

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 158 of 2004

(From Original conviction (s) and Sentence (s) in Criminal Case No. 218 of 2004 of the Principal Magistrate's Court at Kajiado (Sd. Ndungu H.N. (Miss) P.M) on 1/10/04

DANIEL WAMBUA KIMOTHOAPPELLAN

T

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

The appellant **DANIEL WAMBUA**, was charged with the offence of robbery with violence Contrary to Section 296 (2) of the Penal Code. He was convicted and sentenced to death as provided by law. He appealed against the conviction and the sentence.

When the appeal came up for a hearing, Mr O'Mirera, for the state hesitatingly conceded the appeal. He pointed out that the complainant Collar Ngote was not present during the robbery and was not therefore attacked or robbed. The witnesses who gave the evidence upon which the conviction was based were also not present or robbed and those robbed were not made complainants. If anything happened to the institution called Undugu Childrens Centre, it must have so happened in the absence of the person named as the complainant or the witnesses. The evidence on record shows that on 19/1/2004 at about 11.00 p.m. Undugu Children's Centre, Kitengela, was invaded by people who carried torches, clubs, pangas and other weapons. The attackers demanded to be told where their teachers were at the time and where the office and store were situated. They had tied the institution's watchman and ended up stealing from the institution and from individual students. The appellant is said to have been one of the robbers. The witnesses identified the appellant by recognizing his voice, not visually. Later it was established that the thugs had stolen several items from the institution including the school video deck. The witnesses who testified were mainly students in the institution or watchmen. PW4, Vincent Olamisi who was a social worker in the institution was not only injured by the attackers but was as well personally robbed of Kshs.7,000/= and was also robbed various institution properties which he was guarding. So was another guard called Joshua King'oo who testified as PW6 in the lower court who was also attacked by the robbers and injured. He was robbed of his whistle.

What appears difficult to understand, is why the Undugu Children's Centre's administrator, who was not present at the institution at the time of the robbery, should have been made the complainant, at least of the robbery charge. She could have been made a complainant of various charges arising from the attack and theft from the centre but not robbery with violence which demands that the complainant must have been personally attacked. That offences like burglary, breaking into and stealing from the centre, were available for charging the appellant, is not a secret. Indeed, the watchmen and the students who were individually robbed and beaten could have been made complainants of several individual charges in respect of their own properties or in respect of the institution properties. This did not in the wisdom of the investigating officer and the police station, happen.

The end result was that Mr O'Mirera, found it difficulty to support the conviction in this appeal. We sympathize with his situation and support the stand he took. Accordingly, this appeal must succeed. The conviction is quashed and the sentence of death set aside forthwith. The appellant shall be released

forthwith unless otherwise lawfully held in prison. It is so ordered.

Dated and delivered at Machakos this 20th day of December, 2005.

D.A. ONYANCHA

JUDGE

J. LESIIT

JUDGE