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

Criminal Case 526 of 2005

***(From Original Conviction and Sentence of the Senior Principal Magistrate's Court Gatundu*)**

(CORAM: OJWANG, DULU JJ)

BENARD KAMUNA MUHORO…….APPELLANT

VERSUS

REPUBLIC…….…….RESPONDENT

JUDGMENT

BENARD KAMUNA MUHORO, the appellant, was charged before the subordinate court with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on the 28th March 2005 at Kimunyu village in Thika District within Central Province being armed with a dangerous weapon namely a metal bar robbed MAGDALINE WANJIRU KIMANI of cash 180/= and a wallet all valued at Kshs.280/= and immediately after the time of such robbery wounded the said MAGDALINE WANJIRU KIMANI. After a full trial he was convicted of the offence and sentence to suffer death as provided for by law. Being dissatisfied with the decision of the learned trial magistrate, he has appealed to this court. His grounds of appeal in the amended petition are that:-

1. The learned trial magistrate erred both in law and fact while basing his conviction on the purported visual identification by recognition as was alleged against him by PW1 a single identifying witness without considering that the same was made under hectic prevailing circumstances and the same remained to be doubtful and questionable in view of the advanced evidence as revealed clearly on record.

2. The learned trial magistrate erred in basing the conviction on charges that were not proved as to how he was part and parcel of the alleged charges.

3. The learned trial magistrate erred in rejecting his sworn defence which was not displaced by the prosecution as per section 212, and that there were irregularities during the trial of the case in the court below.

The appellant also filed written submissions.

Learned State Counsel, Mrs. Gakobo, opposed the appeal and supported both conviction and sentence. Counsel contended that the identification by PW1 was positive. Counsel submitted that though the time

was 730 p.m. there was moonlight from which PW1 recognized the appellant, when the appellant got hold of her. The appellant hit PW1with a metal bar and injured and robbed her of her handbag and money. When PW1 screamed, members of the public came and, soon thereafter, traced the appellant and arrested him from a nearby school, into which he had ran. Therefore, in counsel's view, there was no possibility of mistaken identity. Counsel also contended that the defence of the appellant was considered by the trial magistrate, found to have no merits, and was rejected. Therefore the appellant had no basis for his ground that his defence was not considered.

The facts in brief are as follows. On 25.3.2005 at 7.20 p.m. the complainant, PW1 MAGDALINE WANJIRU KIMUNYU, left her home at Kimunyu (in Thika District) and was on her way to call some women who would have assisted her take some sodas to a home where his son wanted to get a wife. On the way, she met somebody whom she did not initially recognize. That person grabbed her by the neck and pressed her ribs with a blunt object and demanded some money. She turned and faced that person. She gave him her purse which had Kshs.180/=. It was the evidence of this witness that she recognized the person who had grabbed her, as there was moonlight and she knew him before the incident. PW1 screamed and when a motor vehicle approached, the person ran into the compound of a nearby school. In the meantime, PW1 had already been injured. Members of the public, including PW2 ANDREW IRAKI KIMANI, responded to the screams and came to the scene. PW1 informed them that the person had ran into the nearby school. They immediately mounted a search, and found the appellant in a maize plantation in the school. On being brought to the scene, the PW1 claimed that he was the person who had robbed her. Police also received a call and PW4 PC FRANKLIN KIRAITHE from Gatundu police station arrived shortly, and re-arrested the appellant. In the next morning, the same police officer recovered a metal rod around where the robbery was alleged to have taken place. The complainant, PW1, was medically examined by SAMUEL KARIUKI PW5, a clinical officer. A P3 form was filled on 18.4.2005. The clinical officer found a huge bruise on the right hand, and multiple bruises on both breasts which, in his opinion, were caused by a blunt object. He classified the injuries as harm. None of the alleged robbed items were recovered. The appellant was consequently charged.

In his defence, the appellant gave sworn testimony. It was his defence that he came from Githigiro village. When he was at Kamuyu, he heard noise and people went and asked him where he came from, and he responded that he was going home. Those people beat him up, took him to the complainant and the police came and he went with them. In cross examination he stated that he did not come from the area where he was arrested, but that he had been invited by a friend called MWANGI. He also stated that he had been escorted to the school by MWANGI, and that he did not know the complainant before.

Faced with this evidence, the learned trial magistrate found that the evidence adduced against appellant was overwhelming and convicted him. The learned trial magistrate stated thus in the judgment:-

"**Firstly, he was properly and positively identified by the complainant who said that she knew him prior to the incident and saw him clearly since there was moonlight and he robbed her of her purse which had Kshs.180/= and attacked her with a metal bar. Her evidence was precise and clear and incorporated (sic). Secondly, the accused was arrested the same night near the scene. It was PW2's evidence that the complainant said that her assailant ran towards the school and him (sic) and other member of the public ran towards the school and managed to arrest the accused at the school maize farm a few minutes after the attack. Surely it cannot be by coincidence that the person who attacked the complainant ran into the school compound and the accused was found at the school compound just within that time. Moreover, the accused would not explain what he was doing in the school compound at night. Thirdly, the metal bar which the complainant identified as the one used to attack her during the robbery was recovered at the scene and positively identified".**

This being a first appeal, we have to remind ourselves that we are duty bound to re-evaluate the evidence on record and come to our own conclusions and inferences – See **OKENO – vs – REPUBLIC [1972] EA 32**.

