



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**CRIMINAL APPEAL 188 OF 2011**

**BETWEEN**

**DAVID PARSEEN YIALE .....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Mombasa (Ojwang & Odero, JJ) dated 7<sup>th</sup> June, 2011*

**in**

**H.C.Cr.A. No. 136 of 2008)**

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**JUDGMENT OF THE COURT**

The appellant was convicted after trial by Resident Magistrate Mombasa for robbery with violence contrary to **section 296(2)** of the Penal Code and sentenced to death.

The particulars of the offence stated that on 21<sup>st</sup> June, 2006 at Petrol Oil Company the appellant while armed with an offensive weapon, namely, a hammer robbed **Alex Ole Teipan** of one mobile phone make Nokia 6310, one wallet containing national identity card, credit card, Kshs.5,000/= and Ushs.60,000 all valued Kshs.35,000/= and at or immediately before or immediately after the time of such robbery used violence to the said Alex Ole Teipan.

The prosecution called nine witnesses at the trial. The complainant Alex Ole Teipan described the encounter with the appellant on two occasions - 16<sup>th</sup> June, 2006 and 21<sup>st</sup> June, 2006.

On the first occasion, the appellant went to the complainant's office and introduced himself saying that he was from Narok and that William Yiale was his uncle. The complainant who comes from Narok knew William Yiale who was a former councillor. The appellant told the complainant that he and his brother had brought timber in a lorry to sell at Malindi and that the lorry broke down at Mariakani. He asked the complainant to lend him Kshs.2,000/= for repairs and for their own maintenance. The complainant lent the money to him and the appellant wrote down his particulars in a piece of paper which he left to the complainant. Thereafter the appellant left promising to refund the money within 2-3 days.

On the second occasion which was on 21<sup>st</sup> June, 2006, the appellant called the complainant on cell phone and later went to the complainant's office. The appellant told complainant that he had delivered

timber to a businessman in Malindi and he would be paid on the following day after which he would refund the money he had borrowed. After chatting with the complainant for a while, the appellant stood up, requested for a piece of paper to write a message and when the complainant turned to pick the paper, the appellant hit him several times with a hammer on the head. The complainant bled profusely. As the complainant was calling for help the appellant ran away. He was rushed to Mombasa Hospital where he was admitted. He was later taken to Nairobi for further treatment and was admitted at Karen Hospital for three weeks. He was later examined by Dr. Lawrence Ngone four months later. According to evidence of Dr. Ngone the X-Ray showed that the complainant sustained three depressed fractures of the skull. The complainant also developed paralysis of the left side of the body. The degree of injury was assessed as maim.

The appellant was arrested by **Pc. Samuel Wahome** on 30<sup>th</sup> June, 2006 outside Intercontinental Hotel in Nairobi on information.

At trial the appellant explained the circumstances under which he was arrested and denied the charge.

The trial magistrate evaluated the evidence and made findings thus:

*“It is my conclusion that on the two occasions he went to the complainant’s office, and on the latter date 21<sup>st</sup> June 2006 he violently robbed him of his items. No recovery was made but am satisfied and have no reason to doubt that indeed PW 1 lost the items stated in the robbery”.*

The appellant appealed to the High Court on the grounds, among other things, that, there was opportunity for others to steal and that the violence and the loss of property were not connected.

In his written submissions in the High Court the appellant submitted, among other things, in essence, that the prosecution did not prove the theft of the properties stated in the charge sheet.

The High Court considered the elements of robbery with violence and concluded:-

*“The appellant so attacked the complainant in furtherance of his intent to rob the complainant Indeed by so attacking and disabling the complainant the appellant was able to successfully rob him of his phone and cash. We are satisfied that this incident amounted to robbery with violence as envisaged by Section 296(2) of the Penal Code”*

The appellant now appeals on the grounds, in essence, that, the theft of the mobile phone and other goods specified in the charge sheet which is an essential element of the offence of robbery with violence was not proved. The appellant now admits that he assaulted the complainant but denies that he stole the properties stated in the charge sheet. **Mr. Bryant**, learned counsel for the appellant, submitted both in the oral and written submissions that the offence disclosed by the evidence was assault and not robbery and that the initial report to the police was assault. Mr. Bryant particularly referred to the evidence of *Hassan Mohamed (PW2)*, **Juma Hussein (PW4)** who both said that they found the complainant talking on the phone after the appellant had fled. Mr. Bryant also referred to the evidence of witnesses which show that the initial report to police was either of assault or attempted murder.

On his part **Mr. Muteti**, the learned Principal State Counsel submitted that as complainant was hospitalized the witnesses could only have reported what they could observe, namely, that the complainant had been assaulted.

The report of assault or attempted murder was not made to the police by complainant. Rather, the reports were made by colleagues of complainant when he was already admitted in hospital.

Indeed, **Cpl. James Soita** the investigating officer testified that after the report of assault was made, he went to see the complainant at Mombasa Hospital but he could not be allowed to see him as he was in the Intensive Care Unit and thereafter the complainant was airlifted to Karen Hospital. According to the evidence of the complainant, his statement was recorded on 4<sup>th</sup> July, 2006 while he was still admitted in

hospital which statement was transmitted to the investigating officer Cpl. James Soita. The complainant testified that even before he was released from hospital, he had realized that he had been robbed of properties specified in the charge sheet. It is apparent that in his statement recorded on 4<sup>th</sup> July, 2006 he complained that he was robbed. The evidence of **IP. Barasa** (PW7) who conducted an identification parade on 5<sup>th</sup> July, 2006 shows that by that date a complaint of robbery had been made against the appellant.

It is clear that the complainant made a report of robbery at the earliest opportunity in hospital. The complainant did not make two inconsistent reports to police.

The appellant now says that he assaulted the complainant because the complainant had dated his girlfriend. That is additional evidence which cannot be received by this Court under **Rule 29(1)(b)** of the Court of Appeal Rules as this is not an appeal from the decision of the High Court in exercise of its original jurisdiction. That explanation is an afterthought.

There are concurrent findings of fact by the two courts below that the appellant indeed robbed the complainant of the properties stated in the charge sheet. This Court cannot interfere with the concurrent findings unless they were not supported by evidence.

As we have shown above, there was consistent and credible evidence of the complainant that he was robbed. He described the circumstances under which he met the appellant on the first and second occasion and the two courts below believed his entire evidence. He did not know the appellant before. The appellant borrowed money from the complainant on the first occasion. On the second occasion the appellant told the complainant that he had not been paid for the goods he had allegedly sold at Malindi thereby indicating that the appellant had no money on the second occasion.

By **section 119** of the Evidence Act, a court may presume the existence of any fact which it thinks likely to have happened having regard to, among other things, the common cause of natural events, human conduct in their relation to the facts of a particular case. The concurrent findings that the appellant robbed the complainant was not only supported by the evidence of the complainant but also by the presumption that, in the circumstances of this case, and as the High Court correctly found, the assault was in furtherance of robbery.

For the foregoing reasons we are satisfied that the conviction for robbery was warranted.

In view of that finding, it is not necessary to consider the appellant's supplementary affidavit which was intended to be a mitigation in the event that the conviction for robbery was altered to a conviction for assault, which we have not done.

In the result the appeal is dismissed in its entirety.

***Dated and delivered at Mombasa this 24<sup>th</sup> day of January, 2013***

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**