IN THE COURT OF APPEAL

AT NAIROBI

CORAM: O'KUBASU, GITHINJI & NYAMU, JJ.A.

CRIMINAL APPEAL NO. 139 OF 2007

BETWEEN

PIUS OTIANGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ) dated 16th May, 2006

in

HCCRA NOs. 934 & 935 OF 2003)

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JUDGMENT OF THE COURT

The appellant, ***PIUS OTIANGA*** and his co-accused ***MAXWELL MUSALIA*** were arraigned before the Chief Magistrate's court at Kibera in Criminal Case No. 1521 of 2003 charged with two count of robbery with violence contrary to ***Section 296 (2) of the Penal Code***. The particulars of the offence in the first count were as follows:

"1. PIUS OTANGA 2. MAXWEL MUSALIA: On the 12th day of February, 2003 at Kangemi village in Nairobi within the Nairobi Area, jointly with others not before court, being armed with dangerous weapons namely pistols, knives and pangas, robbed MACKNUS INGOSI of a mobile phone – Motorola and cash Kshs.2,000/= all valued at Kshs.8,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said MACKNUS INGOSI."

As regards the second count, the particulars of the offence read as follows:

"1. PIUS OTANGA 2. MAXWEL MUSALIA: On the 12th day of February, 2003 at Kangemi village in Nairobi within the Nairobi Area, jointly with others not before court, being armed with dangerous weapons namely pistols, knives and pangas, robbed FRANCIS IMASIRA of his mobile phone make Motorola T1090, a jacket and a purse containing cash Kshs.2,000/= all valued at Kshs.10,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said

FRANCIS IMASIRA. ”

The trial commenced on 29th April, 2003 before the learned Principal Magistrate (Ms Mwangi) when the two complainants Macknus Ingosi (PW 1) and Francis Imasira (PW 2) testified together with a police officer PC Peter Ndeti (PW 3) who arrested the appellant.
The learned trial magistrate considered the evidence tendered by the prosecution and the defence by each accused person and in the end came to the conclusion that the prosecution had proved the case against the two on both counts. She convicted them and sentenced each of them to death as prescribed by the law. In the course of her judgment delivered on 30th September, 2003, the learned trial magistrate said:

“The court has gone through the evidence on record and taken note that PW 1 and PW 2 said they were attacked at a place where there was light and so they could see the accused persons very well. They screamed and PW 1 held on the 1st accused. They were able to arrest him at the spot.

The witnesses (PW 1 & PW 2) never knew how the 2nd accused was arrested but PW 2 said he was the one holding a panga against him during the robbery. The police said that the 1st accused offered to lead them to the others and after arresting the 2nd accused they tried to get to the others but was shot at and even two police officers were shot. They forsake the endeavour to pursue the others.

The court observes that the shooting evidence is also confirmed by the accused in their Defence who said they were shot and a person killed.

The court has no doubt that the accused persons were properly identified by the complainants although they both denied the offence. I do find that the offence was proofed (sic) beyond any reasonable doubt and I thus convict the two of the two counts as charged. The two were armed and the 2nd accused was found with a panga upon arrest. I convict them accordingly.”

Being aggrieved by both conviction and sentence the appellant and his co-accused filed an appeal in the High Court where the appellant was the 1st Appellant. The learned Judges of the superior court (Lesiit & Makhandia, JJ) in their judgment dated and delivered at Nairobi on 16th May, 2006, dismissed the appellant’s appeal by stating *inter alia*:

“In our consideration of the evidence against the 1st Appellant, it was watertight since he was arrested at the locus in quo of the offence. PW 1and PW 2 said there was light at the scene from a nearby church. That light was sufficient for the two witnesses to see the number of people who stopped them and enable them apprehend one. We have no doubt that even though the light at the scene was not described, that since the 1st Appellant never left the scene from the time he and his co-accomplices approached the Complainants to the time he was handed over to PW 3, there is no possibility of error that he was not one of those who stole the Complainant’s things. The evidence of identification has to be considered together with the evidence of ones (sic) on cross-examination of PW 1 and PW 2. The Appellant did not suggest to them that he was an innocent bystander or passerby or that he was arrested in circumstances as were explained by him in his defence.

The 1st Appellant’s defence that police stopped him as he went home and demanded he shows who his accomplices in crime were was incredible in the circumstances. PW 1 and PW 2 and not police officers first arrested the 1st Appellant and there was no connection between PW 1 and PW 2 on one hand and Police Officers including PW 3. PW 3 were on mobile patrol duties and they were on duty when they came across the 1st Appellant under the arrest of PW 1, PW 2 and members of public. The learned trial magistrate was right to dismiss the 1st Appellant’s defence.

The evidence against the 1st Appellant was watertight. The 1st Appellant’s contention that the evidence adduced by the prosecution was inadequate to justify a conviction that the essential witnesses were not called and that his defence was not given due consideration have no basis and we dismiss these grounds of appeal.”

The learned Judges of the superior court concluded their judgment thus:

"The upshot of this appeal is that the appeal against the 1st Appellant in count 1 is allowed, conviction quashed and sentence set aside. The Appeal by 2nd Appellant in counts 1 and 2 is allowed, convictions quashed and sentence set aside. The appeal by 1st Appellant against conviction is upheld and sentence confirmed. The 2nd Appellant should be set at liberty unless he is otherwise lawfully held."

It is the foregoing that has given rise to this appeal to this Court. The appeal came up for hearing on 14th February, 2011, when Mr A O Oyalo appeared for the appellant while Mr V S Monda (Senior State Counsel) appeared for the State.
Although the supplementary Memorandum of Appeal contained four grounds of appeal Mr Oyalo chose to argue all the four grounds together but his main complaint was that the charge was defective in that the appellant was charged under ***Section 296 (2) of the Penal Code*** which is the punishment section. He went on to argue that the amount stated in the charge was different from the evidence of the complainant (PW 2). For all these reasons, so argued, Mr Oyalo, the trial was a nullity.

The second issue taken up by Mr Oyalo was that the rights of the appellant was violated in that he was not informed of his right to have an advocate as per ***Article 50 (h) of the Constitution***.

On his part, Mr Monda asked us to dismiss the appeal since, in his view, the charge was not defective as the ingredients of the offence were satisfied. Mr Monda pointed out that the judges of the superior court had re-evaluated the evidence and came to the correct decision.
We have considered the rival submissions in this appeal and we wish to deal with the question of the Constitution as regards the right of an accused person to be assigned an advocate by the State. We do not think the issue arises in this appeal since the trial of the appellant commenced on 29th April, 2003 and the judgment was delivered on 30th September, 2003. That was well before the new Constitution which gives accused persons right to counsel as contended, was promulgated. We, therefore, find no merit in that ground. We wish to say no more on that ground.

There was the issue of the charge being defective in that the appellant was charged under what Mr Oyalo called the punishment section. The appellant was charged under ***section 296 (2) of the Penal Code***. Mr Oyalo came up with a novel submission that ***section 296 (2) of the Penal Code*** is the punishment section and so it was wrong to charge the appellant under that section. This Court dealt with a similar situation in ***NGOME PATRICK & ANOTHER V REPUBLIC Criminal Appeal No 139 of 2005 (Unreported)*** in which it was stated:

"On the outset we wish to state that charging a person with robbery with violence contrary to Section 296 (2) of the Penal Code is an extremely serious matter. A person charged under section faces a mandatory death sentence upon conviction. What acts constitute an offence under section 296 (2) of the Penal Code? This Court considered that question in JOHANA NDUNGU VS REPUBLIC – Criminal Appeal No. 116 of 1995 (unreported) where it stated:-

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 ingredient of robbery under section 295 in use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described 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 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.

Analysing the first set of circumstances the essential ingredient apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of the robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. 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 afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.

In the same manner in the second set of circumstances if it is shown and accepted by 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 set of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly."

We think the above answers Mr Oyalo's complaint and we have nothing to add.
In this judgment we have reproduced portions of the judgments of the two courts below which show that the appellant was caught red handed and that the evidence against him was watertight. In our view, the appellant's conviction was inevitable. We are satisfied that he was convicted on very sound evidence and that the sentence imposed was lawful.

In view of the foregoing, we find no merit in this appeal which we order that it be dismissed in its entirety. It is so ordered.

Dated and delivered at Nairobi this 18th day of March, 2011.

E. O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR