



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**  
**Criminal Appeal 126 of 2004**

**MICHAEL M'MARANYA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Meru (Onyancha & Okwengu, JJ) dated 1<sup>st</sup> July, 2004*

**In**

**H.C. Cr. A. No. 126 of 2001)**

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**JUDGMENT OF THE COURT**

The appellant Michael M'Maranya was convicted by the Senior Resident Magistrate Meru for the offence of Robbery with violence contrary to **section 296 (2)** of the Penal Code and sentenced to death on 10<sup>th</sup> April 2001. He appealed against conviction and sentence to the High Court at Meru and his appeal was dismissed by the superior court on 1<sup>st</sup> June 2004.

The charge of robbery with violence was based on the following brief facts.

On 30<sup>th</sup> September 1999 at about 11.00 am., Janet Karuru (PW1), the complainant, left her home at Munithu in Meru to plant beans in her land at Ncheru area about 2 – 3 kilometres from her home. She was accompanied by her two friends Lydia Muthoni (PW2), (Lydia), Jemima Makena (PW4) (Jemima) and her two daughters Damaris Tirima (Damaris) and Lilian Nkatha (Lilian) who were going to assist her to plant beans. The complainant was carrying about 20 kgs of beans while Lydia and Jemima were carrying about 10 kgs of beans and 5 kgs of beans respectively. The complainant's daughter Damaris was carrying tea in two Thermos flasks and food in a dish. The five were walking along the Meru/Maua tarmac road towards the shamba. When they reached Kinyaritha river, about 15 people led by the appellant emerged from Nchiru forest. The appellant was armed with a spear and a slasher while the others were armed with pangas. They ordered the complainant and the other four people in her company to put down the luggage they were carrying which they did except the complainant. When the complainant hesitated, the appellant and others started removing the luggage she was carrying and knocked her down. The appellant also kicked the complainant and hit her with the flat side of a slasher. The complainant and the people in her company screamed and many people came to the scene. The appellant and his companions fled taking away all the property including Kshs.500/- which the complainant had tied in her lessa.

The complainant reported to P.C. Julius Kurgat (PW5) at Meru police station at 3.30 p.m. on the same day giving the appellant's name. Thereafter the complainant led P.C. Julius Kurgat to the appellant's house on many occasions but they could not find him. The police ultimately requested the Chief of the area to trace and arrest the appellant. The appellant was arrested by the Assistant Chief on 21<sup>st</sup> October, 1999. The complainant was examined by Wilson Namu (PW3), a clinical officer, on 30<sup>th</sup> September 1999 a few hours after the incident. The clinical officer found that the complainant had tenderness on both shoulders and tenderness and swelling on the back and assessed the degree of injuries as harm.

The appellant denied the charge at the trial. He stated that the complainant had said that she would follow the

appellant's family to the last person to prevent them from following the land belonging to his deceased father. He stated further that he has had a grudge with the Assistant Chief since 1996; that appellant and his mother, before she died, sought a letter from the Assistant Chief to file a succession case in respect of the land belonging to his father but the Assistant Chief declined to issue the letter; that the Assistant Chief instead issued it to the complainant's cousin who filed High Court Succession Cause No. 34 of 1995; that complainant's son had also caused the appellant's brother Francis Gitonga to be charged in criminal case No. 3586 of 1999.

The trial court convicted the appellant for robbery with violence without considering the appellant's defence to the effect that the charge was fabricated because of a land dispute. In his appeal to the superior court the appellant complained, among other things, that the trial Magistrate erred in law and fact in failing to consider the defence of appellant that there was land dispute between the appellant's family and the complainant's family.

The superior court considered the appellant's defence at the trial court and said:-

***“In his defence the appellant maintained that there was grudge between his family and that of the complainant. The trial Magistrate did not specifically address this defence. It is however apparent that the complainant who was cross-examined at length denied having any relations with the Appellant or his family, but only maintained she had been seeing him seated outside her son's canteen. We find that the trial Magistrate was right in rejecting the defence of the appellant as the same did not have any substance. In any case if indeed there was such a grudge, the same could also have provided a motive for the Appellant to attack and rob the complainant.”***

Mr. James Nderi, learned counsel for the appellant, submitted in support of the first ground in the supplementary grounds of appeal that the appellant's trial was a nullity since it was conducted by a prosecutor below the rank of an Inspector. Mr. Nderi referred to two occasions; 30<sup>th</sup> December, 1999 and 1<sup>st</sup> March 2000, when Senior Sergeant Kirima attended court on mention dates as a prosecutor. He also referred to one occasion; 18<sup>th</sup> February 2000, when Cpl. Kabogo attended court as a prosecutor when the case was in court for re-allocation.

