



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Criminal Appeal 233 of 2004**

JOHN MUTUKU MUASYAAPPELLANT

AND

REPUBLICRESPONDENT

*(An appeal from a judgment of the High Court of Kenya at
Machakos (Lesiit & Wendoh, JJ) dated
2nd November, 2004*

in

H.C.C.R.A. NO. 312 & 314 OF 2003 (CONSOLIDATED)

JUDGMENT OF THE COURT

This is the second and last appeal by *John Mutuku Muasya* against his conviction on one count of robbery with violence contrary to *section 296 (2)* of the Penal Code and one count of grievous harm contrary to *section 234* of the Penal Code. It had been alleged in the charge sheet laid before Kitui Principal Magistrate, Mr. M. N. Gicheru, that the appellant, together with another who was acquitted on appeal, on the night of 1st and 2nd February, 2003, at Nzangathini village, Kwa-Konza Location in Kitui District, jointly and while armed with dangerous weapons, namely pangas, robbed *Florence Ngilee* of one bicycle, 50 Kgs of dry beans, one wrist watch, one small purse, one belt, one radio and cash Kshs.2000/- all valued at Kshs.15,000/- and at or immediately before or immediately after that robbery wounded the said *Florence Ngilee*. The second count related to grievous harm on *Esther Ngilee* during the same robbery. Upon his conviction, the appellant was sentenced to death for the offence of robbery with violence and was sentenced to serve 10 years imprisonment for causing grievous harm. The sentence obviously defies logic because it cannot be executed concurrently or consecutively. Outside the Holy Book, there can only be one death! Ordinarily the sentence of imprisonment on the second count ought to have been kept in abeyance pending exhaustion of the appellate process. We think, however, that the second count was misconceived as the violence committed against *Esther* was not separate and distinct from the violence employed in the course of the robbery in count one. The charge in that respect was duplex and we quash the conviction on count two and set aside the sentence of 10 years. The first appeal to the superior court (*Lesiit & Wendoh, JJ.*) was dismissed on 2nd November, 2004, hence the appeal before us.

Although the appellant drew up and filed what he called “*Petition of appeal*” laying out five grounds,

the petition was abandoned by learned counsel appointed to appear for him Mr. Onalo. Instead, Mr. Onalo sought to argue two grounds of appeal laid out in a supplementary memorandum of appeal he filed after taking instructions from the appellant. The grounds are as follows:

“1. THAT the learned Judges of the superior court erred in law by failing to consider that the appellants rights under section 72 (3) of the Constitution of Kenya were abridged.

2. THAT the learned superior court Judges erred in law by basing their decision on circumstantial evidence.”

As is evident from those grounds, they raise, as they ought to in this second appeal, issues of law, which we shall shortly examine. The concurrent findings of fact made by the two courts below are rather distressing, and may be shortly stated.

On the 1st February, 2003, **Jennifer Mwende Boniface** (PW2) had to leave her home in Kwa-Vonza village, Kitui to visit her husband who was admitted in Kenyatta National Hospital. She left her five daughters, the eldest of whom was 15 year old **Florence Muindi** (Florence) (PW1), under the care of the appellant. The appellant had been employed in the home as a shamba boy for a period of three years. Jennifer left specific duties for each of the daughters and the appellant to perform in her absence. The appellant and Florence were to harvest beans while another daughter, **Ruth Ethoa** (PW4) was assigned duties in the family shop nearby and, **Esther** (PW3) was to look after livestock. They all performed their duties and converged back in the house in the evening. The appellant and Florence had harvested one bag of beans and it was kept in the sitting room. The family bicycle which had been used to bring the sack of beans was also kept there.

By 7.00 p.m. the girls retired to bed; Florence and Esther slept in separate beds in the house, while Ruth and the other two children went to sleep in their grandmother's house nearby. The appellant asked for a torch which he was given by Ruth and shortly left the house telling the children that he was going to look for a calf in the boma.

At some point that night, Florence and Esther were suddenly attacked and were brutally and savagely slashed and left for dead. Fortunately they received extensive medical care in Kitui and Machakos and survived the vicious attack. The various items listed in the charge sheet were also stolen from the house. It was Ruth who had gone to the house early in the morning to wake up his sisters only to find a bloody scene and vandalized house. Neighbours converged at the home and the police were called in. Jennifer was also informed and returned home. The appellant was nowhere to be found although he was expected to be at the family shop where he normally slept. Information was however received from **Lika Kimanzi Mutia** (Lika) (PW6), a watchman at the shopping centre who knew the appellant, that the appellant had gone to Lika's place of work at about 5 a.m. that morning (2nd February, 2003), and left a bicycle there, telling him it belonged to **Ngilee**, (Jennifer's husband). The appellant did not return for the bicycle which was then handed over to the police. On further information received, the appellant was traced two months later at Ukunda, in Kwale working in a hotel. **Pc. Onesmus Kuta** (PW7) and Jennifer travelled there and on 3rd April, 2003, with the assistance of other officers from Ukunda police post, the appellant was arrested. The appellant led them to his residence where he showed them his bag. Inside the bag was Jennifer's purse which she had left in her house with Kshs.2000/- but the money was missing. There was also a belt belonging to Jennifer's husband. Jennifer identified those items and the appellant was subsequently charged with the offences referred to earlier. He was taken to court on 16th April, 2003 and pleaded not guilty. His defence was that, although he had been an employee of Jennifer, he had left employment on 23rd December, 2002 after seeking permission to go to his home. On reaching home however, he found that his grandmother had secured a job for him in a hotel in Ukunda and that is where he was working until the police arrested him on 3rd April, 2003 and charged him with an offence he knew nothing about.

The conviction of the appellant by the trial court was based on his identification by Esther (PW3) and his possession of recently stolen property which he did not account for. The superior court however gave

the appellant the benefit of doubt on identification but upheld the conviction on the basis of circumstantial evidence which irresistibly pointed to him as one of the perpetrators of the offence and was incompatible with his innocence. The court delivered itself as follows:-

“Though the 2nd appellant told court in his defence that he had left PW2’s employment by December 2002, we are convinced by the evidence on record that he was an employee of PW2 as of 1/2/03 and had been left with the complainants on that fateful day and was with them that night. He mysteriously disappeared on the night of the robbery only to be found in Ukunda in April 2003 three (sic) months later. He notified nobody of his departure. We do believe the evidence of PW6 who told court that the 2nd appellant left a bicycle with him on the morning of 2/2/03 promising to come back for it but never did and PW6 handed it over to police. The bicycle went missing from PW2’s house on the night of the robbery. PW2 and 7 said that in Ukunda they searched 2nd appellant’s bag and found a belt and purse stolen during the robbery. PW1 and 3 identified them. 2nd appellant insists that the belt was a gift to him by PW2’s husband. The said husband was not called as a witness. Even if he was not, we are satisfied that PW2’s purse stolen during the robbery was found on the 2nd appellant and one can never have receipts for everything they have. We are satisfied that the 2nd appellant’s conduct on the morning of 2/2/03 when he walked off, left a bicycle with PW6 never to return till arrested three (sic) months later does show that he was one of the robbers and he escaped after the incident. He was arrested while still in possession of some of the stolen goods. The circumstantial evidence points irresistibly to his guilt.

We find that the conviction was safe, we confirm it as well as the sentences meted (sic). It is unimaginable that 2nd appellant who lived with the young girls would so viciously and brutally attack the young girls who were asleep and totally defenseless.”

It is from those findings that the appellant comes before us.

Turning now to the two grounds of appeal, learned counsel, Mr. Onalo, submitted on ground one that the appellant was arrested on 3rd April, 2003 and according to the charge sheet, was taken to court on 22nd April, 2003 which would be a period of 19 days and therefore contrary to the requirements of the Constitution. It is indeed so, that the date, 22nd April, 2003 appears on the face of the charge sheet as the “*date apprehension report to court*”. That was certainly a mistake on the part of the police. The court record shows that the appellant was taken before Kitui Principal Magistrate on 16th April, 2003 and the plea was taken. The case was subsequently consolidated with another criminal case 261/03 on 23rd April, 2003, and a further plea was taken on that day. The operative date as to when the appellant was first taken to court is therefore 16th April, 2003 which was 13 days after his arrest. As such there can be no cause for complaint about breach of **section 72 (3)** of the Constitution and we reject that ground of appeal.

On the second ground of appeal, Mr. Onalo submitted that the superior court fell in error in relying on circumstantial evidence relating to recovery of stolen items when there was no cogent evidence that the items had been stolen by the appellant. Such was the evidence relating to recovery of the bicycle which according to the evidence of Florence (PW1), was found “*at Mbuva’s place where we used to keep the bicycle*”. According to Mr. Onalo, if it was found at its usual place, it was not stolen. The other item was the belt which the appellant had explained had been given to him by his employer, who was not called to deny that fact. The third item was the purse which, in Mr. Onalo’s submission, was a common item found in a house which was occupied, not only by the appellant, but his two aunties. No proof was provided that it belonged to Jennifer (PW2). Finally the defence of the appellant that he had left employment two months before the incident and was nowhere near the scene was not fully considered. He urged us on those grounds to allow the appeal.

We have carefully considered this ground of appeal and we find no substance in it.

We are in no doubt that the appellant was in the employment of Jennifer and her husband when the offence was committed on the night of 1st and 2nd February, 2003. We are in no doubt that he

disappeared the following morning after handing over the bicycle to Lika (PW6). The bicycle was in the house but had been removed therefrom by the appellant and put in the hands of someone who did not have a right to it. There was sufficient asportation in law to justify the inference of theft. We have no doubt that the purse and belt recovered from the appellant's residence in Ukunda were removed from inside his own bag and were last seen by Florence, Esther and Jennifer, at the scene of the robbery who all testified to that effect. Concurrent findings of fact to the same effect were made by the two courts below in respect of those items and the circumstances surrounding the robbery and we have no reason to differ from the findings. As correctly pointed out by learned Principal State Counsel Mr. Kaigai, the findings only reinforce the further finding that the appellant told a blatant lie which serves to corroborate the prosecution evidence. His defence was properly rejected. That ground of appeal also fails.

On the whole the appeal is devoid of merits and we order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 17th day of July, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR