



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal No. 437 & 438 of 2003

JULIUS ARAKEU .....1<sup>ST</sup>  
APPELLANT

PAUL EKAI.....2<sup>ND</sup>  
APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellants have appealed against the original conviction and sentence in Narok R.M. Court Criminal Case No. 221 of 2003. During the hearing of appeals Nos. 437 of 2003, and 438 of 2003, the same were consolidated. Subsequently, the court used the former as the lead file. Earlier, the two appellants had been charged for the offence of robbery with violence, contrary to **Section 296(2)** of the **Penal Code**. The facts of the prosecution case as stated in the charge sheet are as follows:-

***“On the 26<sup>th</sup> March, 2003 at Suswa Trading Centre in Narok District of the Rift Valley Province, jointly robbed KOIKAT MUNDET of his pair of sadak shoes, one Maasai simi all valued at Kshs.700/- and cash Kshs.1,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said KOIKAI MUNDET”.***

After a full trial, the appellants were found “**guilty**” of the offence as charged and were convicted accordingly. The learned magistrate later sentenced both of them to death as provided by the law. While hearing the appeal both the appellants opted to hand in written submissions. The said submissions are headed “**Amended Memorandum Ground of Appeal**”. Since the said written submissions are rather lengthy, the court will only outline briefly the highlights of the same. The 1<sup>st</sup> appellant viz, Julius Arakeu listed the following grounds:-

1. That the learned Magistrate erred in law and fact in relying on identification by recognition by persecution witnesses PW1, and PW3, which was not proved to be free from any possibility of error or mistakes.
2. That the learned Magistrate erred both in law and fact in becoming obliged to convict him on inconsistent and contradictory evidence.

3. That the learned trial Magistrate erred in law and fact in rejecting his defence without giving a proper reason why he rejected the defence thus shifted the burden of proof from the prosecution to him.

On the other hand, the 2<sup>nd</sup> appellant viz Paul Ekai listed the following grounds of appeal:-

1. That the trial Magistrate erred in law and fact in relying on identification recognition by PW1 in that, she recognised the appellant, he failed to note that the same was not proved to be free from possibility of error or mistakes.
2. That the learned Magistrate erred in law and fact in convicting the appellant when the charge against him had not been proved beyond reasonable doubt.
3. That the learned trial Magistrate erred in law and fact in passing sentence when the evidence was inconsistent and contradictory.
4. That the learned Magistrate erred both in law and fact by failing to consider and neglected to or failed to give reason why he disregarded the appellant's defence; he failed in not exercising the law of natural justice that the natural thing a person would do when he has committed a serious crime is to go underground.

On the other hand, the state through Mr. Gumo, Assistant Deputy Public Prosecutor supported the conviction and sentence. According to Mr. Gumo, PW3 had gone to refresh himself in a local bar, and as he was leaving, he was attacked by the two appellants who wrestled and knifed him on the head and shoulder before robbing him cash Kshs.1,100/-. He further added that the scene was well lit by a bright pressure lamp and that prior to the attack, the two appellants were disturbing other revellers. PW1 who was a bar-maid in that pub later asked the two appellants to leave. She later confirmed that the complainant was drinking at the bar and while leaving he was attacked by the appellants. Besides the above, Mr. Gumo also submitted that apart from witnessing the attack, PW1 also knew the 1<sup>st</sup> appellant who was a regular customer. Consequently, a report was made to the police and the appellants were arrested. Mr. Gumo was of the view that the ingredients of robbery were met since the appellants acted jointly. He concluded by submitting that the complainant sustained head injuries that were classified as harm.

This court has carefully perused the above together with the entire record of appeal. As the first appellate court, we are aware of our responsibility and obligation to examine the evidence afresh and reach our own conclusions. See ***NJOROGE VS REPUBLIC [1987] K.L.R. 19.***

In her evidence, PW1 Jane Wanjiru Mbugua stated that she works as a bar-maid in Sport Bar, Suswa. She recalled that on 26<sup>th</sup> March, 2003 at around 8.00 p.m. when she was in Mukurino Bar Turkana men who were known to her got in while looking drunk. When they started disturbing other revellers by holding and pushing them, PW1 talked to them and told them to move outside. Thereafter, an old man went outside and the two appellants held him before they floored him. She saw the appellants through an open window and that there was a kerosene lamp in the bar. Subsequently, PW1 saw the appellants grab the knife that the old man had before they stabbed him on the head and left shoulder. Consequently, the appellants robbed the old man cash Kshs.1,100/- and a pair of black shoes. When the appellants escaped, PW1 reported the incident to the police at Suswa roadblock and they accompanied her to the scene. After searching for the appellants in several bars, they found them in New Bar where they were playing music and dancing. PW1 was categorical that though she knew the appellants who were her customers, she never had any grudge against any of them.

In his evidence, PW2 A.P.C. John Ole Keiwa confirmed that PW1 had reported about the incident to them on 26<sup>th</sup> March, 2003. Thereafter, he visited the scene while accompanied by one Mr. Kambo who was his colleague. On reaching the scene, PW2 observed that the complainant was bleeding heavily. They left the man there and went to look for his relatives. On getting one relative, they left him to assist the complainant while they went to look for the assailants. PW2 conceded that it was PW1 who had pointed out the appellants whom they found dancing in a bar. After arresting the appellants, they took them to

Nairegie Enkare Police Station. When PW2 saw the complainant, he was blood soaked and was almost unconscious. In his evidence, PW3 Koikai Ole Mutet who is a farmer stated that on 26<sup>th</sup> March, 2003 at around 10,00 a.m. he sold a cow in Suswa town and later did some shopping. Thereafter, he sent somebody to take some money to his home and he remained with a balance of Kshs.1,100/-. In the evening he went into a hotel where he ate food and left. On going outside, two men pounced on him and stabbed him with a knife on the head, side of the ribs and hand. PW3 also stated that his left hand was broken when he was hit with a rungu. The assailants later robbed him of money, shoes and Maasai clothing sheet. Thereafter PW3 was taken to Kijabe Mission Hospital by his sons. On being discharged, the complainant went and reported the matter to the police station. The complainant stated that he had been attacked by the appellants whom he had seen earlier inside the hotel. Apart from the above, the complainant pointed out that there was a lamp in the hotel, which illuminated even the area outside the hotel. He conceded that he had not known the appellants prior to the incident. In his evidence, pW4, P.C. Patrick Nderitu who is the Investigating Officer in the case stated that on 3<sup>rd</sup> April, 2003 he went to Kijabe Mission Hospital to visit the complainant who had been admitted there. While there he recorded his statement and also issued him with a P3 form before going back to Nairegie Enkare Police Station.

In his medical evidence, PW5 Heliet Kaveli who is a clinical officer at Nairegie Enkare Health Centre stated that on the 17<sup>th</sup> July, 2003 he examined the complainant and noted that his clothes were intact though he had a healed wound scar on the left cheek and a healed scar on the left shoulder. He assessed the approximate age of the injury as 2½ months while the probable weapon used was blunt. PW5 assessed the degree of injury to be harm before he filled the P3 form Exh.1.

In his defence, the 1<sup>st</sup> appellant viz Julius Arakeu stated that on 26<sup>th</sup> March, 2003 he went to check the charcoal that he was burning and later went back to his house. At around 2.00 p.m. the 1<sup>st</sup> appellant went to Suswa to look for a lorry to transport the charcoal. However, he was unsuccessful in getting a lorry even after waiting up to 6.00 p.m.

According to the 1<sup>st</sup> appellant, it rained and he took cover in a nearby bar where he found patrons taking beer. Later the 1<sup>st</sup> appellant also started taking beer and at around 6.30 p.m. he was joined by the 2<sup>nd</sup> appellant. The 1<sup>st</sup> appellant reckoned that at around 9.00 p.m. police officers went there and arrested all the ten patrons who were in the bar on allegations of taking illicit beer. However, the patrons who bribed the officers with Kshs.500/- were released. Since the 1<sup>st</sup> appellant never had such money he was taken to Suswa Police Post and locked in the cells. According to the 1<sup>st</sup> appellant, on the following morning at around 8.00 a.m. a woman came there while screaming that her husband had been assaulted on the previous night by unidentified persons. Though the woman was accompanied by PW1 she was unable to identify any of the appellants. Later, the woman and the PW1 exchanged bitter words, and at around 8.30 a.m. the complainant was brought to the place by a vehicle. Thereafter, the appellants were taken to Nairegie Police Station where it was alleged that they had assaulted the complainant.

In his defence the 2<sup>nd</sup> appellant stated that he is generally a charcoal burner. The 2<sup>nd</sup> appellant recalled that on 26<sup>th</sup> March, 2003 in the morning he went to see a Maasai who owed him some money. At around 5.00 p.m. he found him at Suswa Market and he was paid Kshs.200/-. After doing some shopping he met a friend and they decided to take a bottle of herbs beer. At around 9.00 p.m., police officers confronted the two appellants and asked them why they were drinking at night. The police officer also complained that the 2<sup>nd</sup> appellant had only delivered to them one bag of charcoal. According to the 2<sup>nd</sup> appellant, about 10 suspects were arrested and taken to the cells at Suswa. While there, the police officers demanded Kshs.500/- from each suspect so that they could be released. The 2<sup>nd</sup> appellant also stated that since they had no money, the appellants were not released.

On the following morning at around 8.00 a.m. a woman came crying while accompanied by PW1. The woman alleged that her father had been assaulted. As far as the 2<sup>nd</sup> appellant was concerned, he was charged for the present offence since he had refused to sell charcoal to the police officers.

This court has carefully perused the above evidence. We have noted the fact that PW1 had previously

known the two appellants who were her regular customers in the bar. Significantly on that night, the two appellants appeared drunk and were a nuisance to other revelers. Due to their conduct PW1 had to ask them to vacate the bar. In addition to the above, the PW1 also testified in details as how the appellants attacked and robbed the complainant. Though PW1 knew both appellants very well, there is no evidence that the parties had any grudge against each other. Besides the above, the evidence of the PW1 was confirmed and corroborated by the evidence of the complainant. It is also crystal clear that PW1 pointed out the appellants – only a few hours after the incident took place. Given the above analysis, we are satisfied that the learned magistrate had analysed the evidence correctly and reached a proper decision. Since the conviction is safe and well-merited, we, hereby dismiss the appeal. In addition to the above, we hereby confirm the sentence since the same is in accordance to the law.

Right of appeal explained.

**MUGA APONDI**

JUDGE

**6/2/2006**

**DANIEL MUSINGA**

JUDGE

**6/2/2006**

Judgment read, signed and delivered in open court in the presence of the appellant and Mr. Gumo, Assistant Deputy Public Prosecutor.

**MUGA APONDI**

JUDGE

**6/2/2006**

**DANIEL MUSINGA**

JUDGE

**6/2/2006**