



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CRIMINAL APPEAL NO. 35 OF 2015**

**MICHAEL KARIUKI NYAGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in CR 1327/14 at the Chief Magistrate's Court at Embu by Mr. P.C. Biwott – SPM on 28<sup>th</sup> April 2015)*

**JUDGEMENT**

1. The appellant has appealed against his conviction and sentence of fourteen (14) years imprisonment in respect of a charge of robbery with violence contrary to section 295 as read with with 296 (1) of the Penal Code (Cap 63) Laws of Kenya, imposed upon him by the court of the Senior Principal Magistrate at Embu on 28th April 2015.
2. The respondent/state has opposed both his conviction and sentence.
3. This is a first appeal. As a first appeal court, I am required to re-assess the entire evidence and come to my own independent conclusions according to *Peters v Sunday Post Ltd (1958) EA 424* while at same time deferring to the trial court on findings of fact based on credibility. The reason for this is that the trial court had the advantage of seeing and hearing the live testimony of the witnesses. In a summarized form the appellant was convicted upon the following evidence.
4. The conviction of the appellant was based on the eye witness evidence of Beatrix Wanjiru Magu (PW1), the complainant and circumstantial evidence of other witnesses.
5. The defence of the appellant was that of an alibi, that is to say, that he was not at the scene of the robbery. The appellant's sworn evidence was supported by that of his mother (DW 1).
6. In his grounds of appeal the appellant has raised three grounds. In ground 1 he has stated that the trial court erred in law and fact by rejecting his sworn evidence, which he says is in violation of *section 169 of the Criminal Procedure Code (Cap 175) Laws of Kenya*. In ground 2 he has stated that the trial court erred in law and fact by relying on the evidence of Dorine Kaimenyi Mwambia ( PW 2 ), which he alleges was not corroborated as required by *section 163 of the Evidence Act (Cap 80) Laws of Kenya*. In ground 3 he has stated that the trial court erred in law and fact in failing to inform him of his constitutional right to be assigned an advocate as required by the Constitution of Kenya.
7. The evidence of Beatrix Wanjiru Magu, who is the complainant (PW 1), is that she locked the bar at 1.00 am in the night of 24<sup>th</sup> June 2014, after closing her business bar business. While on her way home

she saw the appellant emerge from some napier grass. The appellant boxed her down in the course of struggling with her. As a result she sustained injuries in her lips which were swollen and she also lost one tooth while her other teeth were shaken. The examining doctor (Dr. Phylis Ngoja PW 5), classified those injuries as grievous harm. He then took from her cash Shs 30,000 and her cell phone. The complainant screamed.

8. In response Dorine Kaimenyi Mwembia (PW 2) came to her rescue. According to her she saw the appellant with light from her cell phone which were on then. She also stated that she knew the appellant before this robbery. She reported the robbery to the police on the same day. According to No. 32756 CPL Nelson Muriuki the complainant told him that she had been robbed of her cash money Shs 30,000 and her cell phone Nokia model. In the process of the robbery the complainant sustained injuries in her mouth losing one tooth. As a result of screaming by the complainant, members of the public came to her rescue, while the appellant escaped. In the course of escaping a watchman met the appellant, who also identified him. The appellant's cap fell down in the course of the robbery.

9. The evidence of the complainant is supported by that of Dorine Kaimenyi Mwembia (PW 2). PW 2 answered the screams of PW 1. With the aid of security lights that were on PW 2 was able to see the appellant running away from the scene of the robbery. She stated that the appellant's cap remained in the fence, which they recovered. It was put in evidence as prosecution exhibit P ex 4. PW 2 like PW 1 had known the appellant before for a period of three years. She recognized him. In addition she also recognized him by the clothes he wore on that day. She stated that the appellant had been to her bar on the material day.

10. The evidence of Gibson Njeru Njiru, the watchman (PW 3) is that while on duty that night, he heard screams. He then went close to the road and kept vigil and hid himself in the banana plants. He then saw a man coming towards his direction. He then flashed his torch at the man and got ready to shoot him. As a result the man introduced himself as Michael and **asked him not to shoot him**. Michael then told PW 3 that he had been to see women who were screaming. Michael then left in a hurry. Shortly a woman came following him. This woman was Beatrice (PW 1). PW 1 told the watchman (PW 3) that she had been robbed of her money and phone. PW 1 then told this watchman that she had seen Michael. The watchman had known Michael before this incident.

11. The appellant gave sworn evidence in which he set up the defence of alibi. According to him he closed his boda boda (motor cycle) business at 11.00 pm that night and went to sleep until morning. He additionally stated that he went to visit his sister in Nanyuki on 25<sup>th</sup> July where he stayed until 1<sup>st</sup> August 2014. He then returned to Embu. On 18<sup>th</sup> August 2014, the police went to his house and arrested him on allegations of robbery which he denied and the allegations were dismissed by the police. According to him the complainant had a grudge against him. She then threatened to *"use her money to pin me down"*.

