



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Criminal Appeal 73 & 75 of 2004

**BENARD OTIENO DOK MBUZI.....1ST APPELLANT
MARGARET NYAMBURA MACHARIA.....2ND APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in Criminal Case No. 1525 of 2003 of Chief Magistrate's Court, at Nakuru – H. Wasilwa - SRM, Esq.]

JUDGEMENT OF THE COURT

The 1st and 2nd appellants were charged with the offence of robbery with violence contrary to section 296(2) of the penal code. The particulars of the offence are that on the 12th July, 2003 at Flamingo Estate within Nakuru District of the Rift Valley Province, jointly with others not before court while armed with swords robbed **JOHN NGIGI** of 1 T-shirt, 1 packet of biscuits, 1 kg of meat, 1 wrist watch make Prof. Quarts and cash Kshs.2,500/= all valued at kshs.6,700/= and at or immediately before or immediately after the time of such robbery used personal violence against the said **JOHN NGIGI**.

The appellants pleaded not guilty to the charge and after a full trial, each of the appellants were convicted of the offence of robbery with violence and they were each sentenced to ten (10) years imprisonment. Being aggrieved by the conviction and sentence, the appellants appealed to this court. During the hearing of the appeal, both appeal Nos. 73 of 2004 and 75 of 2004 were consolidated for purposes of hearing and determination.

The appellants have raised several grounds of appeal, whereby they have challenged the quality and quantity of the evidence that was considered by the trial court which led to the conviction.

The appellants challenged the credibility of the evidence by the arresting officer who was not present at the alleged scene of crime and for failing to call the Investigating Officer.

The appellants also took issue with the sentence imposed upon them which they submitted was excessive. **Mr. Koech, the learned Senior State counsel** did not oppose the appeal and perhaps rightfully so.

The evidence that was presented and considered by the learned Senior Resident Magistrate may be stated briefly. It was the complainant's [**PW1**] **John Ngigi's** case that on 12th July 2003, at about 8.30 p.m. he was attacked by a group of about 10 people. They ransacked him and snatched from him Kshs.2,500/=, a T-shirt, a Cap, Tomatoes and a Newspaper. The complainant ran home and called his neighbours who

came and arrested the 1st and 2nd appellants. According to the complainant, the 1st appellant was arrested with money Kshs.490/=, a purse, a T-shirt and a Cap. They arrested also the 2nd appellant who was a few metres from the scene of attack and took them to the police station. PW 1 thereafter went to the Provincial General Hospital where he was treated. PW1 told the court that it took him about 10 minutes from the scene of robbery to his home, from where he raised an alarm. He could not scream during the attack because he was strangled. On cross-examination PW1 said the robbery took place in darkness and the reason why the second appellant was arrested was because she was found sitting on PW1's property which had been stolen a short while ago. **Kungu Stephen Ndungu [PW2]** was one of the neighbours who responded to the shouts of "**thief, thief**"! When he came out he was told that some thieves had passed by and were seen talking to a girl, (2nd appellant). [PW2] said he threatened the girl and from where she was sitting they recovered a paper bag containing the complainants T-shirt, cap and tomatoes. He told the court how they arrested both the 1st and 2nd appellant.

Abdul Rashid Ali [PW3] was the police officer at the crime office, when the 1st and 2nd appellants were escorted to the police station. All he did was to book the suspects and preserve the items that were produced as exhibits. The other evidence was by **Dr. Kogutu Vitalis [PW4]** who examined the injuries sustained by PW1 who had a swollen cheek and bruises on the cheek and neck and the laceration on the left knee. The doctor classified the injury as harm.

This is the summary of the evidence against the appellants. They were found to have a case to answer and put on their defence, they gave unsworn statement and denied having been involved with the robbery but they said they were beaten for nothing and taken to the police station.

This being the first appeal, this court is mandated to reconsider and re-evaluate the evidence and arrive at its own determination of whether to uphold the conviction and in doing so to bear in mind that this court never saw or heard the witnesses as they testified and give due allowances for that. (See the case of **Njoroge Vs Republic [1987] KLR 19.**)

The evidence adduced before the trial court, raises two issues for consideration:

Ø *Firstly the issue of identification of the appellants.*

Ø *Secondly, whether there was sufficient evidence to sustain the conviction.*

The robbery against the complainant took place on 12th July 2003 at 8.30 p.m. The complainant said he was attacked by a gang of about ten (10) and there was darkness. What linked the appellants with the offence of robbery with violence was the fact that the 1st appellant was found in possession of the complainant's purse containing Kshs.490/=. We have a problem with this evidence, as the charge sheet does not indicate that a purse or Kshs.490/= was part of the items that were stolen from the complainant. Moreover, the complainant's evidence did not at all indicate that the purse which was recovered from the complainant had his identity. This evidence was given by PW 2. The only reason why the 2nd appellant was arrested is because where she was sitting a paper bag containing the complainant's items was recovered. Both the appellants were arrested by members of public and as the record of proceedings will show, no investigation was carried out.

The other curious matters is that the time the complainant took to get to his house to summon help was about 10 minutes as he could not scream because he said he was struggled. None of the prosecution witnesses identified the appellants and the circumstances under which the appellants were arrested by members of public leave a lot of doubt as to the credibility of the items allegedly found with the appellants. There are gaps in the prosecution's case which should have been filled by investigation and which the police never carried out.

It is most possible that the appellants were at the scene of robbery and the members of public merely assumed that they were among the gang of robbers who attacked the complainant.

These gaps can only be filled by allowing the appeal in favour of the appellants. We hereby allow the appeal quash the conviction, set aside

the sentence of ten (10) years imprisonment, and order the appellants to be released from prison forthwith unless otherwise lawfully held.

Dated and delivered this 24th day of November 2006.

MARTHA KOOME

JUDGE

D. MUSINGA

JUDGE