



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

Criminal Appeal 468 of 2004

(From Original Conviction and Sentence in Criminal Case No.6767 of 2003 of the Chief Magistrate's Court at Kibera - Ms Mwangi, SPM).

ROBERT MUNGAI NYAMBURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant herein, Robert Mungai Nyambura, was arraigned before the Chief Magistrate's Court Kibera on a charge of robbery with violence contrary to Section 296 (2) of the Penal Code, the particulars of the offence being that:-

“.....On the 6th day of September, 2003 along Limuru Road in Parklands within Nairobi Area, jointly with another not before Court robbed Millicent Kwamboka Nyamancha, cash Kshs3000/-, mobile phone Nokia 3310, one bible, National identity Card and Barclays ATM Card all valued at Kshs.18,040 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Millicent Kwamboka Nyamancha.....”

The Appellant's trial commenced on 17th October, 2003 before the Learned Senior Principal Magistrate (Ms. Mwangi) when the Complainant (PW1) testified how she was robbed by the Appellant in the company of another person as she waited to board a Matatu a High ridge Bus Stage. It was her evidence that as she waited for the Matatu, 2 people approached her and immediately grabbed her bag. As she resisted, she was wrestled to the ground and her bag was forcefully taken from her leaving her with the strap. Inside the bag were the items particularized in the charge sheet. As the two people were still struggling with the Complainant a Kenya Power and Lightning vehicle belonging to a Police reservist (PW2) and was injured. However he managed to escape into city park forest. PW2 rushed the injured person to no avail after learning that the two people had just robbed the Complainant. PW2 suspected that the two would come out of the forest in Pangani area. He proceeded there and laid an ambush. After 10 minutes, he saw the two men walking from the City Park side – one was limping. He confronted them and managed to arrest one, the Appellant herein. The Complainant was then, called and was able to identify the Appellant as having been among those who robbed her. Following further investigations the Appellant was charged with the instant offence.

The Prosecution called 4 witnesses in support of their case. At the end of it all the Court was persuaded that the Appellant had committed the offence of theft from the person and not robbery with violence. In reaching that decision the Learned trial Magistrate delivered herself thus:-

“.....I am however not told the accused was ever armed not told the Complainant was injured I

thus find the accused guilty of theft from the person contrary to Section 279 (a) P. C. and not robbery with violence contrary to Section 296 (2) P. C. I convict him accordingly.....”

In my view this was a gross-mis-direction in law. I think it is appropriate to say something about the charge of robbery with violence contrary to Section 296 (2) of the Penal Code what are the essential ingredients of the offence under Section 296 (2) of the Penal Code? I can do no better than cite what the Courts of Appeal said in its decision in **JOHANA NDUNGU VS REPUBLIC CRIMINAL APPEAL NUMBER 116 OF 1995** (unreported):-

“.....The essential ingredients of robbery under Section violence against any person or property at or immediately before or immediately after to further in many the act of stealing. Therefore, the existence of the aforesaid described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in Section 296(2) which we give below and any one of which if proved will constitute the offence under the sub-section:-

- (i). If the offender is armed with any dangerous or offensive weapons or instrument or
- (ii). If he is in company with one or more other person or persons, or
- (iii). If, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person.

Analyzing the first set of circumstances the essential ingredient apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offence that the time of robbery being armed with a dangerous or offensive weapon. No other fact needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in Section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under subsection (2) and it is mandatory for the Court to so convict him.

In the same manner the second set of circumstances if it is shown and accepted by Court that at the time of the robbery the offender is in company with one or more person or person then the offence under subsection (2) is proved and a conviction thereunder must follow. The Court is not required to look for the presence of either of the other 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 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.....”

In summary therefore an offence of robbery with violence is disclosed if the offender is armed with any dangerous or offensive weapon or instrument, if one is in company with one or more other person or persons and lastly 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. All that the prosecution needs to do is prove any of the above set of circumstances and it will constitute the offence.

In the present Appeal evidence was adduced and accepted by the trial Court below that the Appellant was in the company of another person when they committed the offence. That falls in the second category stated above. Clearly, the offence of robbery with violence was committed. The trial Magistrate was therefore wrong in reducing the charge on the basis that the Appellant was not armed and or that the Appellant was not armed and or that the Complainant was not injured in the process.

The state did not seek to vary and or enhance the conviction and sentence in the light of what I have stated above. Had the state done so and issued appropriate notice to the Appellant, I would have had no difficulties in acceding the request. Perhaps the Appellant sensing such possibility elected not to pursue the Appeal on conviction. Instead he opted to pursue the Appeal on sentence alone.

Upon conviction the Appellant was sentenced to serve four years imprisonment. He now wishes that the said sentence be interfered with and reduced. He claims that the jail term was harsh and excessive.

The Appeal on sentence was opposed by Mr. Makura, the Learned State Counsel. Counsel submitted that the Appellant was merely sentenced to 4 years imprisonment for an offence which calls for a maximum jail terms of 14 days. That in sentencing the Appeal, the trial Magistrate exercised her discretion properly. That the 4 years imprisonment was neither harsh not excessive.

The Appellate Court can only interfere with a sentence imposed by the Lower Court if it is satisfied that the sentence imposed was illegal, or if the Magistrate in metering out the sentence considered extraneous matters or failed to take into account relevant matters. Rather this Court will interfere with the trial Magistrate's exercise of discretion in matters of sentencing if it is satisfied that he said Magistrate applied wrong principles of sentencing and as a result arrived at a harsh and excessive sentence. I do not discern any such misgivings in the instant case. Taking into account all the facts and circumstances of the case, I am of the view that the sentence imposed by the trial Court was neither harsh nor manifestly excessive. Considering that the Appellant has easily have been convicted for the serious offence of robbery with violence, the sentence of 4 years imprisonment if anything was lenient. There are therefore no grounds for interfering with it. It will stand. This Appeal is ordered dismissed.

Dated at Nairobi this 24th day of May, 2006.

.....

MAKHANDIA

JUDGE