



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

***(Coram: Ojwang, Sitati, JJ.)***

**CRIMINAL APPEAL NO. 22 OF 2006**

**BETWEEN**

**MUINDE NZIOKA..... APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Appeal from the Judgement of the Chief Magistrate, Ms. Hellen A. Omondi, at the Law Courts, Machakos in Criminal Case No.3722 of 2004 dated 8<sup>th</sup> February, 2006)***

**JUDGMENT OF THE COURT**

***Muinde Nzioka***, the appellant, was charged with robbery contrary to s.296(2) of the Penal Code (Cap.63). The particulars were that the appellant, on 5<sup>th</sup> August, 2004, at Kyamuthilu Village, Mwala Location in Machakos District, being armed with a dangerous, or offensive weapon namely a knife, robbed ***Lucy Kalekye Wambua*** of KShs.700/= in cash and, at, or immediately before, or immediately after the time of such robbery, used actual violence against the said ***Lucy Kalekye Wambua***.

It was the evidence of ***Lucy Kalekye Wambua*** (PW1) that she had left her home in Kwani, Kangundo at 8.00 a.m. on 5<sup>th</sup> August, 2004 with the intention of getting to Kwa-Ndoo in Mwala. She arrived at a village where the accused happened to be, in the company of two women who were in the process of de-husking cowpeas. PW1 is a dealer in scrap-metal, and the object of her visit to Kwa-Ndoo was to procure such material. The two women she met sold to her two metal pans, for which she paid Kshs.30/=, before moving on to another home; and at this home she found a lady and a child, but she had no luck on scrap-metal. The moment she departed from that home, she looked back only to behold the appellant herein, chasing in her direction. As she approached a river, the appellant caught up with her, grabbed her by the neck, precipitating a struggle. She screamed as the accused assaulted her with a knife, cutting her on the right arm and on the fingers as she clutched at the knife in self-defence. The accused punched PW1 and grabbed her handbag which contained Kshs.700/=. He took off, leaving PW1 holding the knife.

PW1 then returned to the home where she had first seen the appellant. When she complained to the women she had earlier left in that home, about the assault she had just suffered at the hands of the appellant herein, they pleaded helplessness, as they already had, they said, warned their son ***Muinde*** against egregious personal conduct, but all in vain. PW1 left, now armed with the name of ***Muinde***, went to a neighbouring hotel at Kwa-Ndoo Market, and let it be known that she was seeking the help of the local Assistant Chief, in connection with the assault and robbery which she had sustained at the hands of ***Muinde***. It so happened that ***Muinde*** was well known at the hotel for a young man found at the hotel said ***Muinde*** had earlier passed there and had intimidated, after stopping by to eat *ugali*, that he was now going to play cards. The youngsters hanging around the hotel volunteered to hunt for ***Muinde***, as PW1 waited at the hotel; and indeed, they found him, arrested him and brought him to the hotel. PW1 at that moment promptly identified ***Muinde*** as the robber and attacker who had inflicted harm upon her. Members of the public ordered ***Muinde*** to produce what he had taken from PW1; and he produced PW1's purse which now contained Kshs.545/= in silver coins. At that moment the Assistant Chief came along, and had ***Muinde*** taken to Mwala Police Station, where a report was made, and PW1 handed over the blood-stained knife, used in assaulting her, to the Police. PW1 obtained the P3 form which was duly filled in, and was produced in Court as an exhibit.

The appellant, who elected to make an unsworn statement, and called no witnesses, averred that he did not know why he had been arrested by some four men and taken to the hotel at Kwa-Ndoo Market. He averred that he had not been properly identified, and it is precisely this point which runs through his Petition of Appeal and through his written submissions.

The learned Chief Magistrate held that there could be no question of mistaken identity in this case, firstly because the assault on and robbery against PW1 had taken place in broad daylight, and she (PW1) had the occasion to see the appellant herein before attack, during attack and

after attack; and when apprehended only a short while following the attack, he had in his possession PW1's purse which had been taken away by the attacker, and the appellant had not explained how the said purse came into his possession.

PW2, **Gabriel Ndolo Ndumbi**, a farmer in Mwala, had met PW1 after the robbery, and she was bleeding on the right arm and the left-hand fingers. After the appellant had been arrested by members of the public, they brought him to PW1 at Kwa-Ndoo Market, and she identified him as her attacker. PW1 handed over to PW5, **Cpl. Paul Ambani** of Masii Police Station, the blood-stained knife with which she had been assaulted; and PW4, **Lilian Kioko**, the clinical officer at Kangundo Sub-District Hospital confirmed the injuries to PW1 occasioned at the time of attack. PW1 had testified that when she left the last home she visited at Kwa-Ndoo, she had Kshs.700/= in coins; and the money recovered from the appellant was Kshs.545/= and it was in coins. This, the learned Chief Magistrate concluded, and we are in agreement, could not have been sheer coincidence, especially when the money was contained in a purse identified by PW1 as hers. The learned Chief Magistrate proceeded to find:

***“I am satisfied that the accused is the person who attacked Lucy [PW1] on the date in question, injured her and took away her purse which contained Kshs.700/=.***

***“The evidence proves the charge beyond any reasonable doubt, and the accused is convicted as charged.”***

We have also considered the appellant's defence and find that the same did not in any way shake the prosecution's consistent and corroborated evidence against the appellant.

We are therefore entirely in agreement with the professional manner in which the learned Chief Magistrate analyzed the evidence. We hold that she came to the right conclusion in fact and in law, and we uphold both the conviction and sentence which she recorded, and dismiss the appellant's appeal.

***Orders accordingly.***

**DATED and DELIVERED** at Machakos this 11<sup>th</sup> day of May, 2007.

**J. B. OJWANG**

**JUDGE**

**R.N. SITATI**

**JUDGE**