



IN THE COURT OF APPEAL
AT NAKURU

(CORAM: O'KUBASU, AGANYANYA & NYAMU, J.J.A.)

CRIMINAL APPEAL NO. 138 OF 2009

BETWEEN

SIMON KIPKORIR CHANGORIK APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from a judgment of the High Court of Kenya at Nakuru (Koome & Mugo, JJ.) dated 14th May, 2009
in*

H.C.Cr.A. No. 35 of 2007)

JUDGMENT OF THE COURT

This is a second appeal after the first one was dismissed by the superior court (*Koome & Mugo, JJ.*) on 14th May, 2009. **Simon Kipkorir Changorik**, the appellant, was, on 20th February, 2006 charged at the Senior Resident Magistrate's Court at Molo with the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code. The particulars of the charge were that on 20th day of November, 2005 at Kiploky village in Kericho District of the Rift Valley Province while armed with a dangerous weapon, namely, a piece of wood robbed **Katherine Chesiele Towett**(PW1) of Kshs.200/= and at or immediately before or immediately after the time of such robbery, used actual violence to the said Katherine Chesiele Towett. The charge was read to the appellant on 20th February, 2005 which he denied and the case was heard between 21st September, 2006 and 29th December, 2006 when the State called 3 witnesses and the appellant gave sworn testimony in his defence.

PW1 was on 20th November, 2005 on her way home from Kiploky where she had been selling "kangumu". It was around 6.30 p.m. She met the appellant who pretended to greet her but instead held her hand and pulled her towards him, searched and removed Shs.200/= from her left dress pocket. When she protested, the appellant hit her on the left arm with the piece of wood and injured her. She then got a chance and ran home. The following day she reported the matter at Kuito farm and then to Londiani Police Station where she made her statement and was issued with a P3 form. She was then treated at Londiani Hospital. The name of the appellant was mentioned as the assailant. He was later arrested on 14th February, 2006 at his house by **Japheth Jumbo** (PW2) of the District Officer's Office at Londiani. PW2 took the appellant to Londiani Police Station.

Moses Kiprotich Ngetich (PW3) a clinical officer at Londiani Hospital examined PW1 on 24th November, 2005 for the injuries she had sustained as a result of the assault by the appellant. He found that the complainant's upper limb had been fractured on the radius which was revealed by an x-ray and a plaster was applied on it. According to him, the injury was caused by a blunt object. The P3 form reflected the injuries suffered by PW1.

When the appellant testified in his defence, he stated on oath that on the day in question, he was on duty at a hotel in Equator and it was when he came home for a 3 days off duty that he was arrested on 13th February, 2006 for this offence. He denied committing the offence.

In its judgment delivered on 1st February, 2007 the trial court (*Kirui, Ag. Resident Magistrate*) concluded, thus:

"I believe she told the truth and if the accused indeed went to Equator as he alleged then it was thereafter when he disappeared to avoid arrest.

I am therefore convinced beyond reasonable doubt he committed the offence as charged under section 296(2) of the Penal code as he was armed with a dangerous weapon and wounded the complainant immediately thereafter robbing to quell her resistance/pretest".

The learned magistrate then found the appellant guilty and convicted him for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. Upon that conviction the appellant was sentenced to death as provided by law. His appeal to the superior court was dismissed hence the present appeal before us. It is based on a home-made memorandum of appeal with 5 grounds of appeal as follows:

"1. THAT the appellate judges of the High Court erred in law to uphold both conviction and sentence while relying on the evidence of recognition yet failed to none (sic) that the prosecution at first did not identified (sic) the appellant by his three names.

2. THAT the appellate Judges erred in law when they relied on the single evidence of PW1 who is the complainant of this case whereof.

3. THAT the appellate Judges erred further in law when they rejected my plausible defence contrary to the provisions of section 169 (1) P.C. (sic).

4. THAT the learned appellate judges erred in law when they relied on evidence that the incidence (sic) took place before it was dark yet there is no side witness to prove this case.

5. THAT the learned appellate Judge erred in law when they failed to consider that the appellant was supposed to be informed that he had been put on defense (sic) contrary to the provisions of Section 211 (1) P.C. (sic)".

The appeal was heard by this Court on 19th April, 2011 when *Mr. Karanja*, learned counsel for the appellant submitted on it and stated that after the prosecution case was closed, there was no explanation by the Court as to the appellant's rights under **section 211** of the Criminal Procedure Code. Learned counsel wondered whether a robbery charge had been made out or whether or when the complainant reported a robbery offence to the police station. Counsel doubted whether the complainant was robbed at all and denied that a piece of wood the appellant carried was a dangerous weapon. He also submitted that the appellant was not in company of any other person, and therefore one of the ingredients in the offence of robbery with violence was lacking.

Mr. Nyakundi, State Counsel for the State opposed the appeal and stated that the appellant was known to PW1 and that conditions were conducive to a positive identification. That when a report was made to the police the next day, the appellant was named as the suspect. He also stated that after the

appellant was arrested, he sought forgiveness from PW1. Counsel submitted further that judging from the way the appellant opted to give evidence on oath in his defence, the provisions of **section 211** of the Criminal Procedure Code were complied with. According to his submissions, the offence of robbery with violence contrary to **section 296(2)** of the Penal Code was committed.

Being a second appeal, by dint of **section 361(1)** of the *Criminal Procedure Code*, only matters of law can be deliberated on. One of them was that of identification. This did not pose any difficulty to the two courts below. The trial court had this to say on the identification of the appellant:

“But the complainant knows him very well a fact he never disputed and she saw him clearly as the incident took place before it was dark. She knows him and his family and she even talked to him. She also gave a consistent and detailed account of what happened; saying the accused even offered to work for her in exchange for forgiveness. She also informed PW2 and PW3 she was attacked by someone known to her. She also appeared truthful in her testimony and has no reason to lie against the accused”.

This finding was confirmed by the superior court and it is our view that both the two courts below properly evaluated the evidence of the complainant regarding the identification of the appellant. Ground 1 of the memorandum of appeal fails.

The appellant also complained about the court’s reliance on the evidence of a single prosecution witness to convict him. By **section 143** of the Evidence Act (*Cap 80 Laws of Kenya*) it is provided that:

“143: No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact”.

In ***Roria vs. Republic [1967] E.A. 584***, the Court of Appeal for Eastern Africa (Sir. Clement De Lestang V.P.) stated:

“subject to well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness”.

See also ***Abdalla Bin Wendo & Another vs. Republic [1953] 20 EACA 166***. This is more so when the conditions favouring a positive identification are difficult, see ***Kinyanjui & 2 Others vs. Republic [1989] KLR 60***.

But in the case subject of this appeal, it was not dark. Though the trial magistrate did not specifically record that he had warned himself about the danger of relying on the testimony of a single witness, he stated that PW1 appeared to be truthful and believed that she told the court the truth about the identification of the appellant. In any case, it was not dark and PW1 knew the appellant. Ground 2 of the memorandum of appeal also fails.

As to whether the provisions of **section 211** of the Criminal Procedure Code were complied with it is our view that this was done and that is the reason why the appellant opted to give sworn evidence and also said he would call no witness. Ground 5 of the memorandum of appeal fails too.

However, we are not convinced in the circumstances of this case that an offence under **section 296(2)** of the Penal Code was committed. Although PW1 testified that she was robbed of Kshs.200/=, the appellant was not in company of any other person when this offence was committed, nor do we feel he was armed with an offensive weapon at the time. The wooden dropper the appellant was said to be in possession of was not recovered in the house he was found sleeping. In any case, we are not persuaded such wooden dropper is a dangerous or offensive weapon in strict sense of the word.

In view of the foregoing, and by virtue of **section 179(2)** of the Criminal Procedure Code, we quash the appellant’s conviction for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code and set aside the sentence of death imposed on him and substitute therefor a conviction for the

offence of unlawfully causing grievous harm contrary to **section 234** of the Penal Code and sentence him to 7 years imprisonment which term shall run from the date of his conviction. It is so ordered.

Dated and delivered at Nakuru this 9th day of June, 2011.

E. O. O’KUBASU

.....

JUDGE OF APPEAL

D. K. S. AGANYANYA

.....

JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR