



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 418 & 419 OF 2008**

J M.. N .....1ST APPELLANT

R. M. K .....2<sup>ND</sup> APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From original conviction and sentence in criminal case Number 211 of 2008 in the Chief Magistrate's Court at Kibera – Mr. Maundu (SRM) on 27<sup>th</sup> November 2008)*

**JUDGMENT**

1. The appellants, **J.M. N** and **R.M.K** were tried and convicted by Mr. Maundu, Senior Resident Magistrate (as he then was) at Kibera Chief Magistrate's court for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**.
2. The particulars of the offence were that on the 5<sup>th</sup> day of February 2008 at Naivasha market, in Naivasha District within Rift Valley Province, jointly with others not before the court they robbed A W N Kshs.7,500/= and at or immediately at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said A W N in count 1,
3. They also faced a charge of attempted rape contrary to **Section 4** of the **Sexual Offences Act No. 3 of 2006** in count II, and in the alternative committing an indecent act contrary to **Section 11(6)** of the same Act. The learned trial magistrate convicted both appellants in count 1 and sentenced each of them to suffer death as by law prescribed. He acquitted them on the second count.
4. Both appellants filed appeals based on similar grounds. They argued that the prosecution case was not proved to the required standard, further that their rights under **Section 77(2)** of the repealed **Constitution** were contravened, hence the trial was unfair and irregular, and that their respective defence statements were dismissed without plausible reason.
5. Miss Maina, the learned state counsel opposed the appeal on behalf of the state. She contended that sufficient evidence had been adduced to support both conviction and sentence and urged us to dismiss the appeal.
6. We have analysed and re-evaluated the evidence afresh in line with **Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR.** In the said case the court of Appeal held that:

***“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.***

7. Evidence was given that **PW1**, the complainant, who was a potato trader was unloading her potatoes at Naivasha market on 5<sup>th</sup> February 2008 at about 3.30 p.m., when four porters approached her. She knew two of them by name as Kamau and Munene, who are the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively, but knew the other two only by appearance. They demanded to know why she was wearing a pair of trousers and proceeded to unzip and pull it down. They touched her vagina and buttocks and also took Kshs.7500/= which was in one of the trouser pockets.
8. They ran off to share the money amongst themselves. The complainant reported the incident at Naivasha Police Station. She returned with police officers who found and arrested the two appellants at the market. They were taken to the Police Station and subsequently charged with these offences.
9. Both appellants denied the offence in their unsworn defence and called no witnesses. They both testified that on the material date, the complainant arrived at Naivasha market in a motor vehicle that off-loaded her wares by the road side. The first appellant went on to state that the complainant called him and the 2<sup>nd</sup> appellant to carry her goods to her stall. They obliged but instead of paying them the agreed sum of Kshs.400/= for their services when the work was done, she went away and returned with police officers who arrested them.
10. The second appellant testified that it was he and two other persons who were given the work of ferrying the complainant’s goods to her place of business. In his testimony he stated that the 1<sup>st</sup> appellant was not with them when they discharged these services and the sum of money agreed for the services was Kshs.200/= and not Kshs.400/=. He also testified that the complainant fetched the police to arrest them because they insisted on being paid on the spot, while she wanted to pay them the following day.
11. On the facts of this case, the question of identification is not in issue. The offence occurred in broad day light and involved persons well known to each other. **PW1** is a trader at the Naivasha market and averred that she had known the two appellants for a period of six years, during which time they offered services as porters to her and other traders. During cross-examination by the 2<sup>nd</sup> appellant, the court record shows that **PW1** was referred to her first report to the police and it reflected that she had stated that she knew two of her assailants by name and the other two by appearance.
12. **PW2**, a sister to **PW1** was present when the offence was committed and gave testimony that lent credence to that of the complainant in so far as she confirmed what was done to the complainant and by whom. She too knew the appellants before the day of the ignoble deed. **PW3** was one of the police officers who accompanied **PW1** to the market after she made her report at the police station. He confirmed that **PW1** herself identified the two appellants for purposes of arrest.
13. The appellants themselves admitted that they were known to the complainant and had offered portage services to her for many years at the Naivasha market. They also placed themselves at the scene of the offence on the material date and time. It is noted that issues raised at the defence stage about money owed to the appellants by **PW1** for services rendered to her, or a sack of potatoes taken from her by the 1<sup>st</sup> appellant to pay himself were never put to her in cross-examination.
14. The question for determination is whether the offence of robbery contrary to **section 296(2)** of the **Penal Code** had been proved to the required standard against the appellants. For better understanding of the offence under this section we referred to the case of **JOHANNA NDUNGU**

**VS REPUBLIC Cr. App No. 116 of 2005 (unreported)** which sets out vividly what constitutes robbery under **Section 295** of the **Penal Code** and under what circumstances such robbery may progress to become robbery under **Section 296(2)** of the **Penal Code**.

