REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 310 of 2004

EMILIO KINYUA NJERU ……..……...…..…..……APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

(Being an appeal against conviction and sentence by J. N. Nyagah – S.R.M. in Criminal Case No.587 of 2004 SRM's Court Karatina)

JUDGEMENT

The appellant herein was charged with one count of robbery with violence c/sec. 296(2) of the Penal Code and on the 2nd count with assault causing actual bodily harm c/sec. 251 of the Penal Code. The learned magistrate after hearing the evidence convicted the appellant and sentenced him to death as provided by the law. The evidence against the appellant was that on the 3rd March, 2004 at about 11.00 a.m. as PW1 and PW2 were traveling on a motor cycle of their employer; they were suddenly hit with a piece of wood which caused them to fall down and the motor cycle fell on them. They were then robbed of Kshs.28,866/= and also cigarettes belonging to the employer.

PW1 stated that at about 10.30 a.m. they were on the way to Karatina town. As they were going up a slope near Unjiru he was the one who was riding the motor vehicle. PW2 was with him as pillion passenger on that motor cycle. He saw a person coming towards them holding his hands at the back looking like he was drunk. The person then attacked them with a 'rungu'. He hit PW1 on the right hand causing the two of them to fall off the motor cycle. The motor cycle then fell on them. That person produced a knife and then removed money from PW1's pocket. By then this person was in company of others. Immediately they stole from them they ran into coffee plantation. What seemed to have caused them to run was the screams of a young man and a woman who were nearby. People on the other side also began to scream. Two people who were apparently accomplices of the appellant were arrested by members of public. PW1 then proceeded to Karatina police station and reported the incident. At that police station one person was brought by the members of the public. PW2 had picked up the sheath of the knife which he had been threatened with and that knife was brought to Karatina police station by members of the public. PW2 had also picked up the stick that was used to hit them. The appellant was identified by this witness as the one who threatened him with a knife. He identified the robber by the clothes he was wearing and from his physical appearance.

PW2 corroborated the evidence of PW1 in respect to the attack. He later confirmed having identified the appellant at an identification parade.

PW3 was at the material time digging a 'shamba' in the company of his grandmother. He clearly saw the two people who were riding the motor vehicle. Then he noted two people who were seated by the

roadside. These people stood up and hit the person riding the motor vehicle with a stick. The rider lost control of the bike and the motor cycle fell on them. The people being robbed started to scream and he saw the robbers insert their hands in the pocket and remove some money. Members of the public began to go to the rescue and the robbers ran away. The members of the public were many and they followed the appellant. As they followed him other people who were ahead of him stopped him. He produced a knife and money and threw them away. This witness confirmed that that person was the same person who removed money from PW1's pocket. On being stopped by members of the public he was beaten but one mzee amongst the members of public stopped them from beating him. The knife and Kshs.1,240/= were collected and taken to the police station and so also was the appellant. This witness confirmed that from the time the robbery took place up to the time he was arrested by the members of the public he had not lost sight of him.

PW5 on that day at 11.00 a.m. was he headed home from Karatina town and on reaching the railway line he saw people who were being chased by children. He told other people in the shamba to catch him. By then people were shouting 'thief'. This witness ran after him and the robber threw the knife at him. He also produced the money and threw it besides the road. He was caught by the people ahead of this witness who started to beat him but this witness appealed to them not to beat him. The money and the knife were taken to the police station and so was the appellant who was identified by these people by the clothes he was wearing at the time.

PW6 was the police officer who confirmed that the appellant was arrested and brought to the police station and that a stick was brought by the complainant together with money and knife by members of the public.

In his defence the appellant said that on the 3rd April, 2004 he was on his way to work. On reaching Ragati village he heard screams across the valley. He saw people coming armed and he feared for his life therefore he ran away. People began to shout that he was a thief and as a consequence the people ahead of him stopped him. They began to beat him and it was PW5 who stopped them. He tried to tell the people that he was going to work and that he did not commit the offence. He said that he worked as a watchman at BP petrol station.

That is the summary of the evidence and as it is to be noted the incident occurred in the morning. The appellant was positively identified by PW1, 2, 3 and 5. The evidence of PW3 corroborated the evidence of PW1 and 2. PW3 was a 14 year old school going child who gave clear evidence of the incident. We reject the argument of the appellant that this witness was a child of tender years. Even if he was, the magistrate examined him at length and found no reason why this witness should not give sworn testimony and indeed he gave evidence on oath. His evidence was corroborated by the evidence of PW5. Further the knife which the appellant threw at PW5 fitted into the sheath recovered by PW1 at the scene. After the evidence was recorded of PW1 the appellant was charged with the 2nd count of assaulting PW2.

In the appellant's submission the appellant stated that the trial court had a responsibility to inform him of his rights to recall PW1 for cross- examination. Section 214 of the Criminal Procedure Code provides as follows:-

"**(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:**

Provided that-

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the

accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination".

The proceedings of the lower court do not show that the appellant did demand the recalling of PW1. Be that as it may the additional count related to the assault against PW2. The evidence of PW2 was that he was attacked by a person wearing a red T-shirt. The prosecution did not prove that the person wearing the red T-shirt was the appellant. We therefore find that the prosecution did not prove a case on the required standard in respect of the 2nd count. We would therefore allow the appeal in respect of count two, quash the conviction and set aside the sentence of one year imprisonment.

In his defence the appellant raised an alibi. He said that he was going to work as a watchman at the BP petrol station. We are aware that the appellant does not bear a responsibility to prove an answer to a charge before him when he raises an alibi defence. See the case of ***Kiarie v Republic [1984] KLR*** where it was held;

"**An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable".**

The evidence of the appellant in his defence does not introduce doubt in our minds in the light of the clear cogent and sound evidence of the prosecution. We therefore find that the evidence of the prosecution proves that the case has been made in respect of the count of robbery with violence beyond a reasonable doubt.

We therefore proceed to dismiss the appeal on conviction and sentence in respect of the 1st count. We do however allow the appeal, quash the conviction and set aside the sentence imposed on count 2.

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

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE