



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 285 OF 2008

PETER KARIUKI MBURUAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 411 of 2008 in the Chief Magistrate's Court at Kiambu – D. Mulekyo (SRM) on 06/08/2008)

JUDGEMENT

1. The appellant filed an appeal following his conviction by Mrs. D. Mulekyo, Senior Resident Magistrate (as she then was), for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in **Nairobi CM Cr. Case no. 411 of 2008**. He was sentenced to death in accordance with the law.
2. It had been alleged that on the 20th day of January 2008, at Kagondo village in Kiambu District of the Central Province, jointly with another not before court, being armed with offensive weapons namely a panga, they robbed Esther Njoki Ndungu of one television make sonny 14 inch, one D.V.D make Philips and cash Kshs.12,340/= all valued at Kshs.29,340/=, and at, immediately before or immediately after the time of such robbery they threatened to use actual violence against the said Esther Njoki Ndung'u.
3. In his memorandum of appeal he argued that the prosecution case was based on the evidence of a single identifying witness, and that the evidence as a whole was contradictory. Further that there existed a grudge between him and the complainant, and that credible independent witnesses were not summoned to testify. He also averred that the case was not proved beyond reasonable doubt, and that his defence was not considered adequately.
4. The state did not respond even when allowed a further fourteen days to prepare their submissions.
5. This being the appellant's first appeal we reminded ourselves that the duty of the first appellate court is not merely to scrutinize the evidence on record to see if there was some evidence to support the lower court's findings and conclusions, but to reassess the evidence and draw our own conclusions. See - **Kiilu and Anor v Republic [2005] 1 KLR pg 174**, in which the learned Judges of Appeal, Tunoi, Waki and Onyango Otieno JJA, held *inter alia* that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts' own

decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.”

6. On the grounds that the prosecution case was based on the evidence of a single identifying witness, and that the evidence as a whole was contradictory and that credible independent witnesses were not summoned to testify, we have analysed the evidence and find that in the circumstances of this case identification was not in issue. Indeed the evidence of identification came from the complainant who was alone at the time of the robbery. We however note that there had existed a tenancy relationship between the complainant and the appellant for ten years upto the period immediately preceding the robbery. **PW1** the complainant was the landlady while the appellant was the tenant.
7. **PW1** testified that she opened the door on the evening in question because she peeped through the window and saw the appellant who was commonly known as “Baba Imani” but whose name was Kariuki. She concluded that he had come to pay up the two months’ rent arrears, and the Kshs.10,000/- soft loan that he owed her. She prepared supper for the appellant and his companion and also made them a cup of tea as they chatted.
8. It was after the two had dined to their fill and settled back to watch television that they sprung up and revealed their nefarious mission. Wielding a machete, they ordered **PW1** to produce all the money she had in the house failing which they would take off her head. She led them to the bedroom where they took Kshs.12,000/=. They took another Kshs.340/= and her mobile phone make Nokia from her hand bag. They also took her T.V. and D.V.D player. They put a gunny bag over her head and tied it around her neck using a T-shirt before they disappeared.
9. Two months later **PW1**’s son traced the appellant at a posho mill in Mindo and called the police who arrested him and recovered the T.V. and D.V.D player from his house. **PW2** the arresting officer who had already received the report of the robbery from **PW1**, **PW3** the son to **PW1** and **PW4** the man who located the appellant, all confirmed that the appellant led the police to his house upon arrest, and that the D.V.D player and T.V. were recovered there from. **PW3** was looking for the appellant because **PW1**, his mother had reported the robbery to him. He too knew the appellant before this incident.
10. The appellant in his unsworn testimony denied the offence and stated that he was arrested on allegations that he had refused to repay money that he owed a certain woman. He was taken to the police station and charged with an offence which he continues to deny. The proceedings show that the trial magistrate did consider the reasons the appellant advanced for his arrest, and found them to be “far fetched and unbelievable”.
11. We note that the issue of a pre-existing grudge between the appellant and **PW1** as stated in one of his grounds of appeal did not arise in the cross-examination of **PW1** or in the appellant’s own defence. **PW1** served supper to the appellant and his companion, and from his line of cross-examination of **PW1**, the appellant seemed to suggest that they had eaten from one plate with **PW1** and that she had asked him to sleep in her house that night which he refused. We were of the humble view that these were not the interactions of people who bore each other a grudge. After duly cautioning ourselves on the dangers inherent in basing a conviction on the evidence of a lone witness in line with **Ogeto v Republic [2004] 2KLR pg 15** and **Abdalla Bin Wendo v Republic [1953] 20 EACA 166 at 168** we analysed the testimonies of all the witnesses including the appellant and are of the same mind as the trial magistrate that it was the evidence of the prosecution which was credible.
12. In order to determine whether the offence of robbery contrary to **Section 296(2)** of the **Penal Code** had been proved to the required standard, we referred to the case of **JOHANNA NDUNGU VS REPUBLIC Cr. App No. 116 of 2005 (unreported)**, which sets out in detail 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** as hereunder:

“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 threat or 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.”**

13. **PW1**'s evidence was that the appellant's companion wielded a panga and both men demanded that she gives them all the money she had in the house. They threatened to relieve her of her head if she refused to do so. They did take Kshs.12,000/= from under her pillow in her bedroom, Kshs.340/= and her mobile phone from her hand bag, and her T.V., D.V.D player, remote controls and cassettes from the living room. This scenario had all the ingredients of robbery under **Section 296(2)** of the **Penal Code**.

14. Having carefully re-assessed the evidence and all the circumstances of this case, we are satisfied that the learned Senior Resident Magistrate properly convicted the appellant, based on sound evidence.

15. We confirm the conviction and sentence imposed on the appellant by the trial Magistrate and dismiss the appeal.

It is so ordered

SIGNED DATED and DELIVERED in open court this **1st** day of **July 2013**.

A. MBOGHOLI MSAGHA

L. A. ACHODE

JUDGE

JUDGE