



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**

**Criminal Appeal 110 of 2004**

**(From original conviction and sentence Kilifi Cr.Case 578 of 2004 before Mr.C.O.Obulutsa)**

**CARLOS DZOMBO MWATELA**

**MARGASTONE JAMBIRI LEWA**

**JOSEPH CHOME MUNGA.....APPELLANTS**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellants were tried in the lower Court with two counts of robbery contrary to Section 296 (1) of the Penal Code.

After a full trial they were each sentenced to seven years imprisonment. The trial court, however failed to make a finding on conviction on the two counts. The sentence of seven years was similarly not shown to relate to which count. This omission in my view has not occasioned injustice to the accused persons. It is against the conviction that the appellants have preferred this appeal. They have filed separate grounds. Their three files were subsequently consolidated.

Carlos Dzombo Mwatela, 1<sup>st</sup> appellant filed 8 grounds, Margastone Jambiri Lewa, 2<sup>nd</sup> appellant had 9 grounds and Joseph Chome Munga had also 9 counts. Looking closely at the grounds, they can be summarized as follows;

- (i) that there was no or no sufficient evidence
- (ii) that no identification parade was conducted
- (iii) the prosecution failed to call key witnesses, and
- (iv) the evidence was not corroborated.

Before considering these grounds I am bound as first appellate Court to evaluate the evidence adduced before the trial Court to reach an independent conclusion, always bearing in mind the fact that the trial Court had the opportunity which this Court does not have –ie to see and hear, first hand, witnesses. See

**Kipngetich V Republic** (1985) KLR 392.

The evidence by the prosecution witnesses was that while Sharon Njoki (PW1) and Evarest Charo (PW2) were on their way home at 9 pm on 25<sup>th</sup> July, 2004, they were confronted by a group of people who assaulted Njoki by touching her breasts and threatened both of them with a knife. The couple handed over to their assailants chains, handbag with money and bracelet. An alarm was raised on a securicor security personnel came to their aid. The gang ran in different directions. Three ran towards Club Garden. One of the gang members was arrested outside the club while two were found hiding in the toilet at the club. The three were taken to the police station and charged with the two Courts of robbery. In their defence the confirmed that on the evening in question they were at they Club Garden when trouble started between some of the customers. The three were arrested allegedly for the offence of creating disturbance. They were surprised when they were later charged with robbery.

I have considered the evidence by both the prosecution and the defence. I have also considered the arguments advanced in the appeal. The trial magistrate's decision has been challenged for convicting the appellants against the weight of the evidence adduced. The incident took place at night. The two complainants came face to face with their assailants, some of whom covered their faces to avoid recognition. Yet some, like the 3 appellants interacted with their victims without covering up their identities. The trial Court correctly found that there was enough light which enabled the complainants to clearly see the three appellants. The first accused at the trial was identified as the one who had a knife, and a rasta hair style, the 2<sup>nd</sup> accused at the trial is said to have been the first to arrive. He is said to have touched the breast of the first complainant. The Court also correctly observed that the three were arrested moments after the attack in a nearby pub where they had ran to. I am also satisfied that although the attack took place at night, using a security light the complainants were able to clearly identify the three appellants. The appellants spent some time with the complainants as the latter were handing to them chains, bags and bracelets. The three were arrested shortly after the incident.

Having found that the three appellants were properly identified the next matter for my consideration is whether their conduct amounted to robbery.

The ingredients of the offence of robbery under Section 296(1) of the Penal Code are:

- a) stealing anything and
- b) at or immediately before or immediately after the time of stealing
- c) using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained

See **Oluoch V R** (1985) KLR. 549. With respect, I share with

the learned Principal State Counsel, his thoughts that the three appellants were lucky to have escaped a charge of robbery with violence contrary to Section 269 (2) of the Penal Code.

But for the offence they were charged with there was evidence of stealing. The complainants lost personal valuables including money. At the time of stealing one of the appellants had a knife with which he cut the second complainant's wrist before grabbing his bracelet.

Given that the appellants were arrested shortly after the attack and the complainants had no difficulties identifying them, there was no need for an identification parade.

The other ground raised was that no medical evidence was adduced. I presume that what they meant is that if the second complainant was injured there should have been evidence that he was attended in a medical centre. There is no evidence of the extent of injury – whether it was serious enough to call for medical attention. The second complainant did not testify that he sought treatment for his injuries.

The last ground is that there was no corroboration of the evidence.

This was not a case which under the law would require corroboration. I find nothing compelling in this appeal to warrant me to interfere with the findings of the trial Court.

The appeal is dismissed.

Dated and delivered at Melinda this 29<sup>th</sup> day of November, 2005.

**W.OUKO**

**JUDGE**

29.11.2005

Judgment delivered.

All appellants present.

Mr.Ogoti for the state.

CC: Gladys.

W.OUKO

JUDGE