



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO.289 OF 1999**

**(From original conviction and sentence in Criminal  
Case No.2034/1999 of the Chief Magistrate's Court  
at NAKURU – S. MUKETI (S.R.M.)**

AYUB WANYONYI WAMBANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**J U D G M E N T**

The Appellant AYUB WANYENYI WAMISANI has appealed against both the conviction and sentence of Mrs. MUKETI, SRM in CM Cr. Case No.2034/98 in which he was convicted of a charge of ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code and sentenced to death. The offence took place on 12th November, 1998.

The appeal was argued on behalf of the Appellant by his Advocate Mr. Keboga; while Mr. Onderi appeared for the State. The appeal was opposed.

The counsel for the appellant argued two grounds. One that the conviction was against the weight of evidence. He submitted that the Complainant, who was PW1 in the case, and her driver PW2, were unsure of whom among the three alleged robbers sat with them in the driver's cabin. That the Complainant, had said it was the 3rd Accused in the case who sat with them while PW2 contradicted her and said it was the Appellant. The Counsel for the Appellant confused his submissions by stating that the Appellant was in fact not denying being with the Complainant and PW2 at the scene when the accident occurred. He urged the court to find that there was no evidence that he was involved in the crime for two reasons. One that the Complainant's evidence was clear that the Appellant attacked her loader yet the loader was not called as a witness. Two that the Appellant's co-accused jumped bail and were not tried in the lower court which proves that the two had a guilty mind.

The Learned State Counsel supported the lower court's finding and submitted that the evidence of identification of the Appellant was watertight. He submitted that the Appellant had gone to the Complainant before the incident offering them wheat for sale. That on the day of the incident, the Appellant lured the Complainant, her driver PW2 and loader to the scene where the robbery took place.

That therefore the evidence of identification was that of recognition.

He also submitted that in addition the Appellant was arrested soon after the incident as he tried to flee

from the scene when PW2 raised the alarm. That before he could be apprehended he injured PW2 with a knife he had in his attempt to resist arrest. The Counsel submitted that the Appellant's conduct was not that of an innocent person. On the issue of being armed, the Counsel asked the court to find that the Appellant was in constructive possession of the gun used in the robbery even though it was his co-accused who had possession of it.

We have examined the lower court's record and carefully considered the submissions by both Counsels. We find that the Appellant was positively identified by both the Complainant, and PW2 as one of three men who robbed the Complainant of her handbag with Kshs.59,000/-. Even though the handbag with 4000/- in it was recovered at the scene, the rest of the money was not. From the submissions of the Appellant's Advocate, there is no dispute whatsoever that the Appellant was at the scene of this incident. In fact the evidence on record shows that the Appellant had approached the Complainant on the 11th, one day before, to offer her wheat for sale. The second day, 12th, when the incident occurred, the Appellant had gone to the Complainant to show her where the said wheat for sale was located. The Complainant was robbed on the way. It is clear that the Appellant's co-accused attacked the Complainant and carried away her handbag while the Appellant engaged the Complainant's loader.

The Appellant's Advocate has urged the court to find that the Appellant's presence at the scene was innocent. In her Judgment the Learned Magistrate stated:-

***“It is the opinion of the court that the Accused person was not framed. His defence that he was hired as a loader cannot be true, this is because the same springs from no basis as it was not laid down during cross -examination. The Complainant also already had her loader. The evidence that he was previously at the Complainant's premises vacates this.”***

We are satisfied that the court did consider the evidence of the prosecution and defence, analysed it and came to the right conclusion that the Appellant's presence at the scene of this incident was not innocent.

We are satisfied that the events of the 12th cannot be isolated from those of the 11th. The Appellant and his companion had gone to see the Complainant and her husband with an offer to sell to them some bags of wheat. The next day, 12th, the day of this incident, the Appellant went back to allegedly lead the Complainant to where the wheat was. It is safe to make an inference that on the 11th the Appellant had formed a common intention with his co-accused to lure the Complainant from her shop on pretence they would take her to where she could get wheat in order to rob her. That common intention was demonstrated when, instead of leading the Complainant to the place she could buy wheat, they led her where they robbed her. It is irrelevant that the Appellant was not armed and did not personally attack or rob the Complainant.

***Section 21 of the Penal Code provides:-***

***“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commi - ssion was a p robable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”***

The provisions of Section 21 of the Penal Code settles the Advocate's submission that the Appellant was innocent, was unarmed and never robbed anyone.

Right from the 11th when the Appellant first visited the Complainant at her shop, up to the 12th when the offence was committed both the Appellant and his co-accused had formed a common purpose to rob the Complainant and went ahead to execute it.

It is irrelevant that the Appellant did not personally attack and rob the Complainant. He was a joint offender executing a common purpose with each of his co-accused. On the charge proved, whether it was a Capital Robbery, Section 296(1) and (2) of the Penal Code reads:-

***“(1) “Any person who commits the felony of robbery is liable to imprisonment for 14 years together with corporal punishment not exceeding 28 strokes.***

***(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any Person, he shall be sentenced to death.”***

The offence of Robbery with Violence contrary to Section 296(2) of the Penal Code is proved if the person charged was either:-

(i) armed with any dangerous or offensive weapon or instrument or

(ii) is in company with one or more person or persons or

(iii) immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.

It is doubtful whether the Appellant in this case was armed with any offensive or dangerous weapon or instrument

We are however very clear in our minds, and the Appellant does not contest this, that he was in company of two others who were his co-accused in the lower court and who were armed with a home made gun, a knife and hammer. Actual violence was also used on the Complainant, her driver PW2 and her loader. Clearly the ingredients of the offence were proved and the court's finding that the charge had been proved was correct. We are satisfied that the court correctly directed itself on the evidence adduced and the charge and came to the right conclusion.

The second ground argued by the Appellant's Advocate was that the sentence imposed against the Appellant was excessive, oppressive and draconian.

The Learned State Counsel does not accept this and submitted that it was the mandatory sentence the court could pass upon arriving on a conviction for Robbery with Violence. We agree with his submissions. We have already quoted the provisions of Section 296 of the Penal Code which also gives the penalty for the charge under Sub-Section (2) as:-

***“he shall be sentenced to death.”***

The penalty provided under that section is mandatory and no court has the power to exercise any discretion to alter the sentence once a conviction of Robbery with Violence is arrived at.

The Appeal against both the conviction and the sentence fail and is accordingly dismissed.

Read and Signed in the presence of Mr. Onderi, State Counsel and in the absence of the Advocate for the Appellant. Kosegei court/clerk.

**1. MUGA APONDI**

**JUDGE**

**6.03.2003**

**2. JESSIE LESIIT**

**JUDGE**

**6.03.2003**