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

Criminal Appeal 353 of 2005

(From original conviction (s) and Sentence(s) in Criminal Case No. 8396 of 2003 of the Chief Magistrate's Court at Kibera (Miss Mwangi - SPM)

JULIUS ODHIAMBO ONYANGO……...……..APPELLANT

VERSUS

REPUBLIC……..…….…....RESPONDENT

J U D G M E N T

JULIUS ODHIAMBO ONYANGO was convicted for one count of **ROBBERY** contrary to **Section 296(1)** of the **Penal Code** and was sentenced to serve 4 years imprisonment. The learned trial magistrate reduced the charge facing the Appellant from **CAPITAL ROBBERY** contrary to **Section 296(2)** of the **Penal Code** to **SIMPLE ROBBERY** contrary to **Section 296(1)** of the **Penal Code** on grounds that "**even though the accused occasioned the offence, it was not a premeditated one and thus I do find even his use of an iron bar to hit PW1 may not have been planned…"**

The Appellant filed amended grounds of appeal and submissions in the amended petition in which the Appellant challenged the conviction for the offence on grounds that the evidence disclosed a totally different offence. He also contented that his defence was not given adequate consideration, that the prosecution did not prove its case and in the consequences the sentence imposed was harsh and excessive.

The brief facts of this case are that the Complainant, **Onyancha**, a 'matatu' driver was driving from Kibera Olympic toward Town at 5.30 a.m. when the accused, who was driving a saloon vehicle, drove on his lane and hit the matatu. The accused did not stop but instead drove into the Railway line direction as if trying to escape. **Onyancha** followed him with the matatu vehicle up to the Railway line where the accused had stopped, and alighted. He confronted the Appellant who was still seated in the car. Before the Complainant could speak to him, two men and a lady passengers alighted from the Appellant's vehicle. That the Appellant boxed the Complainant after which one of the 2 men hit the Complainant with an iron bar causing him to fall down unconscious. The Complainant said that when he woke up, he found a crowd surrounding him and his mobile phone, cash and cap missing. The Appellant was standing in the crowd wearing his, (complainant's) cap. The matter was reported to PW3, a Police Officer, by the Complainant who eventually arrested the Appellant. The Appellant in his defence which was sworn admitted scratching the Complainant's vehicle. The Appellant said that he was a mechanic, that the vehicle he was driving was not his but for a customer. He said that when he realized he had scratched the matatu he got afraid and drove away when he saw the Complainant go to attack him in company with others. That they followed him and beat him up abit. He then abandoned his customer's vehicle and

police towed it away.

I have carefully analyzed and evaluated the evidence adduced before the lower court while bearing in mind that I neither saw nor heard any of the witnesses and giving due allowance. See **OKENO vs. REPUBLIC [1972] EA 32**.

The Appellant was unrepresented during this appeal while **Mrs. Kagiri**, learned State Counsel represented the State and opposed the Appeal.

The Appellant in his written submission argued that the evidence adduced by the prosecution did not support the offence of **ROBBERY** as no evidence was led to prove that he had stolen anything from the Complainant. The Appellant stated that all the Complainant established was that he had been beaten and therefore the offence proved was 'ASSAULT'.

The learned State Counsel was of a different view. Learned Counsel submitted that the Appellant both assaulted and robbed the Complainant and that the Complainant's evidence was materially corroborated by PW2, his conductor. Learned counsel further submitted that the evidence of the Police Officer, PW3 further fortified the Complainant's evidence.

Section 295 of the **Penal Code** defines robbery as follows: -

"***295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen, or retrained, is guilty of the felony termed robbery."***

The prosecution has to adduce evidence to prove that the Appellant stole from the Complainant and also either threatened or used force or visited violence on the Complainant. The circumstances of the case shows that there was a minor accident with a slight vehicle damage between the Appellant's vehicle and that driven by the Complainant. It was when the Appellant did not stop that the Complainant followed him in his vehicle. After both stopped their vehicles, a confrontation then occurred between these two parties. These facts were not disputed by the two parties in their evidence. It is the details of the events which followed the confrontation where controversy occurs in the evidence. As opposed to the learned State Counsel's submission, the Complainant contradicted his own evidence and none of the other witnesses corroborated his. To begin with, the Complainant apparently testified twice. From the record, one **Miss Siganga** ceased to exercise jurisdiction in the matter after hearing the Complainant. **Miss Mwangi** took over the case and started *denovo.*

What the Complainant stated before **Miss Siganga** was materially different from what he stated before **Miss Mwangi.** Just to demonstrate some of the inconsistencies in his testimony, the Complainant told **Miss Siganga** that when he confronted the Appellant, the Appellant alighted from his vehicle, boxed him on the left ear and bit him on the left jaw before one of the Appellant's passengers hit him with an object causing him to fall down unconscious. Before **Miss Mwangi**, the story changed and the Complainant claimed that he was beaten for 15 minutes before one man alighted from the Appellant's vehicle, hit him with an iron bar causing him to loose consciousness.

PW2, the conductor in the Complainant's vehicle witnessed the entire episode. His description of what happened was inconsistent to the Complainant's evidence. PW2 said he saw the two passengers in the Appellant's vehicle alight and beat up the Complainant before the Appellant hit him with an iron bar felling the Complainant to the ground. PW2 then ran away from the scene. The most interesting information was told by PW3, the person to whom the Complainant reported the incident the same morning. PW3 stated that the Complainant reported that he was injured with a panga by three men who also robbed him of Kshs.1,600/- in cash contrary to the learned Counsel's submission. PW3's evidence did not fortify the Complainant's evidence but went further to show that the Complainant was not consistent concerning the events which occurred during the alleged attack. The Complainant was definitely exaggerating the events of the incident.

Apart from the inconsistencies found in the prosecution case which created a doubt of what actually happened, the prosecution evidence clearly did not implicate the Appellant with any theft. The learned trial magistrate erred when she concluded that theft was committed by the Appellant. That conclusion was made, not out of evidence adduced before the court, but from conjecture.

The evidence before the court did not support the charge of **ROBBERY**, whether simple under **Section 296(1)** of the **Penal Code** or Capital under **Section 296(2)** of the **Penal Code**. There was no evidence implicating the Appellant with any theft. There was no evidence to establish any intention on the Appellant's part to steal from the Complainant. The evidence clearly shows that the Complainant menacingly approached the Appellant who was calmly seated in his vehicle. A confrontation occurred. However, the truth of what happened could not be established from the prosecution evidence since the Complainant was inconsistent in his own evidence concerning what the Appellant did to him and PW2 who witnessed the incident did not corroborate his evidence.

On the other hand, the Appellant's defence was that he was the one beaten up by the Complainant and those in his company. Considering the circumstances of the case, the Appellant's defence was reasonable and ought not to have been rejected especially because the prosecution's case was riddled with contradictions.

Having considered this appeal, I agree with the Appellant that the offence of **ROBBERY** was not disclosed. The most the court should have found was that a fight took place between at least the Complainant and the Appellant in circumstances that would justify a finding of 'Affray' and not "Assault'. The Appellant's appeal succeeds in it's entirely. I allow the appeal, quash the conviction and set aside the sentence. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 23rd day of January 2007.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant present

Mrs. Kagiri for the State

Tabitha: CC

…….……

LESIIT, J.

JUDGE