



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 178 OF 2007

BETWEEN

OKWARO GEORGE WILLIAMAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ.) dated 27th April, 2006

in

H.C.Cr.A. No. 902 of 2003)

JUDGMENT OF THE COURT

Okwaro George William, the appellant was charged in the Chief Magistrate's Court at Makadara with the offence of robbery with violence contrary to the **section 296(2)** of the Penal Code. The particulars of the charge were that on 14th day of May, 2003 along Gaberone road in Nairobi within the Nairobi area jointly with others not before the court while armed with dangerous weapons namely knives robbed Benjamin Kibitok Koech of his wallet containing cash money Kshs.5,000/= and personal documents and at or immediately before or immediately after the time of such robbery used actual violence to the said Benjamin Kibitok Koech. The case was heard on 20th August, 2003 wherein **Benjamin Kibitok Koech** (PW2) testified that he works with the Department of Defence, Kenya Army and is stationed at Embakasi. He recalled that on 14th May, 2003 he had come from his rural home in Kapsabet and reached Nairobi at around 3.00 a.m. He alighted at the Ambassador Hotel stage and decided to look for a taxi to take him to his residence at Kahawa Barracks. As he stood at York House behind Ambassador Hotel to choose which taxi to hire, he was held by some people by the neck from behind and pressed to the ground. He noted he was struggling with three people, and when he fell down he felt one of them removing his wallet from the pocket. It had Kshs.5,000/=; an identity card, employment card, election card and Kenya Armed Forces Common Association Card. PW2 struggled with the robbers who then released him and ran away in different directions. However, PW2 saw one of the people and pursued him up to a place near Tusker house where police officers assisted to arrest him. It was the appellant who was arrested and when he was asked for the wallet he produced it and PW2 found all his money and

documents intact. The appellant was taken to Kamukunji Police Station where PW2 made his report. He stated that there was electric light along the streets the appellant was pursued and that he was able to see him clearly and never lost sight of him during the chase.

Pc. Lucas Ngige (PW3) supported PW2 in the pursuit and arrest of the appellant. He stated on oath that on 14th May, 2003 at around 4.00 a.m. he was on patrol duties on Gabarone road with Police Constables *Mongare, Oliech, Muriuki* and *Sheikh* when they heard a man calling for help on Mfangano Street near Nyanza house. PW3 and his colleagues went towards that direction and when they got to Luthuli road they saw two men running; one was pursuing the other. PW3 testified that he ran faster than PW2 and went ahead and arrested the appellant. It was then that PW2 arrived at the scene immediately and reported to PW3 and his colleagues that he had been robbed by three people of a wallet which had money, personal documents and a mobile phone. He pointed out the appellant as one of them. According to PW3 the appellant was searched and the wallet was found under his underpants near his private parts. The wallet had the Kshs.5,000/= and personal documents belonging to PW2. The appellant was then taken to the police station where the wallet and the money were kept.

The appellant denied the offence in sworn testimony and said he was a hawker in the city centre on Ronald Ngala Street. On the night in question he went to draw water in order to make coffee for his customers and when he came back he found a man talking to his wife *Grace Wanjiku* at the place he had left her. When he asked Wanjiku why she was talking to the man, the man and the appellant started an argument out of which a fight ensued. It is not clear from the record who of the combatants overpowered the other but the appellant started running away. The appellant ran after him screaming and this is why he was arrested. According to him this charge was fabricated against him by PW2 and PW3.

The Magistrate who heard the appellant's case (*Kimingi P.M.*) wrote and delivered his judgment on 26th September, 2003 in which she stated in part:-

“The court found that PW2’s evidence is corroborated by that of PW3 who knew neither the accused nor the complainant before he found the complainant running after the accused as he (complainant) called for help. PW3 confirmed that he recovered complainant’s wallet and money and personal documents from the accused after he arrested the accused. The court has no reason to doubt the sincerity of PW3 to be an independent witness of truth who was involved in the chase in the course of his duty as a police officer on duty at the material time. The court also finds the complainant to be a witness of truth and find no merit in the defence of the accused. The court accepts the evidence of the prosecution evidence of PW1, PW2 and PW3 and rejects the defence of the accused. The court has no doubt at all and finds that the situation is as stated by the complainant and PW3 and not as stated by the accused. The court finds that the accused in company of others robbed the complainant and injured him. The court finds the accused guilty as charged and convicts him accordingly.”