12. Harriet Gichugu Nyagah (DW 2) was the appellant's mother. She gave evidence supporting the alibi of the appellant. In particular, he stated that on 24<sup>th</sup> June 2014 the appellant arrived at home at 10.00 p.m. Thereafter, he parked his motorcycle and went to sleep. The following day, he woke up as usual and went to work. According to her mother, the appellant went to Nanyuki last in 2010. She denied that the appellant went to Nanyuki in 2014. She added that the appellant never told her that she had differences with the complainant. Finally, she stated that the appellant had not been arrested by AP police officers.

13. In his ground I of appeal, the appellant faulted the trial magistrate for rejecting his sworn evidence which is in violation of section 169 (1) of the Criminal Procedure Code (Cap 75) Laws of Kenya. It should be remembered that both the appellant and his witness and all the prosecution witnesses gave sworn evidence. The learned trial magistrate after seeing and hearing both the prosecution and defence witnesses believed the prosecution witnesses. He rejected the defence evidence because he found it to be untruthful. He pointed out that there was conflict in the evidence of the defence in particular he found as a fact that the appellant stated to have gone to Nanyuki in 2014.

14. On the other hand, The appellant's own mother contradicted him by stating that he never went to Nanyuki in 2014. Instead, she stated that the appellant was last in Nanyuki in 2010. The learned

magistrate was entitled to find that the defence of alibi was not credible in view of the cogent evidence of the prosecution witnesses. He gave his reasons for rejecting the defence evidence. On my own assessment, I have come to the same conclusion as the learned trial magistrate that the defence was rightly disbelieved.

15. In his 2<sup>nd</sup> ground of appeal, the appellant has faulted the trial court for relying on the evidence of PW 2 which he asserts was not corroborated. This is the witness who answered the screams of the complainant and while en-route, she recognized the appellant as the person who was running away from the scene of crime. She was able to see the appellant clearly because there were security lights in the plot. In the process of escaping, the appellant left his cap behind which this witness picked and handed to the police. Subsequently, the cap was produced as prosecution exhibit 4. The conduct of the appellant in running away from the scene of the robbery is corroborative evidence. In the circumstances, the evidence of PW 2 was not impeached in any way as alleged by the appellant. Her evidence is further corroborated by that of the complainant (PW 1).

16. There is further corroborating evidence of Gibson Njeru Njiru (PW 3) who was a watchman at Kathangariri Hospital. PW 3 flashed a torch on the fleeing appellant as PW 3 was hiding in the banana plants. He was ready to shoot him but the appellant identified himself as Michael. It is the appellant's identification as Michael that saved him from being shot by PW 3. I therefore find that the credibility of PW 2 was not impeached in any way. This ground of appeal is therefore rejected.

17. In ground 3, the appellant has stated that the learned trial magistrate erred in law and fact by not informing that he had a constitutional right to be assigned an advocate for his defence as required by the Constitution of Kenya. It is true that under **Article 50 (2) (h)** an accused is entitled to be assigned an advocate for his defence at state expense. Parliament has not enacted implementing or enabling legislation to provide legal aid to persons accused of serious offences. This is a right that is required to be realized progressively. In the circumstances, the learned trial magistrate did not commit any error in refusing to inform the appellant of this right. If he had done so, it would have amounted to an exercise in futility. It should also be remembered that courts do not issue orders in vain. This ground of appeal is therefore dismissed.

18. I have perused the submissions of the appellant which he handed to court during the hearing of his appeal and I find that there is no merit in any of those submissions. The main issue in the appeal was whether the appellant was positively recognized at the scene of the robbery. Although it was at night, the complainant was able to identify the appellant through her light from her phone. She was able to recognize him because she had known him before this incident. The appellant in his own evidence admitted that the complainant knew him. There was further security light at the scene of the robbery. In the circumstances, I find that the circumstances favouring the recognition were favourable. The recognition of the appellant by the complainant is corroborated by the circumstantial evidence of PW 2, 3 and 4 which I have outlined in the foregoing paragraphs. The evidence of recognition of the appellant is free from error mistaken identity. The upshot of this is that the appellant was positively recognized. I find on the evidence adduced in the trial court that the conviction of the appellant is supported by ample evidence.

19. As regards sentence, the appellant was sentenced to 10 years imprisonment. The trial court took into account that the appellant was a first offender. It also took into account that violence was used on the complainant and in the process, she lost one tooth. When he was asked to mitigate, the appellant declined to do so. He did not put to the court any mitigating factors. On my own reassessment of the sentence imposed, I find myself in agreement with the trial court that a deterrent sentence was called for. In the circumstances, the trial court did not commit any error of law in sentencing the appellant to 10 years imprisonment.

20. The upshot of the foregoing is that the appellant's appeal is dismissed in its entirety.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this **7<sup>TH</sup>** day of **APRIL 2016**

In the presence of the Appellant and Ms Mbae for the State.

Court clerk NJue.

**J.M. BWONWONGA**

**JUDGE**

**07.04.16**