



**REPUBLIC OF KENYA**

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

**Criminal Appeal 203 of 2002**

**(From original conviction and sentence of the Chief Magistrate's  
Court at Nakuru in Criminal Case No. 184 of 2002 - N.O. ATEYA  
-S.P.M)**

**PETER MAINA MUIRURI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT OF THE COURT**

The appellant, Peter Maina Muiruri was charged with others who were however acquitted, with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the offence were that on the night of the 22nd and the 23rd of January 2002 at Jawatho Estate, Njoro, Nakuru District, the appellant, jointly with others not before court, while being armed with dangerous weapons namely simis and knives robbed Jimmy Nonyaki of cash Kshs.3700/- and at or immediately before or immediately after the time of such robbery wounded the said Jimmy Manyara. The appellant pleaded not guilty to the charge. After a full trial, the appellant was found guilty as charged and was duly convicted. He was sentenced to death as is mandatorily provided by the law. Being aggrieved by his conviction and sentence, the appellant has appealed to this court.

In his Petition of appeal, the appellant raised several grounds faulting the decision of the trial magistrate in convicting him. He was aggrieved that the trial magistrate had relied on the evidence of the possession of the golf stick to convict him whereas the prosecution had not established that the appellant was found in possession of the said golf stick. The appellant was aggrieved that he had been convicted whereas no eye witness account had been adduced to connect him with the robbery. He faulted the trial magistrate for convicting him based on contradictory and uncorroborated evidence of the prosecution witnesses. He further faulted the trial magistrate for failing to consider his defence before arriving at the said decision convicting him.

At the hearing of the appeal, the appellant with the leave of the court, presented to the court written submissions in support of his appeal. He urged the court to allow his appeal and quash his conviction. On the other hand, Mr Koech, learned State Counsel opposed the appeal. He submitted that the prosecution had proved its case against the appellant to the required standard. He submitted that the appeal filed herein ought to be dismissed and the conviction and the sentence imposed by the trial magistrate be upheld. We shall consider the said arguments made in the said submissions after briefly setting out the facts of this case.

The complainant (*PW 1*) in this case Jimmy Manyara is a professional golfer. On the 22nd of January 2002 he left Njoro Golf club at about 10.30 p.m. for his home situated at Jawatha Estate. He was

given a lift to a place near his residence. He was dropped outside Njoro Highway wines and spirits. The complainant was carrying a golf stick. PW 1 decided to have a drink at a nearby bar after which he requested a watchman, PW 3 Mark Ekapel Ono to escort him to his house. The appellant however intervened and took the golf club from the possession of the complainant. The appellant was known to the complainant prior to the robbery incident. The complainant did not mind the appellant taking possession of the golf stick as he was certain that the said gold stick would be returned to him. The complainant testified that the appellant told PW 3 to return back to the bar and not to worry as he would escort the complainant home.

PW 3 remained at the bar. On the way, the complainant testified that he was attacked by three people. He recalls that the appellant hit him on his legs with the gold stick and soon thereafter other robbers descended on him and beat him up until he lost consciousness. He regained consciousness after two days when he was already admitted at the Nakuru Nursing Home. He testified that when he was attacked, he was robbed of Kshs.3700/-, his golf stick and one golf ball. The golf stick was later recovered and was produced as an exhibit by the prosecution. The complainant testified that he had no grudge against the appellant but was certain that it was the appellant and his accomplices who robbed and assaulted him.

The complainant's evidence was supported by the evidence of PW 3 who recalled that the appellant offered to escort the complainant to his home after the complainant had finished his drink at the bar. He further recalled that the appellant seeing the appellant take away the golf club from the complainant. He saw the appellant and the complainant walk towards the direction of the house of the complainant. On the following morning at 6.00 a.m. after his night duty, he saw the complainant lying on the ground unconscious. PW 3 saw that the complainant had been injured on his head, and mouth. The complainant was still bleeding from the nose. PW 3 sought help to have the complainant taken to hospital. He also made a report to the police and informed them that he had last seen the appellant with the complainant.

PW 2 Anne Mukami Chege, a sister-in-law of the appellant testified that on the material she was woken up by the appellant. It was about 1.00 a.m. PW 2 saw the appellant with a golf stick. The appellant requested to be given food. He further indicated his wish to sleep at his brother's house. PW 2 was surprised by the appellant's behaviour. She did not understand why the appellant wanted to sleep at her house yet his house was just a few metres away. PW 2 refused to grant the appellant's request. She then saw the appellant walk away from her home. She testified that as there was moonlight, she saw the appellant throw a golf stick behind his house. The following morning, the police arrived and arrested the appellant. They also asked PW 2 if she had seen the golf stick. PW 2 pointed to the direction where the appellant had thrown the golf stick. The police searched the area and managed to recover the golf stick. PW 5 Police Constable Joseph Ndwiga, then based at Njoro police station recalled that on the 23rd of January 2002 at about 7.00 a.m. a report was made that a person had been found lying on a foot path unconscious with multiple facial and head injuries. The person was identified as the complainant. PW 5 arranged for the complainant to be taken to hospital after which, acting on information received, he arrested the appellant. After investigating the case, including interviewing the complainant, who had regained consciousness he made the decision to have the appellant charged with the offence for which he was convicted. PW 5 investigated the case with Corporal John Ihugo. PW 4 Dr Noah Masira Mukasa, a consultant surgeon testified that on the 23rd of January 2002 he performed an operation on the head of the complainant.

