



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO. 881 OF 2001**

**FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO.  
625 OF 2001 OF THE SENIOR PRINCIPAL MAGISTRATES'S COURT AT  
KIBERA**

**JACKSON KINUTHIA KUNGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

The appellant, **JACKSON KINUTHIA KUNGU** was convicted on two counts of **ROBBERY WITH VIOLENCE** contrary to section 296(2) of the Penal Code, and also on one count of **SHOP BREAKING AND STEALING** contrary to section 306(a) of the Penal code. He was sentenced to death in relation to each of the counts for **ROBBERY WITH VIOLENCE**. And for **SHOP BREAKING AND STEALING**, he was sentenced to imprisonment for 2 years and 4 strokes of the cane.

Following his conviction and sentencing, the appellant was dissatisfied, and he therefore appealed. In his Petition of appeal, the appellant faults the trial court for convicting him without any corroboration. He also contends that the circumstances prevailing at the material times were not conducive for positive identification. Thirdly, the appellant states that the charges against him were defective.

When elaborating on the contention that the charges were defective, the appellant pointed out that in respect to counts 2, 3, and 4, the charge sheets did not incorporate the phrase **“dangerous or offensive weapon or instrument.”**

It is obvious that the charge does not cite any instruments or weapons. We therefore do not understand what it is that the appellant expected to be described as “dangerous or offensive weapon or instrument.”

But then, does the absence of a weapon or instrument make the charge defective? The answer is in the negative. The reason for that is that the offence of Robbery with Violence has three distinctive ingredients, each of which, if proved is sufficient to found conviction. The three ingredients are set out in section 296(2) of the Penal Code, and can be summarized as follows:

1. The offender is armed with any dangerous or offensive weapon or instrument; or
2. The offender is in the company with one or more other person or persons; or
3. At or immediately before or immediately after the time of the robber, the offender wounds, beats, strikes or uses other personal violence to any person.

In this case, the particulars of the charge in count 2 indicate that the appellant was in the company of his two co-accused when they robbed the complainant, PW3 of his money, amounting to Kshs 70/=. That fact alone would be sufficient to found conviction, if the prosecution led evidence to prove it.

In relation to count 3, the particulars are that the appellant was not only with his two co-accused, but also with other persons not before the court, when they robbed David Mungai of his money, amounting to Kshs 2,000/=.

Those particulars of the charge clearly brought the case within category (2) above, namely that the offender was in company of one more person or persons. The issue of the charge being defective must accordingly fail.

As regards the evidence on record, PW3, David Lemuruka Lemarasi was the complainant, in relation to count 2. He testified that the incident took place on 14th January 2001, at about 1.30p.m. He had traveled from Nairobi, and alighted at Kiserian bus stop. He saw two young men ahead of him, and walked passed them. He entered into a shop, where he bought flour. When he left the shop, he saw two young men ahead of him, walking in the same direction as he was. They walked fast, he said, and he was behind them. Upon reaching a corner, one of the young men produced a knife, and ordered PW3 to produce all the valuables he had. PW3 said he had nothing, and pleaded for his safety. The two young men did not beat him, but searched his pockets, from where they stole Kshs 70/=

PW3 identified the appellant as the person who had threatened him with a knife. He said that the appellant had pointed the knife at his stomach, whilst the appellant's companion ordered PW3 to produce his valuables. PW3 reported the incident at Ngong Police on the next day. He was referred to Kiserian Police Post, where he went on 16th January 2001, i.e. the following day.

On 19th January 2001, the witness encountered a group of people escorting thieves and robbers. He, (PW3) saw the appellant amongst the said thieves and robbers. Later, he was summoned to Kiserian Police Post, where he identified the appellant, as one of the persons who had robbed him of Kshs 70/=

During cross-examination, PW3 reiterated that although he had not known the appellant prior to the robbery, he concentrated on looking at his face, as the appellant pressed the knife to his stomach. He also said that when he reported to the police, he told them that he could recognise one of the two robbers, although he did not know the said robber's name.

PW3 was further cross-examined by the court, and again he said that he had clearly seen the appellant.

The appellant faults PW3 for going to make a report at Ngong Police, instead of Kiserian Police Post. He also says that PW3 should have, at least, notified a neighbour about the incident.

To our minds, the identification by PW3 is clearly beyond reproach. He saw two young men, and they later accosted him. Although one demanded this valuables, he said that he would not be able to identify him, as his attention was focused on the appellant. He also explained that he had concentrated his attention on the appellant as he was holding a knife to his stomach. He therefore had a good reason to concentrate his attention of the appellant.

And whilst it is true that PW3 first reported the matter at Ngong Police, instead of a Kiserian Police post, we cannot see any reason why that should lessen the veracity of PW3's evidence.

As regards count 3, the complainant was David Mungai, PW2. In his testimony, PW2 said that he lives at Kiserian. On 17th January 2001, he traveled from Nairobi, and arrived at Kiserian at about 10.15 p.m. He then started walking from the shopping centre, with a lady neighbour. They walked along Koikali Road, towards their houses. Two men passed them, walking fast. The said two men stopped after some 100 metres, flashed torches at PW2 and the lady, whilst demanding all their valuables. The men took a bag from the lady, and Kshs 2,000/= from PW2.

During the robbery, the men were armed with a Somali sword, iron bar and rungus. They used the weapons to threaten PW2's neighbour, who was in his company.

As the robbery was going on a vehicle approached the scene, from behind PW2. The lights of the vehicle are said to have lit up the faces of the two men, who were in front of PW2. According to the witness, the vehicle lights enabled him to clearly see the faces of the two young men, who included the appellant. PW2 also said that the appellant was the person who used a sword or knife to threaten the lady neighbour.

The Appellant submitted that the identification by PW2 was unreliable because the circumstances prevailing were difficult, and was not favourable for positive identification.

It is clear that the incident is said to have taken place at night. PW2 was attacked by robbers, somewhat unexpectedly. He was only able to identify one of the attackers when his face was lit up by the headlights of a vehicle that approached the scene. Was the said identification reliable?

The witness did not specify the duration during which the face of the appellant was hit up. He also did not state how bright the lights were. But he emphasized that he clearly saw the face of the appellant. Bearing in mind the fact that PW2 knew the appellant well, as a resident of the area; and considering that PW2 told the police that he could identify one of the robbers, when he made his first report, we find no reason at all to doubt the appellant's identification.

On count 4, the complainant was Nicholas Ndichu Kaurai, PW4. He said that he was a meat supplier. He operates shops at both Kiserian and Nairobi. It was his testimony that on 9th January, 2001, when he went to open his shop at Kiserian, he found the rear door open. The padlock was unlocked. He therefore reported the incident at Kiserian police post. He said that the shop was empty, as all the goods, valued at Kshs 100,000/= had been stolen.

PW4 listed all the stolen goods, then returned to his slaughter house. After half an hour, he was told by neighbours that they had arrested one suspect, the 3rd accused who later led the mob to the residence of his accomplices. The said accomplices were said to be the appellant and the 1st accused. They were found at their house, near Kiserian Primary school, and the mob arrested them. However, before the arrest, the house was searched, and a padlock was recovered there from, together with two knives. PW4 said that he identified one of the padlocks as his. It was a "Tri-circle" by make.

PW4 tried to unlock the padlock with his key, and it worked. However, the appellant cast aspersions on the opening of the padlock, as he said that the said padlock had been taken home by the witness. He is therefore saying that the exhibit cannot be deemed authentic.

In the event that PW4 had taken the padlock home from the appellant's house, But on our perusing the evidence on record, we find nothing to show that PW4 had taken the padlock to his house. This is what she is recorded as having said, during cross-examination;

**"I came to your house in search of my stolen shop goods. I had the key to my padlock. I did not make a key for my padlock after recoveries were made. I went with padlock key hom and I came with to court today. It locks and unlocks the padlock. The padlock remained at the station."**

In his defence, the appellant did not say anything about the events of 9th January 2001. Yet PW6 did corroborate the evidence of PW4 regarding the padlock belonging to PW4, which was recovered from the appellant's house. In the light of the foregoing evidence, we find that there was sufficient evidence to sustain conviction of the appellant on all 3 counts. Accordingly, we uphold conviction on counts 2, 3, and 4; and we also confirm the sentences. The appeal is thus dismissed.

Dated at Nairobi this 2nd day of December, 2004

**J. LESIIT**

**JUDGE**

**FRED A. COHEING**

**AG. JUDGE**

Appellant in person present

Mr. Muya/Odero – Court Clerks