



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

**Criminal Appeal 116 of 2006 & 117 of 2007**

**DESDELIO FAUSTO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**Criminal Appeal 117 of 2007**

**VICTOR WAGACERE GICHIRA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being appeals against the conviction and sentence of J.N. Onyiego, Senior Resident Magistrate, in the Senior Resident Magistrate’s Criminal Case No.1595 of 2004 at Kerugoya.)***

**JUDGMENT**

Appeals No. 116/2006 and 117 of 2007 were consolidated for purpose of hearing having arisen from the same trial. The two appellants were tried and convicted on a charge of robbery with violence contrary to Section 296 (2) Penal Code. They were sentenced to death hence this appeal. They were also charged with alternative charge of handling stolen goods contrary to Section 322 (2) Penal Code. This is a retrial ordered by the court on appeal. The hearing commenced on 5/5/2005 at Kerugoya Senior Resident Magistrate.

PW2 confirmed that on 6/4/2001 he had sold a hammer to the appellants and when asked to identify the people to whom he sold the hammer he did so.

PW1 a taxi driver on 6/4/2001 at lunch time left his taxi with one Emilio and when he returned, the car was not there. He received a call at 3.00 p.m notifying him that his motor vehicle had been robbed. Evidence is that the motor vehicle was found in Tigoni Kiambu and was kept at Tigoni police station.

PW3 was Emilio Nthiga Njeru the person left with the taxi by PW2. PW3 identified the two appellants. The appellants paid Shs.400/= . Then the appellants pushed the witness into the back seat. Appellants hit the PW3 in the head with a hammer. PW3 was injured and he decided to struggle with appellants who stopped the vehicle and threw him out of the vehicle in the Baricho area. Later PW3 identified the appellant at police parade at Kerugoya Police Station. He was able to identify them because

he was with them for one hour before they attacked him. There is clear evidence of how the appellants were arrested from PW4 an officer in the Karuri Flying Squad. The hammer was collected and a driving licence from motor vehicle and the motor vehicle. PW6 was another taxi driver. He was approached to hire his vehicle but the person hired that of PW2. Later Emilio (PW3) came and was injured on the head. He said he was attacked by the person who had hired the taxi. Later when PW6 was asked to identify the appellant in an identification parade he did so picking the first appellant.

PW7 confirmed the evidence of PW2 taxi driver. He himself did not witness the incident. When the defence were required to defend themselves the two appellants opted to make unsworn statements and indicated they would call no witnesses. First appellant stated how he was arrested and denied being involved in the incident. He proceeded to make submissions on the prosecution witnesses' evidence. He also alleged that the police officer demanded bribes from him. Second appellant also made unsworn statement denying the offence. He made several remarks on the weakness of prosecution evidence.

We have perused the record and the Judgment of the Trial Magistrate. We are satisfied that the appellants were positively identified. They were with PW3 for a period of one hour. There was a drive to the hospital where the car was parked to collect a "patient". Then they drove for a distance and were negotiating for further payment if the car was to go further and it was agreed that shs.100/= be paid which was paid by appellants. Then there was the period of struggle when eventually appellants kicked out the witness from the vehicle. The appellants were also identified by PW1 as the people who purchased a hammer from him in the market. And then the appellants were arrested when driving the vehicle in Tigoni area in Kiambu District. The trial Magistrate warned himself of the dangers of relying on evidence of one witness. He cited authorities where convictions on evidence of single witness was upheld.

On our part as first appellate court we have examined the evidence on record, we are satisfied that the evidence against the appellants was overwhelming. We have perused the written submissions of the appellant and their respective grounds of appeal.

It is our finding that the case was investigated leading to the recovery of the vehicle. The ingredients of the offence of robbery are clearly stated:-

- 1. If the offender is armed with any dangerous or offensive weapons or instrument (in this case the offenders were identified as the ones who purchased a hammer which was used and which was found in the motor vehicle at the time of arrest.)**
- 2. Or if the offender is in company with one or more other person or persons (in this case there were two persons who applied force on the PW3 and took the vehicle from him.)**
- 3. Or at or immediately before or immediately at or after the robbery, he wounds, beats, strikes or uses any other person violence to any person.**

If any one of the above is proved the offender shall be sentenced to death. We have already said that the issue of identification was proved. The evidence was clear that it was the accused who committed the offence. Lack of identification parade forms does not water down the prosecution evidence.

In the circumstances it is therefore our finding that the case was proved beyond reasonable doubt and that the conviction was based on correct principles of law.

We hereby dismiss this appeal.

Dated this 8th day of Aug 2007

**J. N. KHAMINWA**

**JUDGE**

**MARY KASANGO**

**JUDGE**