



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 163 OF 2009

JAMES KARITU MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.2285 of 2005 of the Chief Magistrate's Court at Nakuru by Hon. W. Juma-Chief Magistrate)

JUDGMENT

1. **James Karitu Mwangi**, the appellant herein, was convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code.
2. The particulars were that on the 13th April 2005 at **Nyakio Farm** in **Koibatek** District within **Rift Valley** Province, while armed with a club robbed **Eunice Waithera Mwangi** of cash Kshs. 18,000/= and at or immediately before or after the time of the said robbery wounded the said **Eunice Waithera Mwangi**.
3. The appellant was sentenced to suffer death. He now appeals against both conviction and sentence.
4. The appellant was represented by Mr. Ikuu, learned counsel. He raised four grounds of appeal that can be summarized as follows:
 - a. The learned trial magistrate erred in law and in fact by convicting the appellant on the evidence of a single witness.
 - b. The learned trial magistrate erred in law and in fact by convicting the appellant on the basis of contradictory and inconsistent evidence.
 - c. The learned trial magistrate erred in law and in fact by dismissing the appellant's defence.
5. The appeal was opposed by the state through Mr. Chigiti, learned counsel who contended that the prosecution proved their case to the required standards.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. In the celebrated case of **Abdullah Bin Wendo vs. Rex 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

Subject to certain well-known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.

This decision has the import that a fact can be proved by the testimony of a single witness except where the issue of identification may arise

when circumstances are not favourable. I will have this decision in mind while analyzing the circumstances of this case.

8. The evidence of the complainant is muddled up. The charge states the date of the offence was 13th April 2005. She however states to have arrived in Timboroa from Bungoma on 12th November 2005 and proceeds to narrate her encounter with the appellant herein. Interestingly, she again narrates events of 13th April 2006 at 7 p.m. This is when she said the appellant robbed her. When I checked the original record, I found that the issue was not with the typing. This is what she had testified to. There was no attempt to reconcile these contradictions by the prosecution.

9. Another piece of the complainant’s evidence that the prosecution needed to pursue is why they were going to purchase potatoes at night from a farmer. The court needed to appreciate what ordinarily happens. Are the potatoes taken to the farmers’ homes and put in the bags or they are bagged in the farm. This failure raises doubts whether indeed they were going for potatoes at 7 p.m. or on other mission.

10. The complainant’s evidence contradicted the particulars of the charge in respect of what weapon was used. The charge sheet indicate that the appellant was armed with a club whereas the complainant testified that he was armed with a piece of cypress wood which later on in her statement referred to as a stick. A stick is not the same as a club. Again there was no attempt to reconcile this contradiction.

11. In her evidence, the complainant said the appellant hit her on the head with the stick and she bled. The medical evidence by Richard Sang (PW2 in the original record) a clinical officer. She went with a complaint of a swollen neck and said the injury was inflicted by a person known to her. The medical evidence contradicted the complainant on where she was injured and the nature of the injuries. The details on the P3 form indicate that she was injured on 13th April 2005 at 8 a.m. She had testified that they had left to purchase potatoes at 7 p.m. This is yet another contradiction in her evidence. The Court of Appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**, (Madan, Miller And Potter)JJA held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

Eunice Waithera Mwangi PW1) the complainant herein painted a picture of herself as a person who is not credible. The conviction ought not to have been based on her evidence.

12. In the face of the many contradictions I have cited, the defence of the appellant was plausible.

13. In view of the foregoing, the conviction of the appellant is quashed and the sentence set aside. The appellant is set free unless if otherwise lawfully held.

DATED and SIGNED at Nakuru this 5th Day of December, 2019

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KIARIE WAWERU KIARIE

JUDGE

DELIVERED at Nakuru this 10th day of December, 2019

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JOEL NGUGI

JUDGE