**“In order to appreciate properly as to what acts constitute an offence under Section (296) (2), one must consider the sub-section in conjunction with section 295 of the Penal Code.**

**The essential ingredients of robbery under Section 295 are use of or thereof to use actual violence against any person or property and at or immediately before or immediately after to further in any manner the act of stealing. Therefore the existence of the aforescribed ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in Section 296(2) which we give below and any one of which if proved will constitute the offence under the sub-section.**

- 1. If the offender is armed with any dangerous or offensive weapon or instrument, or**
  - 2. If he is in the company with one or more other person or persons, or**
  - 3. If at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person.”**
15. Analysing the first set of circumstances the essential ingredient, apart from the ingredient including the use or threat to use actual violence constituting the offence of robbery, is the fact of being armed with a dangerous or offensive weapon at the time. No other fact need to be proven. Thus if the facts show that at the time of commission of the offence of robbery as defined in **Section 295** of the **Penal Code**, the offender was armed in the manner aforescribed then he is guilty of the offence under **sub-section(2)**.
16. In the same manner in the second set of circumstances, if it is shown and accepted by the court that at the time of robbery the offender is in company with one or more person or persons then the offence under **sub-section (2)** is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two sets of circumstances.
17. With regard to the third set of circumstances, there is no mention of the offender being armed or being in the company of others. The court is not required to look for either of these two ingredients. If the court finds that at or immediately before or immediately after the time of the robbery the offender wounded, beat, struck or used any other violence to the victim or any person (not necessarily the complainant or victim of theft) then it must find the offence under sub-section(2) proved and convict accordingly.
18. In the present case, the two appellants were in the company of two others when they set upon the complainant and although there is no evidence that they were armed, they used violence to undress her and to take the money from her. This satisfies the second and third set of circumstances under **Section 296(2)** of the **Penal Code**.
19. **PW1** in his submissions wondered how the appellants, who were persons known to **PW1** for a long time as her porters could have attacked her and robbed her in broad day light without fear of reprisal from the market mob. He submitted that if indeed a robbery occurred in this circumstances there would have been many witnesses from the market. He averred that no sane person could rob another in a market where he was known and continue to work there. In his opinion the case was influenced from elsewhere by one P C Musyoka whom **PW1** called while at the scene of the offence. The 2<sup>nd</sup> appellant on the other hand, questioned why members of the public would stone the police who were trying to arrest them if they had robbed and stripped **PW1**.
20. We have not been called upon to make a finding as to the mental status of the appellants and,

although there is no accounting for the actions of human beings, it would lie in the domain of a psychiatrist, not upon us, to make a finding as to their sanity or insanity. It was the evidence of **PW2** that many people and especially the market women, witnessed the attack on **PW1** but were afraid to intervene. Her evidence found support from **PW3** who testified that at the time of arrest, the appellants resisted arrest and were very violent, and that there were people who pelted the police with stones as they struggled to subdue and arrest the appellants. He also testified that this was a time when young men in Naivasha had issued a proclamation that no woman should wear trousers. The foregoing, in our view, could explain why nobody intervened to save **PW1**, or came forward to testify.

21. The second appellant submitted on the violation of their rights to fair trial under **Section 198** of the **Criminal Procedure Code** and **Section 77(2) (b)** of the repealed Constitution. He argued that the record did not show the language used at the time of plea taking and during the trial and further, that no interpretation was offered for the appellants who did not understand the English language in which the proceedings were conducted.

22. **Section 198** of the **Criminal Procedure Code** provides *inter alia* as follows:

**“(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.**

**“(2) If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.”**

Section 77(2) (b) (f) of the repealed Constitution provided as follows:

**“Every person who is charged with a criminal offence shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged; and**

**Shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge.”**

23. We referred to the decision of the Court of Appeal in the case of **JOHN KAMAU GITHUKU AND ANOR VS. REPUBLIC CRIMINAL APPEAL NO. 229 OF 2008** in which their lordships held that since the appellant participated in the proceedings after the plea was taken, there was no prejudice suffered on his part. We do note that in the instant case the record shows that at the time of taking plea, English/Kiswahili interpretation was employed. The appellants did not raise any issue then. As the proceedings progressed they cross examined the prosecution witnesses and at the end offered mitigation.

24. Having given careful consideration to all the circumstances of this case, we are satisfied that the learned trial Magistrate properly convicted the two appellants, and that the convictions were based on sound evidence.

25. We confirm the conviction and sentence imposed on the appellants by the trial Magistrate and dismiss the appeals.

It is so ordered.

**SIGNED DATED and DELIVERED** in open court this **2<sup>nd</sup>** day of **July 2013**.

**A.MBOGHOLI MSAGHA**

**L. A. ACHODE**

**JUDGE**

**JUDGE**