

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 67 of 2003

SOLOMON MUSYOKA NGULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original Judgment and Conviction in the Chief Magistrate's Court at Nyeri in Criminal Case Number 2308 of 2002 by Mr. C. D. Nyamweya – S.R.M.)

J U D G M E N T

Solomon Musyoka Ngula hereinafter referred to as the Appellant is aggrieved by the judgment of the Senior Resident Magistrate Nyeri in which the Appellant was convicted of the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code. The Appellant maintains that the evidence tendered against him was fabricated, inconsistent totally uncorroborated and insufficient to prove any case against him. Learned Principal State Counsel Mr. Orinda does not support the Appellant's conviction.

We have reconsidered and evaluated the evidence which was adduced against the Appellant. The Complainant Ali Osman was the only eye-witness. From his evidence it appears the Complainant was accosted suddenly by two people who held him, took his mobile phone, removed Kshs.400/- from his pocket and also removed his open shoes and then threw him onto the road. The Complainant's efforts to pursue his assailants were frustrated when He was hit with a piece of wood and thrown into a ditch and the two men escaped.

The Complainant maintains that He saw the Appellant clearly during the attack and identified him in the dock as the one who robbed him. There was however no evidence that the Complainant knew the Appellant before and if so for how long. The Appellant's evidence was not tested by any identification at an identification parade.

The evidence of Hassan Ali (P.W.2) and the arresting officer P.C. Fredrick Kimathi (P.W.4), could have provided some support to the Complainant's case. However the two witnesses contradicted each other in material particulars. While P.W.2 testified that the Appellant and another person ran away and left P.W.2 with the Complainant's cell phone which He (i.e. P.W.2) took to the police station, P.W.4 testified that He went to Chania River where they chased and apprehended the Appellant and that they managed to recover the mobile phone and a knife, thereby implying that He i.e. P.W.4 recovered the phone at Chania River. This was a serious contradiction which completely shattered the prosecution's case.

We concur with the learned Principal State Counsel that the Appellant's conviction was not safe as it cannot be supported by the evidence on record. We accordingly allow this appeal, quash the Appellant's conviction and set aside the sentence imposed upon him. The Appellant shall be set free unless otherwise lawfully held.

Dated, signed and delivered this 5th day of May 2006.

J. M. KHAMONI

JUDGE

H. M. OKWENGU

JUDGE