On his conviction the appellant was sentenced to death as provided by law. His appeal to the superior court against conviction was dismissed, hence the present appeal before this Court which was filed through a supplementary memorandum of appeal on 28th April, 2010. The grounds therein were as follows:

“1. THAT the learned Judge erred in law in believing in consistent and contradictory evidence

2. THAT the learned Judges erred in law in upholding the subordinate court’s decision when the evidence on record was at variance with the charge sheet.

3. THAT the learned Judge erred in finding that the prosecution proved its case to the required standard.

When the appeal came up for hearing on 22nd June, 2010, ***Mrs. Chesang***, learned counsel for the appellant argued all the three grounds of appeal as one and submitted that the evidence was at variance with the charge sheet in that the evidence did not support the charge of robbery with violence and that the weapons used were not stated in the charge sheet.

Counsel applied and was allowed by the court to argue the issue of the language used at the trial as an additional ground of appeal. On this she stated in the record that the language used at the time of plea was not stated and this breached the provisions of **section 77(2)(b)** of the Constitution.

Mr. Monda, learned Senior State Counsel opposed the appeal and submitted that the evidence on record supported the charge under **section 296(2)** of the Penal Code and that the prosecution case was proved beyond any reasonable doubt as the complainant was injured in the course of the robbery.

On language used at the trial Mr. Monda stated that this was an afterthought because during the hearing the interpretation of the proceedings was from English to Kiswahili. According to counsel the appellant understood the charge.

In reply learned counsel for the appellant stated that the charge was not explained to the appellant as required by **section 77(2)(b)** of the Constitution.

On the issue of whether the charge of robbery with violence under **section 296(2)** of the Penal Code was proved against the appellant on the available facts and evidence, we reiterate for the benefit of the appellant that a conviction for this offence does not depend on the establishment of all the ingredients of the charge stated in that section. It is true the evidence did not establish the presence of any weapons used in the attack against the appellant but two of the ingredients spelt out in **section 296(2)** of the Penal Code were present, namely the presence of three attackers and the injury inflicted on the complainant in the process of stealing from him the wallet in which was Kshs.5,000/= and his personal documents.

On the injury he sustained in course of the robbery PW2 testified;

“I realized I was bleeding when police arrested the accused and I found I was injured at the right hand. At the time I was attacked I did not see what those who attacked me had but I found myself with injuries.”

The injuries were confirmed by the evidence of **Zephania Kamau** (PW1) of Police Surgery Nairobi area who examined PW2 on 20th May, 2003 who complained of assault. PW1 testified that PW2 had a swelling on the anterior lower right forearm. There was a stitched wound on same area, a wound on the right femur and two bruises on the right and left knees. According to the doctor the injuries had probably been caused by blunt and sharp objects. This evidence confirms one of the ingredients required for the establishment of the charge under **section 296(2)** of the Penal Code. Thus lack of weapons used does not invalidate the charge as framed against the appellant unless it was the only ingredient of the offence relied on by the prosecution.

In regard to the appellant’s complaint about the language used during the trial, while the record does not show the language used during the time the plea was taken on 19th May, 2003, it however, shows that throughout the hearing Kiswahili is shown as the language used in the proceedings. And given that the appellant pleaded not guilty during plea there can be no prejudice suffered by him. In fact during his appeal to the superior court the appellant made long written submissions in fluent English language thus making his complainant about the language used at plea taking unconvincing.

This being a second and final appeal and taking into consideration what is required of us by **section 361(2)**, the complaints about factual contradictions or inconsistencies in the evidence do not fall for the consideration of this Court. We are of the view that the two courts below having made concurrent finding on the identification and arrest of the appellant in connection with the commission of this offence we have no reason to interfere as the decision of the two courts was based on sound evidence see **Joseph Baarui Imiamba & 2 Others v. Republic - Criminal Appeal Nos. 87, 88 & 889 of 2007 (UR)**. This appeal has no merit and we order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 16th day of July, 2010

P. N. WAKI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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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