He later wrote a P3 form on the injuries sustained by the complainant. In his opinion, the complainant sustained multiple cut wounds on his head and face. The injuries were caused by both sharp and blunt objects. He assessed the degree of injury sustained by the complainant to be maim. The P3 form duly filled by PW 4 was produced in evidence as an exhibit. When the appellant was put on his defence he denied that he was involved in the robbery. He further denied that the golf stick which was produced in evidence was found in his possession. He attributed his woes, including the fact that he was charged with the offence of robbery to the fact that he had had a quarrel with the complainant prior to the robbery incident. In effect the appellant was saying that the charge against him had been framed by the complainant in pursuit of the threat that he (*the complainant*) had made to the appellant that he would suffer dire consequences.

This being a first appeal, this court is mandated to re-consider and re-evaluate the evidence adduced by the witnesses before the trial magistrate and reach its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required 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 decision as to the demeanour of the said witnesses (see Njoroge –Vs- Republic [1987] KLR 19).

Having considered the written submissions made by the appellant and the reply thereto by the State and also having re-evaluated the evidence adduced at the trial of the appellant, the issue for determination by this court is whether the prosecution established its case against the appellant to the required standard of proof beyond any reasonable doubt.

In the instant appeal, the evidence adduced by the prosecution in its bid to secure the conviction of the appellant is both direct and circumstantial. It is direct when the complainant testified that the appellant volunteered to escort him to his house but whilst on the way attacked him and robbed him of his money. The complainant's evidence was corroborated by the evidence of PW 3, a watchman, who said the appellant took away the golf stick from the complainant and later offered to escort him to his house. PW 3 saw the appellant with the complainant a few moments before the complainant was attacked and robbed. In the process of being robbed the complainant was nearly fatally injured. PW 3 saw the appellant with the golf stick which he had snatched from the complainant. At about 1.00 a.m, PW 2 also saw the appellant with the same golf stick. From the evidence of PW2, it is clear that the appellant was distressed when he knocked at PW 2's house and requested for food and accommodation. PW 2 found the appellant's behaviour strange. PW 2 then saw the appellant throw away the golf stick behind his house. When the police (PW 5) came calling, PW 2 was able to point out where the appellant had thrown the golf stick. PW 5 searched the area and was able to retrieve the golf stick. The golf stick was identified by the complainant to belong to him.

Having carefully re-evaluated the evidence adduced and also considered the submissions made by the appellant and the State we are satisfied that the prosecution proved its case against the appellant to the required standard of proof. The complainant knew the appellant prior to the robbery incident. Infact the complainant trusted that the appellant would safely escort him to his house. However on the way, the appellant assisted by accomplices who are unknown to the complainant attacked the complainant and robbed him of Kshs.3700/-. The complainant testified that it was the appellant who first hit him on the legs with the golf stick which blow managed to disable him. The complainant fell to the ground and was repeatedly beaten by the appellant and his accomplices.

There is no evidence that there existed a grudge between the appellant and the complainant. We find this allegation not to have any substance as it would be most improbable that the complainant would have allowed the appellant to escort him if he did not trust him. Furthermore PW 3, the watchman who was guarding the bar where the complainant took his last drink saw the appellant and the complainant walked in the direction of the complainant's house. In the morning, while PW 3 was going home, he found the complainant lying on the ground, unconscious. PW 3 recalled that the complainant had sustained serious head injuries. PW 3 did not hesitate to report to the police that he suspected the appellant. When the police went to the house of the appellant, they managed to arrest him and also recover the golf stick which had been thrown by the appellant to an area behind his house. The police were directed by PW 2 who saw the appellant throw the golf stick behind his house.

Upon re-evaluating the evidence, there is no doubt that the appellant offered to escort the complainant to his house having made arrangements with his accomplices to attack and rob him. In the course of the robbery, the appellant with his accomplices used sharp and blunt objects to inflict injuries to the complainant, which injuries proved fatal. The appellant and his accomplices robbed the complainant of Kshs.3700/-. All the ingredients to prove the charge of robbery with violence contrary to **Section 296(2) of the Penal Code** were proved. The prosecution proved by both direct and circumstantial evidence that it was the appellant who lured the complainant to a place where he (the complainant) was attacked and robbed. In the course of the robbery the complainant was cut with sharp and blunt objects that resulted in him sustaining injuries of a permanent nature. The injuries were assessed by PW 4 Dr

Noah Mukasa to be maim.

We reject his defence as it does not raise any issues that would affect the strong and overwhelming evidence adduced by the prosecution witnesses. We find no merit in the appeal filed by the appellant in this case. We consequently dismiss it. Although the appellant in his submission claims that he was less than eighteen (18) years when the robbery incident took place, there is no evidence on record to suggest that the appellant was a child within the meaning of Section 2 of the Children Act, (Act No.8 of 2001). We confirm the conviction and the sentence imposed by the trial magistrate. It is so ordered.

**DATED at NAKURU this 25th day of November 2005.**

**D. MUSINGA**

**JUDGE**

**L. KIMARU**

**JUDGE**