We have considered the evidence on record. The conviction of the appellant is predicated on two

factors. Firstly, it is predicated on visual recognition. Secondly, it is also predicated on the circumstances of arrest.

Indeed recognition is more reliable than identification of a stranger. See **REPUBLIC - vs – NDALAMIA & 2 OTHERS [2003] KLR 638**. In our humble view, and with due respect to the learned trial magistrate, she did not warn herself on the circumstances of the recognition before convicting. In our view, the evidence of the purported recognition of the appellant by the complainant was wanting in a number of ways. Firstly, it is only the complainant who claims that there was moonlight on that night. None of the other witnesses who went to the scene alluded to any moonlight. Secondly, the intensity of that moonlight was not given by the complainant to establish that, indeed, the complainant could have recognized or identified the appellant. Thirdly, there is no evidence on record that the complainant told anybody that she had identified or recognized the appellant before he was arrested from the school maize farm. The appellant was arrested because he was found in the school maize farm, rather that because of any description given by the complainant. In our view, therefore, the learned trial magistrate erred in making a finding that there was positive recognition of the appellant by the complainant during the robbery. In our view, had the learned trial magistrate considered carefully the circumstances of the recognition, and warned herself, she would not have made the finding that she made.

The evidence which remains that puts a nexus between the appellant and the commission of the offence is the circumstances of his arrest. That is clearly circumstantial evidence. In **SAWE – vs – REPUBLIC [2003] KLR 364**, Kwach, Lakha and O'Kubasu JJA, held, interalia –

"**1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatable with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.**

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstance weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4. ……..…….…….

5. ……..……..

6. ……..……..

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt".

The appellant was arrested from the school farm near where the robbery incident occurred, a short while from the time of the robbery. He was not found with any of the stolen or robbed items. He was not found with the steel bar, which was alleged to be the weapon used. The steel bar was found the next morning by the police, and apparently, in the absence of the appellant. The appellant was arrested from the school maize farm because the complainant told people who came to assist that the robber had ran into the school compound.

The appellant stated in his defence (cross-examination) that he was escorted to the school by his friend called MWANGI. Having re-evaluated the evidence on record, we find that the evidence of the circumstances of arrest of the appellant is stronger than evidence of mere suspicion. It leads to the irresistible conclusion that he was the attacker of PW1 the complainant, that he injured the complainant and took her purse together with the money. We say so because we find that PW2 actually arrested the appellant in the school maize farm. That was soon after the incident. There is no evidence or suggestion that anybody could be in that school maize farm at that time of night, and for a lawful purpose. Also the

complainant saw her attacker ran into the school compound. We find that the appellant was arrested while hiding in the school maize farm after the incident. He himself did not say what he was doing in the school maize farm, after saying that he was escorted to the school by MWANGI. He did not even deny having been found in the school maize farm. In our view, the evidence on record proves beyond reasonable doubt that the appellant was the person who attacked the complainant and took her items, which were not recovered. The circumstances point to no other reasonable hypothesis than that the appellant was the robber.

The appellant claims that his defence was not considered by the learned trial magistrate. We find no basis for that contention. The learned trial magistrate did consider the defence of the appellant, when she stated at page J2 of the judgment –

"**I have considered the accused's defence which I find has no merits, although he says he was with one Mwangi, he did not explain the whereabouts of the said Mwangi at the time of arrest neither did he explain what he was doing in the school farm on that night, or even why the complainant would fabricate evidence against him".**

We dismiss that ground of appeal.

Does the evidence on record establish the commission of the offence of robbery with violence? The ingredients of the offence of robbery with violence are given under Section 296(2) of the Penal Code (Cap. 63), which provides –

"**296(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death".**

The appellant was alone during the incident. He wounded the complainant as dearly shown in the evidence of the complainant and PW 5 SAMUEL KARIUKI, the Clinical Officer who filled and signed P3 form which was produced as an exhibit. The degree of injury was classified as harm. In our view, the offence of robbery with violence contrary to section 296(2) of the Penal Code was established. We respectively agree with the finding of the learned trial magistrate, that the offence was proved.

For the above reasons, we find no merits in the appeal, dismiss the same and uphold both the conviction and sentence of the learned trial magistrate.

Dated and delivered at Nairobi this 23rd October, 2007.

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J.B. OJWANG

JUDGE

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G.A. DULU

JUDGE

In the presence of:-

Appellant in person

Mrs. Gakobo for State

Tabitha/Eric – Court clerk