



**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 524 of 2006**

**BENJAMIN KARIUKI WAIRIMU.....APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

***(An appeal from the judgement of Principal Magistrate Mrs. Wasilwa dated on 20<sup>th</sup> September, 2006 in Criminal Case No. 7746 of 2005 at Nairobi Law Courts)***

**JUDGEMENT OF THE COURT**

The appellant had been charged with robbery with violence contrary to s.296(2) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellant, jointly with another not before the Court, on 5<sup>th</sup> November, 2005 at Ngong Town in Kajiado District, within Rift Valley Province, robbed *Ruth Wambui* of cash in the sum of Kshs.300, and, at or immediately before or immediately after the time of such robbery, used actual violence against the said *Ruth Wambui*.

PW1, *Dr. Zaphania Kamau*, testified that he had examined *Ruth Wambui* on 7<sup>th</sup> November, 2005 for alleged assault, as she was complaining of neck pains; she also had bruises on the back of her index-finger, and on the right hand; and she had a wound on the upper third of the left of the shin. From this examination which took place two days since the date of the alleged assault, PW1 concluded that injury may have been caused by a blunt object. The complainant had been treated at Ngong Health Centre; and PW1 categorized the injury as *harm*. He prepared and signed the P3 form carrying a report on the injuries.

PW2, who works at a bar, was in the company of her husband on the material date at 2.30 a.m., walking to their house; and as the two approached their gate, the complainant saw someone coming towards them. When PW2 and her husband stopped, they saw the person to be a boy who was in the charcoal business with her husband, and his name was *Samuel Muiruri*. As soon as the boy passed, the complainant and her husband heard loud footsteps approaching them from behind; and soon, several men reached them, demanded to know what business they had outside at night, and started kicking and slapping them, in the process snatching Kshs.300/= which was all the money they had, as well as a diary. The complainant fell down under the assault, then managed to stand and to escape by running; but they grabbed her husband and dragged him along, as he screamed for help calling out to *Samuel Muiruri* to come to his rescue. *Samuel Muiruri* returned, and helped to arrest one of the attackers. The complainant, at this time, came out of hiding and joined members of the public who were administering blows on the arrested attacker; and she identified the arrested man as the robber. The complainant called Police officers on patrol, who re-arrested the attacker and took him away.

The complainant had not known the appellant before; but she saw him clearly, as the place where the attack took place was well illuminated with electric lighting. She had seen the appellant when he slapped and kicked her. The complainant said she had clearly perceived the appellant's face, as the incident lasted some ten minutes, and the electric light was situated only some three metres away from the spot.

PW3, the complainant's husband, who sells charcoal, had teamed up with his wife at about 2.00 am on the material night, and they were walking to their house, when the appellant came along with another man, and attacked them. The appellant was arrested only about 10 metres from the *locus in quo*; and the whole place was well lit.

PW4, *Samuel Muiruri Kariuki* testified that he worked at the same place with PW3, in the charcoal-selling business. On the material night he had just passed the complainant and his wife, when he met two boys – the appellant and another, and this other was known as *Kiki*. The two asked PW4 for a cigarette, which he gave them; and they told him they were going for a drink. PW4 saw the two men well, as the place was well lit with electric lights. He left them and kept walking on, but suddenly, PW4 heard PW3 screaming and calling out his name. PW4 turned back, only to find that the attackers had just left. PW3 and PW4 believed the attackers to be headed for a nearby liquor den; so they went there and, very soon the attackers came in. One of them, *Kiki*, escaped, but the appellant herein was arrested and handed over to Police officers on patrol.

In the cross-examination, PW4 said he did not know the appellant herein, save that the appellant was a common figure in the locality, and on the material night he had met the attackers before the incident, and given the appellant a cigarette. PW4 said he had clearly seen the appellant before the incident, and he remembered that the appellant had been wearing a "sweater-coat".

PW5, Police Force No. 43988, *Police Constable Joseph Muturi* testified that he was on patrol at 2.00 a.m. on the material night and, when he heard screams, he rushed to the place wherefrom this emanated, and found a woman who said she had been robbed. PW5 accompanied the complainant to the scene, and they met the accused who had already been arrested by Youth Wingers. PW5 re-arrested the appellant herein, and took him to the Police station where he was charged with the commission of an offence.

PW6 testified that the appellant and another man went and bought alcohol at their house; then the complainant and another person came to complain about a robber; and when they *described* the attackers, PW6 knew straightaway that the appellant herein was one of those being referred to. PW6 asked them to wait for a moment, for the suspects to come back; when the appellant showed his face, the complainants at once fell upon him and his companion with thrashes. One of the suspects took off, but the appellant was arrested, and handed over to two Police officers who were on patrol.

PW7, Police Force No. 72554 *Police Constable Joseph Kisunja* was the Investigating Officer, and recorded the statements of witnesses. He testified that the *locus in quo* was a place with sufficient lighting at night, and this would have enabled the complainants to see the attackers on the material night.

When he was put to his defence, the appellant said he had left his place of work, at a hotel in Ngong, at midnight and, as he took alcohol at a village *chang'aa* den, he was arrested. He said his arrest and prosecution was all a frame-up.

The learned Magistrate's review of the evidence was as follows:

"The complainant says she was attacked on the road next to a hospital, which area is well lit with electric lights. PW3 and PW4 say the same. The three witnesses, PW2, PW3 and PW4 all corroborate one another, on the events of the night and even [on the state of lighting] in the area. The accused had previously been seen in the area by the witnesses, and so it was a matter of recognition, and so they followed and arrested him. All [the] circumstances favoured [the] recognition of the accused....[I find the] evidence of [the] prosecution.....corroborated and convincing, [and it provides proof] beyond reasonable doubt. There is no contradiction in it... I find [the] accused guilty as charged; and I convict him under s.215 of [the] [Criminal Procedure Code]".

In his grounds of appeal the appellant contended that the prevailing circumstances at the material time did not favour safe identification of a suspect; that the basis of his arrest was mere suspicion; that proof beyond reasonable doubt had not been achieved; that the learned Magistrate erred in rejecting his sworn evidence.

On the occasion of hearing the appeal, the appellant brought into Court a set of written submissions; and he stated that he had no oral additions to make.

Learned counsel, *Mrs. Gakobo* contested the appeal, and supported both conviction and sentence. The prosecution, it was urged, had proved that, on 5<sup>th</sup> November, 2005 the appellant and another, had attacked and robbed PW2 of Kshs.300/=. The offence took place in a well-lit place, near a hospital, at 2.30 a.m. The attack, which was effected by two persons, took as long as ten minutes – and this was sufficient time for a proper identification of the suspects.

PW2 raised an alarm, and this led to the arrest of the appellant almost immediately; and PW2 did confirm that the appellant was one of the attackers.

*Mrs. Gakobo* submitted that there was no possibility of error in the identification of the appellant as one of the attackers of the material night; and that the evidence showed the offence of robbery with violence to have been committed against PW2 – as the appellant had then been *in company*; and the complainant had been *subjected to violence*.

At the last moment, the appellant raised certain technicalities to challenge the decision of the trial Court; but we are in agreement that the said shortcomings are either purely imaginary, or are so minor as to be readily *cured* under s.382 of the *Criminal Procedure Code*.

We are convinced that the learned Principal Magistrate conducted the trial well, and properly analysed the law and the evidence, coming to the only correct conclusion: that the appellant was *guilty as charged*. The appellant was correctly sentenced, as ordained under s.296(2) of the Penal Code.

We dismiss the appeal; uphold the conviction entered by the trial Court; and affirm the sentence imposed by that Court.

*Orders accordingly.*

DATED and DELIVERED at Nairobi this 14<sup>th</sup> day of October, 2008.

**J. B. OJWANG      H.A. OMONDI**

**JUDGE          JUDGE**

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mrs. Gakobo

Appellant in person