

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 2 OF 2002
**(From original conviction and sentence of the Senior Principal
Magistrate's Court at Naivasha in Criminal Case No. 406 of
2001)**

WILLYS ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Willis Odhiambo, was charged with several offences under the Penal Code but was convicted of two counts of robbery with violence contrary to **Section 296(2)**. The particulars of the said offences were that on the 16th of February 2001 at Nyondia village, Naivasha the appellant, jointly with others not before the court robbed Lucy Wangui and Jane Waithera Karanja of various household items and clothing; one pair of sofa set, 12 plates, 2 padlocks, 2 skirts, 3 blouses, 12 cups, one radio make Phillips, 2 hen, one record player, one bar soap, 2kg of beans, 5kgs of flour and Kshs.170/- and in the course of the said robbery either used actual violence or threatened to use actual violence on the said complainants. The appellant pleaded not guilty to the charges. After a trial conducted under Section 167 of the Criminal Procedure Code, the appellant was found guilty as charged, and sentenced to be detained at the President's pleasure in accordance with **Section 167(1)(a)** of the **Criminal Procedure Code**. The appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court against the said conviction and sentence.

In his petition of appeal, the appellant raised several grounds of appeal mainly touching on the fact that he was unable to understand the proceedings due to his mental illness. The appellant stated that he had been tried yet he was not at the time mentally fit to stand trial. He was aggrieved that the trial Magistrate had ordered that he be detained at the pleasure of the President yet he had not participated in the trial. He urged the court to order that he be retried by another court of competent jurisdiction. At the hearing of the appeal, the appellant, with the leave of the court, presented to the court written submission in support of his appeal. The appellant also made oral submission in further support of his appeal. Mr Koech, learned State Counsel opposed the appeal. He made submissions supporting the conviction and the sentence imposed by the trial Magistrate. He urged the court to disallow the appeal. Before considering the said submissions made, it is imperative that the facts of this case are set out, albeit briefly.

The appellant was first arraigned before the trial Magistrate's court on the 23rd of February 2001. The plea could not be taken because the trial Magistrate observed that the appellant appeared mentally disturbed. He ordered the appellant to be taken to hospital for his mental status to be ascertained to establish whether the appellant was fit to stand trial. On the 28th of March 2001, the court ordered the appellant to be referred to Mathare Mental Hospital for further mental examination and treatment. A medical report prepared by Dr E.G. Wazome addressed to the OCS Naivasha police station and copied to the Law Courts, Naivasha dated the 28th of June 2001 indicates that the appellant was admitted for two months where he was treated. At the time the appellant was stated to be mentally fit to stand trial. On 4th of December 2001, the appellant was arraigned before the trial Magistrate's court when his case had been fixed for hearing. The prosecutor told the court that the appellant was pretending to be insane. The trial Magistrate made an order for the appellant to be removed from the court. He further ordered the case against the appellant to proceed in the absence of the appellant. PW1 Lucy Wangui testified that on the 11th of February 2001 at about 8.30 p.m while she was at her house at Nyondia village, she heard dogs barking. She went outside and met with some people. They ordered her to return to the house. The robbers, who were seven in number, ransacked the house and stole therefrom a sofa set,

a radio and clothes. They also stole several cups and glass plates. The five of glass plates and three sofa set cushions were later recovered in the house of the appellant.

PW1 testified that she was raped by the robbers. It was her further testimony that she was able to positively identify the appellant as being among the persons who robbed and raped her. She pointed out the appellant at the police station where the appellant had been arrested for a different offence. PW2 Jane Waithera Karanja testified that on the 16th of February 2001 at 8.00 p.m while she was at her house, robbers entered her house and ordered her to lie down. They demanded that she gives them money. They then took her radio, cassettes and children's clothing. After they had robbed her, they ordered her to escort them to the house of PW1. PW2 testified that she was locked in the children's room whilst the robbers were raping PW1. After the robbers had left the homestead, PW2 made a report to the police. Later the police recovered a basket which was stolen from her house at the house of the appellant.

PW3 Beth Nyambura testified that on the 16th of February 2001 at 8.30 p.m while she was with PW 1 at their home at Nyondia village, robbers entered their house and demanded money. They beat up PW 1. PW 3 testified that the man who beat up PW 1 was a Luo (whom she identified as the appellant). She narrated how the robbers stole several items from her homestead including a sofa set, cushions, basket, glass plates and items of clothing. She testified that some of the stolen items were recovered from the house of the appellant. PW4 Corporal John Ikutho testified that on the 19th February 2001, a complaint was made concerning an assault. The appellant was the suspect. PW 4 went to Kabati area in Naivasha and managed to arrest the appellant. When he searched the appellant he found that the appellant had in his possession ten rolls of bhang (Cannabis Sativa). When the appellant was taken to the police station, PW1 identified him as being among the robbers who had robbed and raped her three days prior thereto. PW4 escorted the complainant to his house where he was able to recover a sofa set with its cushions, plates, cups and basket. The complainants identified the properties as theirs. The said items were produced in court as plaintiffs exhibit No. 1 to 7. The prosecution then closed its case. The appellant was then brought back to court and told that he had a case to answer. According to the record of the court, the appellant opted to say nothing.

