



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**(CORAM: OJWANG, J.)**

**CRIMINAL APPEAL NO. 211 OF 2006**

**BETWEEN**

**CHARLES BARAZA..... APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

*(An appeal from the Judgement of Senior Resident Magistrate Mrs. Kasera dated 11<sup>th</sup> June, 2006 in Criminal Case no. 1314 of 2004 at the Kibera Law Courts)*

**JUDGEMENT**

The appellant herein was charged with the offence of robbery, contrary to s.296(1) of the Penal Code (Cap.63); the particulars being that on 16<sup>th</sup> January, 2004 at Kawangware, along Naivasha Road within the Nairobi Area, he robbed **Michael Mungai** of cash in the sum of Kshs.2000/=.

PW1, **Joseph Ndungu Muchina** who runs a hotel at Kawangware, along Naivasha Road, testified that he was in one of his hotels on 16<sup>th</sup> January, 2004 when somebody knocked on the door, and told him a theft had taken place in another hotel of his. PW1 was then accompanied by neighbours, as he followed up on the matter.

**Mungai** reported to PW1 that **Baraza**, who had been PW1's employee until four days before the incident, had entered the hotel as a customer, just as he (**Mungai**) was going to close, and **Baraza**, came up to the counter and demanded money while armed with a knife. **Baraza** left after **Mungai** gave him Kshs.2000/=. **Mungai** raised the alarm, and many people came along, blocking **Baraza's** exit. **Baraza** was arrested and brought to PW1's other hotel; and from there, the whole crowd walked over to the Chief's Camp, where a search was conducted, and **Baraza** was found with Kshs.2000/= and a kitchen knife.

On cross-examination by the accused, PW1 testified that **Baraza** had been his dish-washer for two months but, on account of his irregular turn-up, his employment had been terminated several days earlier. PW1 had been paying the accused Kshs.100/= per day for his services.

PW2, **Michael Mungai** testified that he was employed by PW1 at his hotel in Kawangware. On 16<sup>th</sup> February, 2004 at 8.00 p.m. PW2 was on duty, counting stock. The accused, whose services had earlier

been terminated, came to PW2 and “insisted he wanted money”; the accused was armed with a knife, and he demanded all the money collected so far; and the accused took Kshs.2000/=. As the accused left, PW2 called out to neighbours, who arrested the accused and took him to PW1’s second hotel, finding PW1 there. The accused, upon seeing PW1, again asked for money, which PW1 refused to give, and the arresting crowd took the accused up to the Chief. At the Chief’s office, the accused was searched and found with the said sum of Kshs.2000/=:, and also with a knife that belonged to PW1’s hotel.

On cross-examination, PW2 testified that both the accused and he had been employed together at PW1’s Maskani Hotel, accused as cook, and PW2 as cashier. Maskani Hotel used to close at 8.00 pm; and on the material night, just as PW2 was going to close, the accused had entered and demanded money, taking from PW2 the sum of Kshs.2000/=:.

PW3, Administration Police No. 900865076 **A.P.C. Anjeru Mbogali** had been on duty at 9.40 p.m. on the material night, at the Kawangware Chief’s Camp. At that time, members of the public brought in the accused, saying the accused was a thief and had stolen Kshs.2000/= from PW2. When the accused denied the claim, PW3 conducted a search, a knife dropping from the accused’s jacket when PW3 raised it; and on further search of his pockets, the sum of Kshs.2000/= was found. PW3 who became convinced the accused had committed the offence claimed, called Police officers from Muthangari Police Station, who came and made a re-arrest.

After the Court ruled that the accused had a case to answer, he chose to make an unsworn statement, which went as follows. The knife said to have been found on the accused was unknown to him, he only saw it in Court. He had not been paid, during the four months he had served, and so he was only trying to get his deserved pay. The accused said he had gone, in the company of PW2, to see PW1 so he would be paid his dues – and it is PW2, the accountant, who gave him the money. But this testimony is unclear, as the accused said that even as he got paid by PW2 he went to the counter, where PW1 slapped him four times, arrested him, and took him to the Chief.

The learned trial Magistrate considered all the evidence, and found as follows:

***“PW2 told the Court [the] accused demanded from him money and he gave the accused Kshs.2000/= which was [the] day’s collection. PW3 confirmed the same and said he recovered Kshs.2000/= from the accused’s small pocket on the Jeans shorts worn under the long pant. The accused said he had not been paid and he needed his money...PW2 told the Court he [gave out] the Kshs.2000/= as he [realised] the accused had a knife. The said knife has been produced in Court as an exhibit. I have no doubt in my mind that the accused committed this offence. The accused said he went to PW1 looking to be paid his money but he was assaulted by PW1. This does not come out in his cross-examination of [Prosecution witnesses]. Indeed, even his claim for four months’ salary arrears [was not properly taken up during cross-examination]...I find the accused’s evidence unreliable and I proceed to dismiss the defence.”***

In the grounds of appeal the appellant contends that the four-year jail sentence meted out against him was “harsh and excessive”; that the prosecution had not discharged the burden of proof; that he is remorseful and he had been only a “victim of circumstances”; that the defence evidence had not been considered by the trial Court; that the complainant who was his employer, had not paid his salary for three months.

Learned counsel **Mrs. Kagiri** contested the appeal, and urged that conviction be upheld, and sentence affirmed.

Counsel urged that the testimony of the single eye-witness, PW2, was clear, consistent, and embodied unmistakable evidence of recognition. The two had worked together over a period of less than one month, and in that period of time, there had been no grudges between the two.

The cross-examination by the appellant had not at all broached the possibility that PW2 had owed him any money; and the issue of monies owed only came belatedly, in the accused’s unsworn defence; on this account, it was only an afterthought.

Learned counsel urged that the defence case had not at all shaken the prosecution evidence. PW2's testimony had been strengthened by that of PW1 who also knew the accused, having been for a short while the accused's employer. Counsel urged that there was nothing on record to show why all the prosecution witnesses would be minded to do a frame-up case against the accused. The learned Magistrate, who took note of the demeanour of the witnesses, had found the prosecution witnesses credible. In these circumstances, it was urged, the conviction of the appellant herein was safe and secure.

In his response, the appellant said that the material day was pay-day, and the employer had promised him money. This, of course, is inconsistent with the testimony of witnesses who said that the accused, at the material time, was no longer in PW1's employ.

What the appellant was endeavouring to do before this Court was to give new evidence, and that was not proper. The question before this Court is whether the appellant had been properly convicted, and sentenced to four years' imprisonment.

I am in agreement with learned counsel, that the appellant was properly convicted, on the reliable evidence that, while armed with a knife, he obtained Kshs.2000/= from PW2 which he had no right to. He was a robber, and was properly convicted. Under the law he could have been committed to jail for up to 14 years; he got only four years.

I hereby dismiss the appellants appeal; uphold the conviction; and affirm sentence.

***It is so ordered.***

**DATED and DELIVERED** at Nairobi this 19<sup>th</sup> day of September, 2007.

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Ndung'u**

For the Respondent: Mrs. Kagiri

**Appellant in person**