IN THE COURT OF APPEAL OF KENYA
AT NYERI
CRIMINAL APPEAL 227 OF 2008

BETWEEN

DAVID GITHUI WERU ……..….APPELLANT
AND
REPUBLIC ……..……RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated 1st October, 2008
in

H.C.CR.APPEAL NO. 174 OF 2006)
****

JUDGMENT OF THE COURT

The appellant, ***David Githui Weru***, was on 5th October, 2006 convicted by the Principal Magistrate's Court at Karatina (P.C. Tororey) of the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code and sentenced to death.

The evidence at the trial court was that on 22nd February, 2005 at about 10.30 p.m. ***Daniel Kingori Muchiri*** (PW1), the complainant, left the Impala Bar in Karatina. As he walked towards the taxi park, he was accosted by five people, who began to pound him with blows using their hands and *"weapons"*. He could not describe the nature of the weapons used immediately. As he struggled with one of the five men, he fell down and continued to hold this one person by his neck, and never let go of him. In the process he suffered injury to his left eye, leg, fingers, and back. He screamed for help, as he held on to this one person, until help arrived. The *"help"* was a police officer ***Pc. Francis Kimur*** (PW2), who was having dinner in a nearby restaurant, and who, upon hearing the screams, dashed out to the scene. He saw five men beating up the complainant, and he fired a shot in the air. As a result four men ran away, while the complainant held onto the fifth man, who was then apprehended by PW2, taken to the police station, and charged with the offence as aforesaid. That fifth person was the appellant, who, after a full trial was found guilty of the offence charged.

Following his conviction in the trial court, the appellant filed his first appeal in the superior court. On 1st October, 2008 the superior court (Kasango and Makhandia, JJ) dismissed the appeal after analyzing and evaluating the evidence adduced in the trial court, as is required of them as a first appellate court.

The appellant then filed this second and final appeal in this Court, and by *dint* of the provisions of ***section 361*** of the Criminal Procedure Code, we are enjoined to consider only matters of law and not matters of fact. The appellant filed three sets

of home-made memoranda of appeal, and on 22nd March, 2010 his learned counsel, Mr. S.K. Njuguna filed a supplementary memorandum of appeal. At the hearing of this appeal, Mr. Njuguna relied only on the supplementary memorandum of appeal and abandoned all other grounds filed previously. Essentially, he confined his arguments to three major grounds: that the charge as framed was defective on account of the omission to state therein that the weapons allegedly used by the appellant were dangerous or offensive; that the appellant had not understood the language used in the trial court, thus violating his constitutional rights; and that the entire case against the appellant was based on the evidence of only one witness, the complainant, without any corroboration, making the conviction unsafe.

Mr. Kaigai, learned Principal State Counsel, defended the conviction, arguing that the evidence against the appellant was water-tight, and that the charge, as framed, was not defective.

The issue relating to the language used at the trial has absolutely no substance and may quickly be disposed of. Even a casual look at the proceedings would indicate that the proceedings were conducted at all times in Kikuyu/Kiswahili/English, and that there was an interpreter throughout the proceedings. Similarly, the learned Principal Magistrate recorded the language used by each of the witnesses who testified including the language used by the appellant, which was Kikuyu. There was no complaint raised at any stage on this issue, and we think on our part, that it is an afterthought which we dismiss.

Mr. Njuguna's second complaint was that the charge was defective as there was omission of the words *"dangerous or offensive"*, and he relied on the case of **Juma v. R (2003) 2 EA 471** where it was held that where the prosecution is relying on the ingredient of being armed, it must be stated in the particulars of the charge that the weapon or instrument with which the appellant was armed was dangerous or offensive. The example given in that case was a knife and a stone which are not inherently dangerous or offensive items but the use to which they may be put would make all the difference.

In the present appeal, the prosecution did not intend to rely on the ingredient of the appellant being armed, but rather on the ingredient of being in the company of others, and the ingredient that the appellant wounded the complainant. Hence, the case of **Juma v. R** (supra) is distinguishable. All the same, we think it is appropriate that we reiterate what we have said severally on many occasions relating to the ingredients of the offence of robbery with violence under ***section 296 (2)*** of the Penal Code. In **Johana Ndungu v. R. (Criminal Appeal No. 116 of 1995 (UR)**, this Court said

> **"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 is 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, beat, strikes or uses any other violence to any person.**
>
> **Analyzing 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 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 sets 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 at or 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."

The particulars of the charge the subject of this appeal state that the appellant *"robbed"* the complainant. As we said in the case of **Moneni Ngumbo Mwangi v. R. (Cr. Appeal No. 141 of 2005 - UR)** the word *"robbed"* is a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property in order to obtain or retain stolen property (see also **Opoya v Uganda (1967)EA 752**.

In this appeal there was evidence that the appellant and four other men pounced on the complainant and rained blows upon him, both with their hands and with certain weapons which the complainant could not describe immediately at the time, and caused severe injury to him. As already stated there are three ingredients, any one of which is sufficient to constitute the offence of robbery with violence under ***section 296 (2)*** of the Penal Code. If the offender is armed with any dangerous or offensive weapon or instrument that would be sufficient to constitute the offence. Secondly, if one is in company with one or more other person or persons that would constitute the offence too. And lastly 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 that would be yet another set to constitute the offence. In the present appeal evidence was adduced and accepted by the two courts below that the appellant wounded the complainant in the process of attacking him. That falls in the second and third categories stated above. Clearly, the offence of robbery with violence was committed.

In view of the above, we are satisfied that the charge was not defective since the prosecution relied on the fact that the appellant was, at the time of the robbery, in company with one or more other persons, and also that the appellant wounded the complainant during or immediately after the robbery. We must therefore reject Mr. Njuguna's submission to the effect that the charge was defective.

Finally, with regard to Mr. Njuguna's submission that the case against the appellant was not proved beyond reasonable doubt, in that it depended only on one witness, the complainant, without any corroboration, we also reject that

argument. First, the complainant was not the only witness. Pc. Francis Kimuri, PW2, was the other eye-witness who, as it were, caught the appellant in the act. The complainant never in fact let go of the appellant until the time of his apprehension. We find it difficult to understand what further corroboration Mr. Njuguna expected us to find. Not unlike the two courts below, we have absolutely no doubt in our minds that the case against the appellant was proved beyond reasonable doubt.

Accordingly, and for reasons outlined, we find that there is no merit in this appeal and the same is dismissed.

Dated and delivered at Nyeri this 14th day of May, 2010.

E.O. O'KUBASU
……..
JUDGE OF APPEAL

P.N. WAKI
…….
JUDGE OF APPEAL

ALNASHIR VISRAM
…….
JUDGE OF APPEAL

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

DEPUTY REGISTRAR