REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 188 of 2004

DANIEL NJERU NJAGI ……...…….……APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

(Being an appeal against conviction and sentence of the judgement of G. K. Mwaura (P.M.) in criminal case no.102/04 Murang'a Magistrate's court

JUDGEMENT

The appellant were charged before the lower court for robbery with violence. The lower court after hearing the evidence found that the prosecution had not proved an offence under Section 296(2) of the Penal Code and proceeded to convict the appellant for simple robbery under Section 296(1) of the Penal Code. The appellant was sentenced to 14 years imprisonment on each count.

At the hearing of this appeal the appellant was put on notice by the court that after the evaluating the evidence if the court found the charge under Section 296(2) of the Penal Code is proved, the court would proceed to convict the appellant under that section. Despite that warning chose to proceed with his appeal.

PW1 in evidence stated that he runs a shop in Murang'a town. On the 9th January, 2004 at about 7.45 p.m. he arrived at the shop where he found his two daughters-in-law. He moved to the inner room at the shop and began watching television. After some time his son known as Paul Mwangi Muchima came to the shop. After sometime a person walked into inner room and pointed a gun at him. PW1 stated that the lights were on. He clearly saw the intruder who was pointing the gun at him. This person was not known to him before. The person demanded money and PW1 showed him where it was. The person took Kshs.15,000/=. That person was arrested and so was not before the court during the lower court's trial.

PW2 Paul Mwangi Muchima said that on the material date at 8.15 p.m. he was in the company of his brother Samuel. A person came in. He had a woolen hat on which he pulled down to cover his eyes. He then indicated to some people to enter the shop. Five people entered the shop. Two were left at the door while two entered the inner room. One of them had a gun. This person with a gun wore a greenish suit and a red cap. PW2 said he saw his face well. He pointed a gun at him and then entered into the inner room. The one with the woolen cap went to the cash box and removed the money. Another one removed money from PW2's rear trouser pocket. He took Kshs.12,000/= and PW2 was able to describe him well. That he was dark of medium height. He had no hat on him. These people were in the shop for about five minutes. PW2 said that the person who took money from his pocket was the appellant herein. On 19th January 2004 PW2 was able to identify the appellant on the identification parade. He confirmed that he

was able to see the robbers because the lights were on and he confirmed that before attending the identification parade he had been kept at a police station corridor. He therefore did not see the appellant before the parade. On cross examination he said that the appellant had a mark on his nose whereas the other robbers did not have.

PW3 Samuel Wainaina Muchiri said that at the material date he was at the family shop in Murang'a town at 7.45 p.m. He was at the counter with his brother PW2. Their father was watching television in the inner room. He corroborated PW2 how someone entered the shop wearing the shop which he pulled down to hide his eyes then waved his colleagues who came into the shop. The shop at the time was well illuminated with electric light. He was able to see one of the robbers well and he said it was a person who he had not seen before. About six people entered the shop. One wore a greenish suit with a bluish shirt. He also had a white cap. The person who entered last wore a dark T-shirt. This person was familiar to this witness because he had seen him in Murang'a town. He identified him as the appellant in court. This witness was threatened by the person with the gun who ordered him to lie down. He sat down and the gun man went into the inner room. The appellant then frisked his brother's pocket. When this witness looked at him the appellant slapped him telling him to lie down. On 19th January, 2004 this witness attended an identification parade when he was able to pick out the appellant. He confirmed in cross examination that he was kept at the office of the Deputy OCS up to the time he identified the appellant.

PW6 was a police officer who carried out the identification parade on 19th January 2004. He gave details of how he organized the identification parade. He had ten members in that parade and indicated where the appellant stood among these people. PW2 and 3 on being requested were able to identify the appellant. The appellant after the identification said that he was satisfied with the parade and countersigned the forms.

The court found the appellant had a case to answer and in his defence he stated that on 18th January 2004 at mid day he met two policemen who stopped him. He thought he was being arrested for being drank and then he was charged with the offence before court. PW2 and 3's evidence clearly identified the appellant. They both stated that the shop was sufficiently lit by electric power. PW2 described the appellant as the person who took Kshs.12,000/= from him. He described him as dark and medium height. He also noted that he had an identifiable mark on the nose. PW3 had seen the appellant before in Murang'a town. He was able to observe him as he robbed his brother. The two witnesses also identified the appellant through an identification parade. The appellant confirmed that the parade was well organized according to PW6. It should be noted that in his defence he did not fault the identification parade.

There is therefore very clear and cogent evidence that the appellant participated in the robbery. The evidence sufficiently meets the required burden of proof of a criminal trial. As stated before the appellant was warned by us that if after the evaluation of the evidence we formed the opinion that the charge of robbery with violence was proved, we would convict him of the same. The reason the learned magistrate reduced the charge to simple robbery was as he stated "*as for 2nd accused (the appellant) since there is no evidence that any of the victims were harmed or subjected to violence, I find that the prosecution has proved an offence of simple robbery beyond reasonable doubt. I proceed to find the 2nd accused guilty of the offence of simple robbery under section 296(1) of the Penal Code and convict him accordingly*". For the avoidance of doubt the ingredients of robbery were well stated in the case of **Johana Ndungu v Republic Cr. A. 116/95** as follows:

"**In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the sub-section in conjunction with s. 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296(2) which we give below and any one of which if proved will constitute the offence under the sub-section:**

1. if the offender is armed with any dangerous or offensive weapon or instrument, or

2. if he is in company with one or more other person or persons, or

3. **if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."**

The Court continued after explaining the essential ingredients under the first two sets of circumstances:-

"**With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly."**

It is clear from the summary of the prosecution's evidence that more than one of those ingredients of robbery with violence was met. We find that the learned magistrate was wrong to reduce the charge to simple robbery. On our part we find that the prosecution's evidence sufficiently proved the two charges of robbery with violence against the appellant.

We do therefore convict the appellant of the two counts of robbery with violence and we do hereby sentence him to death as provided by the law.

Dated and delivered at Nyeri this 4th day of October, 2007.

MARY KASANGO

JUDGE

M. A. MAKHANDIA

JUDGE