

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

Criminal Appeal 123 of 2003

PETER NJIRU NJAGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged tried and convicted of an offence of Robbery contrary to section 296 (1) of the Penal Code. The particulars were that on 25th day of February 2003 at Blue valley area in Embu Municipality in Embu District jointly with others not before the court robbed Mwaniki Daniel cash. Sh.2000/= and at or immediately after the time of such robbery threatened to use actual violence on him. He has filed grounds of appeal thus:-

1. The Trial Magistrate erred in relying on the evidence of prosecution.
2. Evidence was short of standard as no independent evidence was called.
3. No description was given to the police and no identification parade was arranged.
4. Trial Magistrate relied on previous convictions to sentence notwithstanding mitigation.
5. Case not proved beyond reasonable doubt.

The prosecution evidence was given by two witnesses. The complainant PW1 testified that on 25.2.2003 he was walking in Blue valley taking a short cut. He met appellant. There was another person following Appellant at a distance. The appellant greeted him and offered his hand in greeting. Then the appellant held on to the hand of complainant until two other persons came to the scene. They said “**Toa pesa**”. The money was in the pocket. Another man held the hand of complainant and the appellant opened the shirt pocket and took the money. Then he states “**Accused person was coming and so I feared to scream otherwise they would kill me as no help was near**”. It was during day light at 9.00 a.m.

He went to police and reported. “**We went to look for the man**” he said. Using the description given by the complainant the police got the appellant in Dallas Estate. The complainants description included the appellant’s clothing. The appellant was found with a 100 shilling note and a 5/- coin. He was not drunk. It was said no violence was involved. The short cut he mentioned was by hospital mortuary and no one was there. The appellant was arrested at about 3 P.m. same day. The complainant was not present when the appellant was arrested.

PW2 was a police constable was at the station at 1.00 p.m. when PW1 went to make a report of how he met three people one of whom greeted him and the other said he dealt with herbal medicine and that they took his 2000/- and left. The officer accompanied the PW1 went to look for these people the descriptions of whom were given. At Dallas the officer with another, Kimanzi arrested one of them and searched him and found shs.100/- and 5/= coin mentioned above. It is to be noted that the complainant said his two thousand shillings were stolen in (2) 1000/= noteS. The complainant was not present he was left in a police vehicle. He saw appellant and said. “**that is the one**” . Then PW2 said “**you had been accused severally of picking pockets and stealing. I got your description he said further PW2 said one time**

I saw you at the court, I chased you away as I know you pick pockets and one do not get you at it". The officer also said **"we found you in an illicit liquor drinking place and we arrested you"** PW2 further said I do not know how many times I have booked you for various offences. PW2 said on re-examination that there was no need for identification parade for appellant as he was already known to the accused. This was not true the complainant said he did not know the complainant before this incident. The appellant gave his defence of alibi saying he was at his child's school from 8.30 a.m. to 12.30.p.m. According to complainant PW1 the appellant was arrested at about 3 p.m. same day. After the complaint was made at about 1 p.m. and the incident occurred at 9.00 a.m. The alibi was not considered by the Trial Magistrate. He mentioned the visit to school but did not analyse it. An alibi is a known acceptable defence in a Criminal Case and all the accused is required to do is to raise the same and for the court to consider whether what the accused said could be true or not. There are errors in this trial. The basic principle of criminal law is that an accused is presumed innocent until proved guilty. In this case the Trial Magistrate allowed the prosecution to lead PW2 in giving evidence of previous history of criminal life of the appellant in the cause of trial. All previous convictions of an accused person are disclosed after conviction not before in this case the evidence of PW2 was highly prejudicial to the accused and it cannot be said he received fair trial. The complainant said clearly he did not know the accused before. An identification parade ought to have been held for him to identify the appellant. PW2 erroneously says that the complainant knew the accused but then his evidence shows that it is PW2 who knew the appellant very well. And indeed PW2 arrested the appellant not because of the identification of complainant but because he knew him as a criminal. It was only afterwards that the complainant said **"it is this one"**. The complainant was not able to identify the other persons who he says robbed him. I have considered the whole record and I find that there was not sufficient evidence to prove the case beyond reasonable doubt. The trial was tainted with fundamental error and the outcome was prejudicial to the appellant. The Trial Magistrate ought to have considered the mitigation by the appellant that he had **"changed his heart"** and had started doing his business.

In view of what I have stated above, I allow this appeal, quash conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered in open court this 18th July, 2006.

J. N. KHAMINWA

JUDGE