



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 251 OF 2014

DAVID MWANGI NDUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the Senior Principal Magistrate's Court at Nyahururu, Hon. D. K. Mikoyan– Ag Senior Principal Magistrate delivered on the 21st March 2013 in SPMCR Case No. 1400 of 2012)

JUDGEMENT

The appellant **DAVID MWANGI NDUNGU** has filed this appeal challenging his conviction on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 29(2) OF THE PENAL CODE**. The particulars of the charge were that:

“On the 21st day of August, 2012 at Nyahururu township in Laikipia County jointly with another not before court robbed ALEX WACHIRA MAINA of one Nokia 1112 mobile phone and cash Ksh 1,500/= all valued at Ksh 2,700/= and at the time of such robbery used actual violence to the said ALEX WACHIRA MAINA”.

The appellant pleaded ‘**Not Guilty**’ to the charge. His trial commenced on 7/2/2013 at which trial the prosecutor led by **INSPECTOR OMWERI** called a total of three (3) witnesses in support of their case.

PW1 ALEX WACHIRA MAINA told the court that on the material day he was at Silas Pub with one Wairimu. The said Wairimu had an altercation with the watchman and the complainant intervened. At that point the appellant who was also present began to beat **PW1** together with the watchman.

Police on patrol came and dispersed them. As they walked home the appellant and his companions again attacked the complainant. They began to pull him and beat him. One of the men robbed the complainant of his Nokia Phone 1200 and Ksh 1,500/= cash.

PW2 PC EVANS YEGON told the court that he responded to the cries for help from **PW1** and arrested the appellant at the scene. The appellant was taken to the police station where he was later charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied having robbed the complainant. On

21/3/2013 the learned trial magistrate delivered his judgment in which he convicted the appellant of the Offence of Robbery with Violence and thereafter sentenced him to death.

Being aggrieved the appellant filed this appeal.

MS OUNO representing the Respondent State opposed the appeal. I have carefully perused the record of the trial before the lower court. I note that the State failed to call '**Wairimu**' who was a key witness. Whilst I do agree with learned State Counsel the no minimum number of witnesses is required to prove a case, I find it very odd that the key witness who was with **PW1** when his quarrel with the appellant started was not called to testify. No reason was given for the failure to call this crucial witness. The court is entitled to draw an adverse inference from the failure to call this witness.

The incident allegedly occurred at 10.00pm when it was dark. **PW1** claims there were security lights nearby. He does not say how far these lights were from the scene or the quality of light which they gave.

The complainant claims that he was robbed of a Nokia Mobile Phone. **PW2** did not see the appellant take that phone from the pockets of **PW1**. There is no proof that **PW1** ever had in his possession such a mobile phone.

The complainant claims that he was attacked and beaten by 2 or more men yet there is no evidence that he sustained any injury from this thorough beating. There is no evidence that the complainant sought medical treatment and no evidence of injuries. Such a beating would not have left the complainant unscratched.

On the whole my own finding is that the evidence was less than convincing. There remain doubts in the prosecution case which doubts must be settled in favour of the appellant I find that his conviction was not merited and I hereby quash that conviction. The death sentence imposed upon the appellant is also set aside. This appeal therefore succeeds. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated in Nakuru this 7th day of November, 2016.

Appellant in person

Maureen A. Odero

Judge

7/11/2016