



IN THE COURT OF APPEAL  
AT KISUMU

(CORAM: BOSIRE, WAKI & AGANYANYA, J.J.A)  
CRIMINAL APPEAL NO. 154 OF 2011

BETWEEN

ERICK ONYANGO MUSULA .....APPELLANT  
AND  
REPUBLIC .....RESPONDENT

*(An appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ.) dated 17<sup>th</sup> March, 2009*  
in

H.C.CR.A. NO. 41 OF 2008)

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JUDGMENT OF THE COURT

This is the appellant's second and probably last appeal, his first appeal having been dismissed by the High Court, (Mwera & Karanja, JJ) on 17<sup>th</sup> March, 2009. He was convicted by the Principal Magistrate (Mwaura) at Siaya Magistrate's Court for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code and sentenced to death. The particulars of the charge were that on the night of 27<sup>th</sup> and 28<sup>th</sup> day of November, 2007 at around 1.00 a.m. at Kogilo sub-location in Siaya District of the Nyanza Province, jointly with others not before the court robbed Mary Atieno Warom of cash Kshs.5,400/= and at or immediately before or immediately after the time of such robbery used or threatened to use actual violence to the said Mary Atieno Warom.

On the date in question **Mary Atieno Warom** (PW1) was asleep at her house. At about 1 am the appellant went there, knocked at her door and identified himself. PW1 knew him as her cousin. When she opened the door for him the appellant went in and said he wanted to buy some cigarettes. It would appear she was a dealer in such items. There was another person who came in the house together with the appellant. She recognized him as **Samson Omondi**, her neighbour. Omondi did not ask for anything but went straight to PW1's bedroom and started going through her properties. Omondi sought to take away PW1's basket which had some of her property but PW1 took it to withhold it from Omondi. It would appear there was a struggle over the basket between PW1, the appellant and Omondi. In the course thereof, the appellant attacked and kicked her on the stomach whereupon the basket fell down. The appellant and Omondi then grabbed the basket and Omondi ran out with it. There was Kshs.5,400/= in the basket which was taken away. The appellant remained behind. PW1 screamed and neighbours rushed to her house to help her. They found the appellant there and apprehended him. They found him with a panga tucked in his trousers. He was escorted to Nyangweso and Wagai Police Posts and then to Yala Police Station.

Amongst the neighbours who answered PW1's screams were **Joseph Otieno Onala** (PW2) and

**Michael Gomba Were** (PW3). They reached the scene after the appellant had already been apprehended by other members of the public.

**Cpl. Wilson Kinyondi** (PW4) was stationed at Yala Police Station at the time the offence was committed and he re-arrested the appellant from members of the public on 28<sup>th</sup> November, 2007.

When the appellant was placed on his defence he gave unsworn evidence in which he agreed he went to PW1's house to buy some cigarettes and though he was with Omondi, he did not know what the latter wanted. But he agreed that Omondi went straight to the bedroom where PW1 was sleeping and started beating her up, and took her said basket and escaped with it. He was arrested and taken to Wagai D.O's office, then to Akala Police Post and later to Yala Police Station where he was charged with the present offence.

In his judgment delivered on 24<sup>th</sup> April, 2008 the learned magistrate considered the evidence of PW1 and that of the appellant on the events of the night in question and had no difficulties in accepting the evidence of PW1 as true and rejecting that of the appellant as false. He convicted and sentenced the appellant as earlier stated.

The appellant was aggrieved by this decision and he appealed to the High Court which appeal was dismissed, hence the present appeal before us. It is based on a memorandum of appeal which had three grounds of appeal, as specified hereunder: -

1. *The learned and noble judges of the first appellate court abdicated their statutory duty of reanalyzing and re-evaluating the evidence on record afresh and thus it wrongly upheld the appellant's conviction.*
2. *The 1<sup>st</sup> appellate court wrongly upheld the appellant's conviction since the entire body of evidence adduced was extremely weak and not adequately sufficient to warrant a conviction.*
3. *The learned and noble judges of the superior court wrongly upheld the appellant's conviction since the essential ingredients of the offence of robbery with violence were never proved as required by law."*

The appeal was heard by this Court on 15<sup>th</sup> September, 2011 when Mr. Odhiambo learned counsel for the appellant submitted that the High Court did not analyse the evidence adduced and that if it had done so it would have come to a different decision. He stated further that it was Omondi who took the basket from the complainant's house and escaped with it, but, he, the appellant did not escape. He pointed out the appellant was drunk and he did not know what Omondi was up to. He stated further that if, indeed he had a sinister motive he would have used the knife against PW1, which he did not do.

Mr. Kiprop, State Counsel for the Republic opposed the appeal and submitted that the High Court analysed and summarised the evidence and found that the trial court was right in convicting the appellant and that all the elements of the offence under **section 296 (2)** were present, as the appellant was armed, was in company of Omondi and violence was meted out on PW1.

The case against the appellant was decided mainly on the evidence of PW1 and what he stated in his own defence. Both courts below found that PW1's evidence was credible and it pointed to the appellant as one of the robbers. The appellant was known to PW1, he was armed with a knife and in company of another person, also known, who escaped. The two used violence on PW1 and robbed her of Kshs.5,400/= which was in the basket. Clearly all the ingredients of the offence under **section 296 (2)** of the Penal Code were established.

It is worthy to note that when PW1 tried to pursue the other person, Omondi, to retrieve her basket from him, the appellant prevented her by kicking her in the stomach. In such circumstances he could not have convinced the lower court that he had not played any part in the robbery committed against PW1.

We do not agree with learned counsel for the appellant that the High Court failed to reevaluate and reassess the evidence of the trial court to come to its own independent decision, nor do we agree that the prosecution evidence was weak and incapable of founding a conviction against the appellant. The case was straight forward and the High Court properly dismissed the appellant's appeal. In the circumstances we find no merit in this appeal which we order to be dismissed. It is so ordered.

*Dated and delivered at Kisumu this 3<sup>rd</sup> day of November, 2011.*

**S.E.O. BOSIRE**

.....  
**JUDGE OF APPEAL**

**P.N. WAKI**

.....  
**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**