. The appellant herein need not have called any witnesses to support his alibi defence as the learned magistrate tended to think.

We have no doubt at all that the appellant had set up a perfect defence which should have invited consideration by the learned magistrate. Had she done so, we have no doubt at all that she would have come to a different conclusion other than that the appellant had committed capital robbery.

PW1, it is claimed was seriously injured after incident. He was in fact rendered unconscious. His friend (PW2) ran away as he was being attacked. One would have expected that he would have sought assistance from nearby homes or anybody he came across. He did not. As it is he went all the way to town. After sometime he came back to the scene alone. If he had gone all the way to town, one would

again have expected that he would make a report to the police and seek their assistance. He did not. When he came back to the scene, he found PW1 missing. He never bothered to look for him. Instead he retreated to PW1's house and slept. However from the evidence of PW1, having been beaten unconscious he never left the scene until he came around at about 1 a.m. when he crawled home. If indeed PW2 came back to the scene as he claimed how come he failed to see PW1? We note that from the evidence PW1's house was one kilometre away from the scene of attack. PW1 having been seriously injured following the assault which left him with a fractured left knee joint we doubt whether he would have walked or even crawled to his house one kilometre away. When he got to his house, PW2 opened the door for him and though he noted that PW1 was seriously injured he never bothered to have PW1 attended to medically. He simply carried him into

the house and they slept. To say the least we find the evidence of both PW1 and PW2 incredible and totally unbelievable.

Even if we were to turn a blind eye to this obviously conjured up evidence and accept that indeed PW1 was assaulted, we would still have a problem in convicting the appellant on the charge of assault. Reason, the P3 form was tendered in evidence in contravention of the law. Under Section 77 of the evidence Act, a document purporting to be a report under the hand of a Government analyst, medical practitioner e.t.c. upon any person, matter or thing submitted to him for examination or analysis can be tendered in evidence by any other person other than the maker. However before such a person can be allowed to do so, the trial court is obliged to inform the accused of his right to insist on the maker being called for cross-

examination on the document. If he insists that the maker of the document be called as a witness, then the document cannot be admitted in evidence until the maker is availed as witness. In the instant case, the learned magistrate without taking the trouble of informing the appellant of his aforesaid rights merely acceded to the application by the prosecutor to have PW3, the investigating officer, produce the P3 form under section 77 of the Evidence Act. This was gross misdirection in law and was prejudicial to the appellant. That being the case, the evidence of the P3 form must be disregarded. Such evidence having been disregarded there is no other evidence upon which the offence of assault can be founded.

In the result then, we allow the appeal, quash the conviction recorded against the appellant, set aside the

sentence of death and order that he be released from prison forthwith unless otherwise held for some other lawful cause.

Dated and delivered at Nyeri this 7th day of May 2008

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE