



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO.86 OF 1999**

(From original conviction and sentence in Criminal Case No.2935/96 of the Senior Resident Magistrate's Court at NAIVASHA – L.W. GITARI (SRM))

**JAMES MAINA MBUGUA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

The Appellant was charged with two offences. The first one in brief was ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code that on the 13/9/96 he robbed the Complainant ISAACK NJUGUNA MWANGI of money Kshs.3,120/- and used actual violence on him. The second charge was ATTEMPTED ROBBERY WITH VIOLENCE contrary to Section 297(2) of the Penal Code that on same day he attempted to rob the same Complainant of his motor vehicle Reg. No.KWJ 030 a Datsun 1200. The Appellant was found guilty of both counts and sentenced to death. He now appeals against the conviction and sentence imposed against him. He raised five grounds of appeal. In the first ground he raised the issue of identification which he argued at length In his submissions before us. He contends that the Complainant did not notice the gap in his mouth due to missing teeth yet he claimed to have given him a lift in his vehicle. He also submitted that PW3's evidence was that she identified him by the shirt he was wearing yet in court she identified a jacket. The Appellant also submitted that there ought to have been an identification parade carried out for the witnesses to identify him.

The learned State Counsel opposed the appeal against both conviction and sentence. On the issue of identification, he submitted that the offence took place at 4 p.m., in broad daylight and that the Complainant, who had seen the Appellant from the Limuru/Narok road flyover- where he carried him in his vehicle to Naivasha where the incident occurred had sufficient time to identify him. That during the ride between the flyover and Naivasha, the two of them sat in the front seat and that they talked to each other. He ruled out any possibility of mistaken identity on the Complainant's part.. The Learned State Counsel submitted further that PW3 witnessed the struggle between the Complainant and the Appellant inside the Appellant's vehicle. She is the one who screamed drawing the attention of members of public who arrested the Appellant about a kilometre from the scene.

**In Wangombe –v- Rep** 1980 KLR 149 the court made reference to factors that must be taken into consideration when determining whether identification of an Appellant was reliable and safe. These can be paraphrased as follows:-

- (1) The circumstances for seeing the Appellant Which enabled his identification later.
- (2) The lighting under which he was seen and,
- (3) The proximity or distance between the Appellant and the identifying witness.

In this case, we are satisfied that the trial court considered the circumstances under which the two identifying witnesses, PW1 and PW3, saw the Appellant and arrived at the correct finding that it was safe. The court did consider the length of time the Complainant was with the Appellant in his vehicle and also the fact that it was in broad daylight. We are fully satisfied that the court fully addressed these factors. In addition to the evidence of identification the court made a finding that there were two factors which provided corroboration to the evidence of PW1 and 3. The first one was the fact that the Appellant's identity Card and photograph produced in court as Plaintiff's Exhibit 6 were found in the Complainant's vehicle after the incident. We are satisfied that the finding of the Appellant's property inside the Complainant's vehicle soon after this incident rendered corroboration to the evidence of PW1 and 3. The other factor was that the Appellant was found with money identified by the Complainant as the money he stole from him during the incident. More importantly the court found that the money had blood which when tested by a Government Analyst was found to be that of the Complainant. The Analyst's report was Plaintiff's Exhibit7. We do agree with the trial court that the evidence that the money which was exhibited in court had the Complainant's blood on it when PW2 recovered it from the Appellant and that that provided corroboration to the Complainant's and PW3's evidence of identification.

The Appellant raised four other grounds in his appeal which in his submissions he combined into two. He argued that the prosecution case was full of inconsistencies. One of these inconsistencies was that PW4, the arresting officer made no reference to blood on the money in issue. That is misleading because the arresting officer, PW4, merely handed over the Appellant to PW2 at Naivasha Police Station. He did not search him at any time. That point was therefore misplaced. The Appellant also raised issue with the evidence of PW1 and 2 arguing that it was not clear whether he found the Complainant at the Police Station as PW2 testified or whether the Complainant found him there as he testified.

In our considered view, that point is of no significance to the case and renders no assistance to the Appellant's case. The Appellant raised issue with the failure by the prosecution to produce either the motor vehicle or photographs of it which he submitted Scenes of Crime had taken, to show the court what it is he was charged of attempting to rob from the Complainant. We did consider that issue of great importance. In the second charge facing the Appellant, it is alleged he attempted to rob the Complainant of a vehicle. We do agree that the vehicle should have been exhibited in court in one form or other.

In our considered view the failure to exhibit the vehicle in whichever form was fatal to the prosecution case. That charge ought to have been dismissed.

The Appellant has finally submitted that the court did not consider his defence. That the object he allegedly used to stab the Complainant with was not produced and therefore the case was not proved as required.

The Learned State Counsel submitted that the presence of the Appellant's document in the Complainant's vehicle, which the Appellant failed to explain was proof he had been in that vehicle and that he robbed the Complainant.

In our considered view the court did consider the Appellant's defence. We did peruse the trial court's Judgment. We found that the court summarised the Appellant's defence at page 2 of the Judgment. We are also satisfied that the court evaluated the entire evidence and made a final finding at page 5 of the Judgment. The trial court commenting on the Appellant's defence concluded:-

***“I find that the evidence adduced is overwhelming and proves beyond any reasonable doubts that it is the Accused who robbed the Complainant Kshs.3,120/- and also attempted to rob him his motor vehicle after the Complainant gave him a lift. I find that the defence***

*of the Accused is a make up story which is Totally disapproved by the evidence Adduced by the prosecution witnesses. I find that the defence of the Accused Is not true and so I reject it.”*

The trial court stated that the prosecution evidence disapproved the defence story. It was not necessary for the prosecution evidence to do so. That finding is a misdirection. However, we are satisfied that the said misdirection does not render the finding of the court erroneous. We do agree with the trial magistrate that the evidence adduced by the prosecution was overwhelming. We also find that the defence case was given its due weight and was correctly rejected.

As we noted earlier in this Judgment, the prosecution did not produce the motor vehicle in support of the second count of Attempted Robbery with Violence. That was fatal to the prosecution case. Accordingly we set aside the conviction and sentence on this count.

On the first count we find the conviction was safe and that the sentence was the one provided for in the law. Both are accordingly upheld.

In the upshot we do dismiss the Appellant’s appeal against the conviction and sentence in the first count but allow the appeal in regard to the second count.

Dated and delivered at Nakuru this 15th day of May, 2003.

Read signed and delivered. Mr. Onderi and Appellant present..

**1. MUGA APONDI**

**JUDGE**

**2. JESSIE LESIIT**

**JUDGE**