REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 142 OF 2009

MWARUA MFAUME ….....….....….. APPELLANT

VERSUS

REPUBLIC ….....…….....…RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 1680 of 2008 of the Chief Magistrate's Court at Mombasa – Hon. Mwangi **- SRM**)

JUDGMENT

MWARUA MFAUME hereinafter referred to as the Appellant was Convicted and Sentenced to suffer death for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

The particulars of the charge being that on the 5th day of March, 2008 at about 7:15 a.m. at Kongowea Village – Mombasa County jointly, with another not before the Court and while armed with dangerous weapons namely knives robbed **GLADYS NYAGUTINE** of cash Ksh. 30,000/= a mobile phone make Nokia 1110 a flask and a pair of ladies shoes all of the value of Ksh. 38,000/= and at or immediately before or immediately after such robbery used actual violence to the said **GLADYS NYAGUTINE**.

Brief facts of this case. The Complainant and the appellant are known to each other as they deal in the same business of scrap metal.

The Complainant as an attendant at a scrap metal yard belonging to her employer **SAMUEL MWANGI MAINA (PW 2)** and the Appellant being one of the customers offering for sale scrap metal at the yard.

On the 5th day of March, 2008 while on her way to work she heard footsteps running and upon checking she saw the Accused whom she knew before and who was in the company of an acquittance whose name was not familiar to her.

Upon enquiring from the Appellant as to what was the matter, she was ordered to shut up and produce all the money she had. The appellant produced a knife and stabbed her on the mouth. She bled profusely and lost consciousness. She later found that she had lost her phone make Nokia 1110, her thermos flask, pair of shoes and cash Ksh. 30,000/=. Two months later she traced the Accused whom she caused to be arrested by police, nothing was recovered.

The grounds of appeal are

1. **That the charge was defective**
2. **Identification was faulty**
3. **The trial magistrate did not consider his defence.**

On the issue of defective charge. It is submitted that the Appellant was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code but ought to have being charged under section 295 as read with section 296 (2) of the Penal Code.

The Court of Appeal in the case of **SIMON MATERU MUNIALU – VS- REUBLIC eKLR** (Criminal Appeal 302 of 2005). When confronted with the issue whether a charge sheet citing only section 296 (2) of the Penal Code was sufficient held,

> **" the ingredients that the appellant and for that matter any suspect before the Court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or threatened with actual bodily harm is section 296 (2) of the Penal Code. It is these ingredients which need to be explained to such Accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery.**
>
> **In short section 296 (2) is not only a punishment section but it also incorporates the ingredients for that offence which attracts that punishment.**
>
> **It would be wrong to charge an Accused person facing such offence with robbery under section 295 as read with section 296 (2) of the Penal Code as that would not contain the ingredients that are in section 296 (2) of the Penal Code and might create confusion".**

The Court of Appeal in the recent case of **JOSEPH NJUGUNA MWAURA & OTHERS – VS- REPUBLIC** Criminal Appeal No. 5 of 2008 restated the same position and followed also the case of **Joseph Onyango Owuor -Vs- Republic (2010) eKLR** Criminal Appeal No. 353 of 2008. The charge is therefore not defective as argued by the appellant.

Identification. It is the contention by the appellant that the attack was sudden and terrifying and might have caused panic hence affecting the capacity to observe what was happening around her.

At page 6 line 9 of the record of proceedings this is what the learned trial magistrate had to say,

> **" I am alive to the fact that a single witness evidence ought to be treated cautiously. I have also warned myself of the danger of Conviction on a single witness evidence …... Her evidence was watertight. She had known the Accused for three months before. The Accused person had supplied her with scrap metal and was her customer and on the fateful morning she spoke to the Accused before the Accused stabbed the day had also broken and there was sufficient light".**

We are of the respectful view that this was not a case of identification but recognition. The Complainant had seen her assailants before after hearing their footsteps and before they attacked her. As observed by the learned trial magistrate and conceded by the appellant in his defence the two knew each other before.

In his defence the appellant alleged that there existed a grudge between him and the Complainant over business rivalry. During cross-examination no questions on such rivalry were put on the Complainant and we surmise that this was an afterthought. Moreover, the Complainant was an employee of PW 2 Samuel Mwangi Maina and its doubtful whether there would be business rivalry between an employee and a customer.

We find no good reason to interfere with the findings of the learned trial magistrate. The Conviction was safe and the Sentence legal. The appeal has no merit and its disallowed.

Judgment delivered dated and signed in open Court this **13th** day of **February, 2014.**

…..... **….....**

M. ODERO **M. MUYA**

JUDGE **JUDGE**

In the presence of:-

Learned State Counsel Miss Mwaura

Appellant present

Court Clerk Musundi