REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.126 OF 2012

(Arising from the conviction and sentence in Maralal Criminal Case No.179 of 2012 by A.K. ITHUKU (PM)

LOWETHIT LORITIM ……...……. APPELLANT

VERSUS

REPUBLIC ……...… RESPONDENT

JUDGMENT

The appellant (LOWETHIT LOTIRIM) faced a charge of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code, that on 9/12/2011 at NACHOLA in SAMBURU NORTH DISTRICT, while armed with a stone, he robbed LOONGOROT AMUI of Kshs.15,000/= and a Safaricom sim card, and immediately before the time of such robbery, wounded the said LOONGOROT AMUI.

The appellant denied the charge and after a trial in which 5 witnesses testified in favour of the prosecution and the appellant was the only defence witness, he was convicted and sentenced to death.

LOONGOROT AMUI (PW2) was at his home on 9/12/2011 at about 7.00 p.m., when he heard people screaming outside, so he rushed to check. He found the appellant fighting with his sister named NAMADI. PW2 tried to separate the two, and as he held the appellant the latter hit him on the chest with a stone, and he fell down. The appellant took a wallet which was in his breast pocket, and which contained Kshs.15,000/= and a safaricom card. PW2 lost consciousness and came to, while at NACHOLA health centre. He was also treated at Baragoi District Hospital. He gave police the name of his assailant, who was his neighbour. The appellant was arrested, but no money was recovered from him. The sim card was recovered by PW2 from the appellant's compound. PW1 testified that there was no existing grudge between them.

EIYAPOR OME (PW3) had visited PW2 at his home and was present when the appellant and his sister were fighting. He confirmed that the appellant assaulted PW2, who had gone to separate them, PW2 fell down and while on the ground, the appellant removed a wallet from his breast pocket and ran off. PW2 lost consciousness and when he came to, he complained that Kshs.15,730/= had been stolen. Although the incident occurred at 7.00 p.m., it is his evidence that it was still light, and in any case, he knew the appellant who was his neighbor, and was just a metre away from him during the incident.

AKIDOR EMATHE (PW4) is the wife of PW2 and she corroborated what PW2 and PW3 said. She too confirmed that it was not dark and she could clearly see the appellant who was well known to her as their

neighbor.

PC JAMES MUATHE (PW5) of Baragoi police station received the report about the incident and on 26/12/2011; he received the appellant from GSU personnel at NACHOLA GSU Camp. The appellant had been arrested by GSU personnel as a suspect of stock theft.

PW2 was examined by **PETER CHELIMO (PW1),** a clinical officer at Baragoi who found that he had a cut on the abdomen which was swollen and tender. The injury was caused by a blunt object and was classified as harm, and he produced a duly filled and signed P3 form as exhibit in court.

The appellant in his unsworn testimony told the trial court that the charges were a frame-up as he did not steal or beat up anyone.

The trial magistrate in his judgment noted that the prosecution witnesses were consistent as to what took place during the incident. He also found that since PW2 was assaulted, and his property taken thereafter, so the charge of robbery was adequately proved.

Secondly, that the appellant was positively identified since it was not very dark, and the witnesses who knew him very well as a neighbor, were able to clearly see him, since they were not far from him during the incident, and in fact PW2 was facing the appellant. His defence was considered and rejected as a mere denial.

The trial magistrate thus found beyond reasonable doubt that:-

> **"The accused person is the one who hit the complainant with a stone and took his wallet and sim card. There was slight variation on the amount of money in the wallet. . . . In my view . . . do not affect the substance and ingredients of the offence of robbery with violence. . . ."**

The appellant had nothing to say in mitigation.

In challenging the findings of the trial magistrate the appellant laments that although PW1 reported that he had been robbed of Kshs.15,000/=, all the witnesses said it was 16300/=. Further, that all the witnesses were members of his family, and there had been the usual family quarrels just before the said robbery. The appellant argued his appeal by way of written submissions saying there was inconsistency in the prosecution case as the evidence of the witnesses did not support the particulars of the charge, regarding the amount of money purportedly stolen from PW2. This is because whereas the charge sheet stated the amount as being Kshs.15,730/=, the prosecution witnesses said it was Kshs.15,000/= while PW3 and PW5 said it was 15,730/=. His contention is that this variation can only mean that complainant was never robbed nor was any money stolen from him.

The appellant also argues that the stone which was used to assault PW2, was never produced in court, despite claims that it had been taken to the police station, and he terms this as a fatal omission. He also faulted the medical evidence as not supporting the complainant's claims, saying that whereas the prosecution witnesses claimed that PW2 was assaulted on the chest, the clinical officer's findings were that injury was on the abdomen, which is a different location of the body. He also wonders why the alleged initial victim of his assault i.e. NAMADI, was not called to testify, and contends that such failure raises suspicion which should b resolved in his favour.

Mr. Marete, on behalf of the State, conceded this appeal, saying the charge of robbery with violence was not proved, and at best the appellant should have been charged with the offence of assault. He pointed out that the definition of robbery with violence under **Section 295 Penal Code** contemplates an intention to steal – which does not appear to have been the case here. Further that, the complainant had gone out to separate the appellant who was fighting his sister; and got injured.

He doubts that the complainant had any money at all, because of the variation in figures, and argues that

if the complainant had not tried to intervene in the fight, he wouldn't have lost his property.

We have considered and re-evaluated the evidence on record. A charge of robbery is defined under Section 295 Penal Code as:-

> **"Any person who steals anything, and at, or immediately before, or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery,"**

For this robbery to qualify as a violent one attracting a death sentence, the offender must be:-

a. armed with a dangerous or offensive weapon OR
b. be in company with one or more other persons OR
c. immediately before or after the time of robbery, wound, beat, strike or use any other personal violence to the victim.

Whereas these elements contemplated by Section 295 and 296 (2) did manifest themselves at different stages, during the incident, we consider it prudent to take into account the sequence of events, and the reasons for that sequence. Whereas a robber uses violence on the victim with the aim of stealing from that victim, this wasn't the cases here. The evidence discloses that the violence meted on the complainant was because of interfering in a fight between the appellant and his sister. There is no evidence to suggest that the violence was intended to disable the complainant and facilitate the taking away of his property. At the point when the appellant assaulted the complainant, the evidence does not demonstrate that his intention was to carry out what is envisaged under **Section 295** and **296(2) Penal Code**. The assault was **COINCIDENTAL**, to what followed **NOT INCIDENTAL** to it.

Once the appellant realized that he had overpowered the ***"intruder",*** he then decided to unlawfully relieve him of his belongings, whether it was just an empty wallet or a loaded one – it was still PW2's property and all witnesses were consistent that the appellant took it without PW2's permission. That action by the appellant, as consistently described by all the prosecution witnesses, fits in with the offence defined under **Section 268 Penal Code** as stealing.

> **"268 (1) A person who fraudulently and without claim of right takes anything capable of being stolen . . . is said to steal that property or thing.**
>
> **(2) A person who takes anything capable of being stolen . . . is deemed to do so . . . if he does so with any of the following intents . . . .**
>
> **a) an intent permanently to deprive the general or special owner of the thing of it."**

We hold the view that the appellant's actions amounted to stealing, irrespective of whether there was Kshs.15,000/=, 15630/= or 15730/= in the wallet, or whether the wallet had no money at all, it is the action of depriving the owner of anything capable of being stolen (including the wallet and sim card) which constitutes an offence, and not the amount of money involved.

Yet we cannot ignore the fact that the complainant did sustain injuries when he went to intervene in the fight. We are of the view that this ought to have been a second count of assault contrary to **Section 251 Penal Code**, and for which a conviction was sustainable.

Our finding therefore is that the evidence did not prove a charge of robbery with violence contrary to **Section 296 Penal Code** as read with **Section 296(2),** and to that extent the conviction was unsafe and is quashed. The evidence however did disclose an offence of stealing contrary to Section **268 Penal Code**, as read with section **275 Penal Code** and find the appellant guilty on these two charges as separate counts. The death sentence meted is set aside and substituted with 2 years imprisonment on each count which shall run concurrently from the date of conviction by the lower court.

Delivered and dated this 14th day of February, 2014 at Nakuru.

M.J.ANYARA EMUKULE **H.A. OMONDI**

JUDGE **JUDGE**