**Section 85 (2)** of the Criminal Procedure Code which was in existence at the time the appellant was prosecuted provided :-

***“The Attorney General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service not being a police officer below the rank of Assistant Inspector of police, to be a public prosecutor for the purposes of any case.”*** (underlying ours).

In **Elirema & Another v. Republic [2003] KLR 537** this Court in construing **section 85 (2)** of the Criminal Procedure Code held that a prosecution conducted by a person below the rank of Assistant Inspector of police was a nullity.

In the present case neither S/Sgt Kirima nor Cpl. Kabogo conducted the prosecution at the trial of the appellant. They only appeared during pre-trial mentions. This Court has held on many occasions in effect, that, a mention of a criminal case is not a prosecution.

It is indisputable that the prosecution was conducted by I.P. Mati from 14<sup>th</sup> August 2000 to 20<sup>th</sup> March 2000 when appellant defended himself. Incidentally, **section 85 (2)** of the Criminal Procedure Code has now been amended by **Act No. 7 of 2007** by deleting the words **“not being a police officer below the rank of an assistant inspector of police”** from the section.

The other three grounds of appeal in the supplementary grounds of appeal relate to the identification of the appellant. Mr. Nderi cast doubt on the evidence of identification or recognition of the appellant and submitted that the superior court failed to evaluate the evidence on recognition and that the circumstances were difficult as the complainant was confronted by many people. The incident occurred at about midday along a tarmac road. The complainant testified that she used to see the appellant before and in fact gave his name to P.C. Julius Kurgat a few hours after the incident. Both Lydia and Jemima did testify that they saw the appellant during the incident and that he is the one who attacked the complainant. There is evidence that both Lydia and Jemima did not know the appellant before. The appellant did not say that the two independent witnesses Lydia and Jemima had any grudge against him. That the complainant knew the appellant before is clear from the statement of the appellant in his defence that there was a grudge between his family and the family of the complainant arising from a land dispute. There are concurrent findings of fact by the two courts below that the complainant indeed recognized the appellant during the incident. Those findings are supported by cogent and credible evidence and there are no grounds on which we can interfere with them.

What is of great concern however, is whether the evidence established the offence of robbery with violence as charged. While the evidence clearly established that the complainant and the four people in her company were confronted by a group of about 15 people including the appellant, the circumstances surrounding the incident raised

reasonable doubts as to whether the motive of the assailants was to rob and that a robbery was committed. Firstly, the incident occurred about 400 metres from the house of the appellant. Secondly, the incident occurred along a public road during broad daylight. Thirdly, the complainant and the appellant knew each other before. Fourthly, the assailants asked the complainant and the people in her company to keep the luggage down and the complainant was attacked and abused when she hesitated. The assailants did not demand any money from any of the five people or search them for money. There is no evidence that the assailants attacked the four other persons who were in the company of the complainant. Fifthly, the medical examination report (P3 form) issued to the complainant has a column thus:-

“*Brief details of alleged offence*” The police inserted under that column thus :-

“*Assaulted by someone known to her. Please examine.*”

Lastly, during the trial Mr. Momanyi, the advocate who appeared for the appellant questioned the complainant about the ownership of the land where the complainant was going to plant beans and suggested to the complainant that the land belongs to the appellant.

All these circumstances coupled with the statement of the appellant in his defence that there was indeed a land dispute and a succession case already filed in court and that the son of the complainant had caused the brother of the appellant to be prosecuted tend to show that the motive of the attack was most probably to prevent the complainant from proceeding to the disputed land to plant. The circumstances further discredit the complainant’s evidence that the appellant robbed her of beans, 2 thermos flasks, a dish and money.

The superior court did not adequately evaluate the evidence or give adequate consideration to the appellant’s defence. Had the superior court performed its duty it could have reached the conclusion that the charge of robbery was not established beyond any reasonable doubt. On our own analysis of the evidence we are of the view that evidence established the offence of assault and not the offence of robbery with violence.

In the result, we allow the appeal in part, quash the conviction for robbery with violence and set aside the sentence of death and in substitution thereof convict the appellant for assault causing actual bodily harm contrary to **section 251** of the Penal Code and sentence appellant to 9 months imprisonment. We order that the sentence of 9 months imprisonment will take effect from 10<sup>th</sup> April 2001 when the appellant was sentenced by the trial court. The result is that the appellant has served the sentence in full and shall therefore be released forthwith unless lawfully held for another offence. Orders accordingly.

Dated and delivered at Nyeri this 31<sup>st</sup> day of October, 2008

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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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.**