



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 336 of 2006**

**JOHN ITOYI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(From the original conviction and sentence in Criminal Case No.6660 of 2005 of the Chief  
Magistrate's Court at Kibera by Mrs. Wasilwa – P.M.)*

**JUDGEMENT**

The Appellant John Itoyi is convicted of robbery with violence contrary to section 296(2) of the Penal code. The particulars of the offence are that on 30<sup>th</sup> August 2005 at Kibera Laini Saba within Nairobi area Province while armed with an offensive weapon namely a knife, robbed Bernard Waro of Kshs.640/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Bernard Waro.

The prosecution called five witnesses in support of the charge against the appellant. The evidence of PW1 is that on the material day while at a kiosk belonging to his uncle he witnessed a commotion in a toilet that was next to the kiosk. He says that there was a boy by a name Mogaka who was in charge of the use of the toilet facilities and who was charging and/or receiving payments from people using the toilets. He heard noises coming from inside the toilet and on rushing in he found a person running out of the toilet. He contends that he found Mogaka on the ground bleeding from his hands and stomach. He says that Mogaka told him that he was stabbed by John but he did not know John. Pw1 further states that the appellant was arrested as he was trying to run away from the scene of the crime.

PW2 Joseph Mureithi Mwangi was the owner of the toilet services that was operated by the injured victim. He says he was informed that his employee Bernard Waro was stabbed and on rushing to the scene he found the complainant having been stabbed in the stomach and hands. He rushed the complainant to Kenyatta National hospital where the complainant was admitted.

PW3 Dr. Zephaniah Kamau attended to the complainant on 17<sup>th</sup> September 2006 and after examination he found that the complainant was a victim of assault and he assessed the degree of injury as harm. He also produced the P3 form as exhibit P2.

PW4 Bernard Waro is the complainant who was allegedly assaulted by the appellant herein. He says that on 30<sup>th</sup> August, 2005 while in charge of the toilet facilities on behalf of PW3 he was assaulted by the appellant. He says that the appellant who was known to him asked for toilet facilities which he gave him. The appellant got into the bathroom but found there was no soap. He then asked the complainant for soap and when the complainant gave him the soap he got hold of him and drew a knife which he used to assault the complainant. In the process PW4 lost Kshs.640/=. He was then taken to Kenyatta National hospital where he was admitted for 3 weeks.

PW5 PC Alex Makau's evidence is as follows: that on 30<sup>th</sup> August 2005 while at Kilimani police station, two suspects were brought by Administration police officers on allegation that they were involved in a

case of robbery. He booked the two suspects into the cells and recorded statements from complainant who informed him that he was attacked by the appellant.

In his defence the appellant denied having assaulted the complainant and says that he was arrested by two people alleging that he had assaulted someone whose name was not disclosed to him.

No doubt that the complainant PW4 was assaulted on the material day but the question that arises is whether the appellant was the one who attacked the complainant. It is the evidence of PW4 that he was attacked by the appellant who was a person well known to him. PW1 says that he saw the appellant run away after hearing a commotion from inside the toilet. And on reaching inside the toilet he found the complainant lying in a pool of blood. According to the trial court the evidence of PW4 is corroborated by that of PW1. It is clear in our mind that PW1 was arrested together with appellant for assaulting the complainant PW4. The person who arrested them and circumstances leading to their arrest is not clear to us, since the administration police officers who arrested them were not called as prosecution witnesses. PW4 in his evidence mentioned the appellant as the person who attacked him. However, it is not clear to us the circumstances that resulted in the complainant being assaulted. We think the testimony of the arresting officer would have resolved the gaping holes that exist to the evidence of PW4. We do not understand why the arresting officers were not called as prosecution witnesses. The question that now arises before us is whether a conviction of a single witness is safe and in a situation where the trial court did not warn itself of the dangers of basing its conviction on the evidence of a single witness. In our mind we think the conviction of the appellant is not based on strong evidence. There were material contradictions in the prosecution evidence which should have been resolved in favour of the appellant. In sum we think the prosecution did not prove the case against the appellant beyond reasonable doubt. The law is that the appellant is entitled to the benefit of doubt unless the prosecution has proved its case beyond reasonable doubt.

In conclusion the conviction of the appellant is not based on sound and credible evidence and that the evidence on record gives the impression that there could be a possibility that the wrong person was arrested and convicted. We therefore, allow the appeal, quash the conviction and set aside the death penalty that was imposed by the trial court. We substitute with an order for the release of the appellant unless lawfully held.

**Dated, signed and delivered at Nairobi** this 28<sup>th</sup> day of October, 2008.

**J. B. OJWANG**

**M. WARSAME**

**JUDGE**

**JUDGE**