REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 759 OF 2001

(From original conviction(s) and Sentence(s) in Criminal case No. 111 of 2001 of the Senior Resident Magistrate's Court at Limuru (Ezra Awino – S.R.M.)

PETER NG'ANG'A NGUGI……..…….....……..APPELLANT

VERSUS

REPUBLIC…… …….....……....RESPONDENT

J U D G M E N T

PETER NG'ANG'A NGUGI was convicted in two counts of the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296 (2**) of the Penal Code. He was sentenced to death as mandatorily provided in the law. Being aggrieved by the conviction and sentence he lodged this Appeal. He was acquitted in counts 3 and 4 of **ATTEMPTED RAPE** contrary to **Section 141** and the alternative charge of **INDECENT ASSAULT ON A FEMALE** contrary to **Section 144 (1)** of the Penal Code. The Complainant in counts 3 and 4 was PW5, the daughter of PW2 and 4.

The brief facts of the case are that on the morning of 31st December 2000, PW1 who was the Complainant in count 1 took his wife and daughter in his vehicle registration No. KAJ 056 R to Kiambu District, Tigoni Picnic Site. The wife, PW4, was the Complainant in count 2. As he drove slowly within the picnic site, the family was attacked and robbed. Due to shouts from the PW1's daughter, members of public went to the scene. They apprehended one of the attackers who was identified as the Appellant.

The Appellant has raised five grounds of Appeal in his Petition of Appeal. On scrutinizing those grounds, we have summarized them as follows: -

> **1) That the learned trial magistrate erred in law and fact in finding the evidence sufficient to convict. 2) That the Appellant's defence was not considered.**
>
> **3) That no medical evidence was adduced to support the capital robbery charges.**

In his submission both written and oral, the Appellant emphasized contradictions in the Prosecution case. He submitted that there was contradiction as to what he was armed with during this attack, whether a knife or a stone. **MISS MWENJE**, learned counsel for the Respondent, opposed the Appeal. Even though not making any response to the alleged contradiction in the Prosecution case, **MWENJE** submitted that PW1 and 4 had clearly seen the Appellant throw a paper bag, in which was a rock, onto the windscreen shattered. He then robbed the Complainant PW1, of his wrist watch, mobile phone and 10,000/- in cash. PW4, also saw the Appellant chase her daughter, PW5, when she opened her side of the

door and ran out of the vehicle.

We have perused the entire record of the proceedings on the issue of contradictions raised by the Appellant. We find no material contradiction in the evidence of the Prosecution. The Complainants, PW1 and 4 were very clear that the Appellant had a big bag which he threw at their vehicle's windscreen as they passed him on the road. When PW1 stopped the vehicle due to damage on the windscreen, the Appellant was seen by both witnesses, flash a knife and demand money from the Complainant. PW1 and 4 testified that they saw him with the knife at the time he demanded valuables from PW1. They saw the knife again after the Appellant's arrest, together with a torch which was retrieved from his back.

PW5, who is the Complainant's i.e. PW1 and PW4's daughter, did not mention a knife. That does not surprise us because it is clear from the evidence that PW5 was sitting at the rear of the vehicle, while PW1 and 4 sat in front. It is possible she may not have been in a position to see the knife due to her position inside the vehicle.

PW7, who spoke of the Appellant having a stone was very clear in his evidence that he was referring to the stone that was in the paper bag. That stone was also seen by PW1, 4 and 5 when, according to their evidence, the Appellant threw it at the windscreen, breaking it and causing PW1 to stop the vehicle. We find that there was no contradiction at all in the Prosecution evidence as to the objects or items the Appellant used during this incident.

As to the evidence adduced being sufficient to sustain the charged, we have reevaluated the evidence before the trial court. We find that the Prosecution was able to establish two important ingredients to the charges of robbery with violence –

> **One, the Prosecution proved that the Appellant was in company of others during this attack. From evidence of PW1 and 4, those others were three. However, they managed to escape arrest.**
>
> **Two, that the Appellant and his accomplices were armed with dangerous weapons to wit knives and stones. We agree that in addition, the particulars of the charge allege that the attackers were also armed with simis. However, no evidence adduced supported that particular of the charge.**
>
> **The evidence clearly established that the Appellant had a stone with which he shattered the windscreen of the Complainant's vehicle. The Prosecution adduced photographs proving the damage to the Complainants vehicle which was exhibit 5.**

Even though the Prosecution did not establish that any of the Complainants were injured as a result of this incident, we are satisfied that under **Section 296 (2)** of the Penal Code, the two elements of the charge that were proved were sufficient to sustain the charge under that section. We are guided by the case of **OLOUCH vs. REPUBLIC 1986 KLR 549**.

In the same vein, we do not find merit in the Appellant's submission that he ought to have been charged of **SIMPLE ROBBERY** contrary to **Section 296 (1)** of Penal Code. It is not the absence of violence that reduces a charge from capital to simple robbery. The offence of simple robbery is proved where evidence is led which establishes that the accused person;

> **1. Stole anything and**
>
> **2. at or immediately before or immediately after the time of stealing**
>
> **3. used or threatened to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or to overcome resistance to its being stolen or retained. (See OLUOCH vs. REPUBLIC** (Supra)

We have already dealt with the various elements of a capital robbery. We are satisfied that the charge proved was the one under Section 296(2) of the Penal Code.

The attack took place in broad daylight. We agree with the learned trial magistrate's finding that the Appellant was arrested soon after the robbery by PW2, 3, 4 and others and identified at the scene by all three Complainants in the case. Also recovered from him was the knife he used in the attack. The stone he had carried in a paper bag was also recovered. Both were exhibits in the case.

We therefore agree with the learned trial magistrate's finding that there was no doubt that the Appellant committed the offence. The evidence of the Prosecution was watertight and free from any error or mistake. We agree with his decision to disbelieve the Appellant's defence that the case was a frame-up.

Upon considering this Appeal, we find no merit in it and dismiss it. The upshot of the Appeal is that it fails. We uphold the conviction and confirm the sentence.

Dated at Nairobi this 26th day of October 2004.

LESIIT

JUDGE

OCHIENG'

Ag. JUDGE

Read, signed and delivered in the presence of;

LESIIT **OCHIENG'**

JUDGE **Ag. JUDGE**