This is a first appeal. As the first appellate court in criminal cases, this court is mandated to reconsider and re-evaluate the evidence adduced before the trial magistrate afresh and reach its own determination whether or not to uphold the conviction of the appellant. In so doing, this court has to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any finding as to the demeanour of the witnesses. **(See Njoroge -Vs- Republic [1987] KLR 19)**. In the instant appeal, the appellant aggrieved that he was convicted in a trial conducted by the trial Magistrate before he had established that the appellant understood the proceedings. According to the appellant he was suffering from mental illness at the time.

The issue for determination by this court is whether the appellant has established that indeed he was unable to follow the proceeding due to his lack of mental capacity. If it is found that the appellant had the requisite mental capacity to follow the proceedings, the other issue for determination is whether the prosecution proved its case against the appellant to the required standard of proof beyond any reasonable doubt. The proceedings of the trial Magistrate reveal that the court was convinced when the plea was taken that the appellant was not mentally fit to stand trial. The said court ordered the appellant to be escorted to Mathare Mental Hospital where he was admitted for a period of two months. Thereafter the doctor certified that the appellant was mentally fit to stand trial. The appellant was not tried immediately thereafter. Six months later he was arraigned before the same trial Magistrate for the hearing of the case facing him. It appears that the appellant exhibited symptoms of the behaviour of a person who was not mentally stable. However this time, instead of the trial court making an order that the appellant be referred to hospital for psychiatric treatment, it ordered the appellant to be excluded from the trial. The trial court had formed an opinion that the appellant was pretending to be mentally unstable. After carefully re-evaluation the evidence on record, I do find that the trial Magistrate fell into error in excluding the appellant from the trial. The history of the appellant's mental status was before the court. The possibility that the mental illness had recurred was not discounted by the trial Magistrate before he made the fateful order excluding the appellant from the proceedings. The trial Magistrate did not put into consideration that the appellant could have been mentally unfit to stand trial. The trial Magistrate was

required to send the appellant to a doctor to certify if he was mentally fit to stand trial before making the exclusion order. On this ground alone, I would allow the appeal. The appellant was clearly not mentally fit to stand trial. Even if he was fit to stand trial, there is no evidence on record to establish beyond reasonable doubt that the appellant was feigning mental illness so as to enable the trial Magistrate to invoke the provisions of Section 167 of the Criminal Procedure Code. The section is only applicable to accused persons who cannot be made to understand the proceedings. It does not apply to inalcitrant accused persons.

Because of the said decision made by the trial Magistrate to exclude the appellant from the proceedings, the appellant was denied the opportunity to cross-examine the prosecution witnesses who gave contradictory evidence against the appellant. The evidence adduced by the complainants did not disclose how they were able to positively identify the appellant from the gang of robbers who robbed them. The robbery incident took place at night. The source of light was not disclosed. The complainants did not state that the appellant possessed unique features that would have enabled them to identify him when he was arrested at the police station. The evidence of identification does not disclose if the appellant was known to the complainants prior to the robbery incident. The evidence of identification, especially the identification of the appellant by PW1 at the police station when he (the appellant) had been arrested for another offence is unsatisfactory.

Although it is alleged that the goods which were stolen from the premises of the complainant were recovered from the house of the appellant, the complainants did not establish positively that they owned the said properties. Further the appellant was denied an opportunity to give an explanation of how (if ever) he was found in possession of the said stolen items. For the doctrine of recent possession to be applied an essential ingredient is that the property has to be positively identified. Another essential ingredient is that an accused person fails to give a satisfactory explanation of how he came into possession of the said stolen items (**See Malingi –versus- Republic [1989]KLR 225**). In my considered view, it was fortuitous that the appellant was arrested and taken to the police station where the complainants (especially PW 1) was present to be able to identify him. Such coincidences fit too neatly and raises suspicion. It should be considered with caution.

Having considered the evidence adduced, the submissions of the appellant and the State, and having re-evaluated the evidence adduced before the trial Magistrate, I do hold that the prosecution failed to establish a case against the appellant for the offence of robbery with violence. The appellant appears to have been a victim of circumstances due to his mental illness. His appeal has merit I will allow it, and quash his conviction and set aside the sentence imposed. The appellant is ordered set at liberty and released from Prison unless otherwise lawfully held.

DATED at NAKURU this 26th day of October 2005.

L. KIMARU

JUDGE