



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Criminal Appeal 252 of 2004

SAITOTI LESOROGOL APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Musinga & Kimaru, JJ.) dated 19th October, 2004

in

H.C.CR.A. NO. 104 OF 2001)

JUDGMENT OF THE COURT

The appellant, *Saitoti Lesorogol*, with one, *Joseph Lekuye* were jointly charged with robbery with violence contrary to **section 296(2)** of the Penal Code before the Principal Magistrate's Court at Nyahururu. The particulars of the offence were that on the 27th day of July, 2000 at *Mugur* in *Samburu District* within Rift Valley Province, jointly being armed with a dangerous weapon, namely a panga, robbed *Lucy Wanjiru Kimani* of cash **K.shs.3,000/=** together with various other personal items enumerated in the charge sheet and at or immediately after the time of such robbery used actual violence on the said *Lucy Wanjiru Kimani*. The appellant and his co-accused were alternatively charged with the offence of handling stolen property contrary to **section 322(2)** of the Penal Code. The particulars of that alternative charge were that on the same day (27th July, 2000) at *Ledungokwe* in *Samburu District* within Rift Valley Province otherwise than in the course of stealing, dishonestly "*handled*" the personal items belonging to *Lucy Wanjiru Kimani* that were enumerated in the charge sheet knowing or having reason to believe them to be stolen goods or goods unlawfully obtained.

The appellant and his co-accused pleaded not guilty to both charges but after a full trial before the learned Principal Magistrate (*S.N. Riechi, Esq.*) they were both convicted on the main count of robbery with violence. Each was sentenced to death as mandatorily provided by the law.

Both the appellant and his co-accused being aggrieved by the said conviction and sentence appealed to the High Court but before the appeal was heard, the appellant's co-accused died in prison on 10th May, 2002 and hence his appeal abated. The appellant's appeal in the High Court proceeded to hearing and the same was dismissed on 19th October, 2004.

Still aggrieved by the dismissal of his appeal to the High Court, the appellant now comes to this Court by way of second and final appeal. That being so, only matters of law fall for consideration – see **section 361(1)** of the **Criminal Procedure Code (Cap. 75 Laws of Kenya)**.

The prosecution relied upon the following facts as accepted by both the trial and the first appellate courts. On the 22nd July, 2000 the complainant **Lucy Wanjiru Kimani (PW1)** travelled to Maralal with the appellant's co-accused who is now deceased (hereinafter referred to as the deceased) because she had been led to believe that there were gemstones which could be mined from a place called Lodungokwe. On 24th July, 2000, **Lucy (PW1)** was introduced to the appellant by the deceased. The appellant informed Lucy that he knew where the gemstones could be excavated. Lucy, the appellant and the deceased got what could be described as excavation implements and the trio proceeded to the place where the appellant had assured the complainant gemstones would be found. For two days the trio excavated in two different places. On the material day (27th July, 2000) while the complainant was in the process of excavation, the appellant came from behind her and cut her on the neck. She was ordered to give all her personal belongings to the appellant and the deceased. She surrendered the key to her bag which had been left in the Manyatta where they had slept. The complainant was then tied to a tree by the appellant and the deceased and left her for dead. After a short while the complainant untied herself and walked with difficulty, to Mugui Administration Police Camp where first aid was administered on her and she was later admitted at Wamba Mission Hospital for thirteen days. At the hospital she gave the names of the appellant and the deceased. On the same day that the complainant was assaulted, the appellant and the deceased were found in possession of the complainant's belongings. It was **Ikilewa Lenolkujuka (PW4)**, the Assistant Chief of the area, who arrested the appellant and the deceased in possession of the complainant's belongings. The two were taken to the Administration Police Camp and then to court where they were charged.

When put to his defence, the appellant made a sworn statement in which he testified that on an earlier date before the material day the complainant, the deceased and himself went looking for gemstones. They did not get the gemstones on the first day and so on the second day they went looking for gemstones in another place where they were able to get some. The complainant and the deceased went to Nairobi after getting the gemstones and they promised the appellant that they would pay him upon their return from Nairobi. It was the appellant's evidence that when the complainant came back with the deceased they refused to pay him as promised. It was then that the appellant left the complainant with the deceased looking for gemstones. Later the appellant was surprised when he was arrested allegedly for assaulting the complainant.

In the course of his judgment the learned Principal Magistrate said:-

The only eye witness to the assault and robbery is the complainant. I am aware of the danger of relying on the evidence of a single witness of identification (sic). I warn myself of the danger of court relying on such evidence, but I am satisfied that the condition of recognition of the accused were favourable and the complainant did not make any mistake as to identification or recognition in this case. The accused were found with the stolen property only a few hours after the robbery and even the weapon used to inflict the injury was recovered after accused 1 led police to where he had hidden it.

Considering all the evidence I have no doubt in my mind that the accused with common intention injured the complainant and tied her to a tree in order to obtain her property and to prevent or overcome resistance (sic) to the taking of her property. I therefore find that accused did rob the complainant of her property using violence contrary to section 296(2) of the Penal Code. I find both accused guilty of the offence of robbery with violence contrary to section 296(2) of the Penal Code and convict them accordingly."

The superior court (*Musinga and Kimaru, Ag. JJ.*) considered the appellant's appeal and came to the same conclusion as did the learned Principal Magistrate that the appellant and the deceased, indeed, committed the offence of robbery with violence and that they had been properly convicted and sentenced.

In dismissing the appellant's appeal, the learned Judges in concluding their judgment delivered on

19th October, 2004 stated:-

“While we are conscious of the fact that the burden of proving a criminal case is always on the Prosecution, in the instant case when the prosecution closed its case, it was incumbent upon the appellant to give at least an explanation that would exonerate him from the prima facie case that was established against him by the Prosecution. The appellant in this case gave an explanation that can only be described a product of an active imagination. It is our finding that the evidence adduced by the Prosecution was cogent, consistent and corroborated in giving a detailed sequence of events as they took place on the material day.

In the circumstances of this case, it is the finding of this Court that the Appeal filed by the appellants lacks merit. There is no merit in the grounds of appeal put forward by the appellant. He was properly convicted on cogent and watertight evidence.

All the ingredients to prove the charge of robbery with violence were satisfied by the Prosecution. The appeal is consequently dismissed. The conviction and the sentence imposed by the trial magistrate is hereby upheld and confirmed. It is so ordered.”

When this appeal came up for hearing before us, Mr. W.O. Nyende appeared for the appellant, while Mr. P.M. Gumo the learned Assistant Deputy Public Prosecutor appeared for the State.

Mr. Nyende started his submissions by asking us to declare the appellant’s trial a nullity on the ground that he had been kept in custody for over **14 days** before being arraigned before the trial court. Mr. Nyende further submitted that the first appellate court failed to consider the appellant’s defence. Mr. Nyende further submitted that the first appellate court failed to re-evaluate the evidence and that it failed to consider the appellant’s defence. Finally, Mr. Nyende submitted that nothing was stolen from the complainant as she handed over the key to the manyatta. For that reason, Mr. Nyende contended that the ingredients of the offence of robbery with violence were not proved.

On his part Mr. Gumo did not have any firm stand on this appeal. He started his submissions by stating that he supported both the conviction and sentence. But when we put a few questions to him, he said that the evidence disclosed the offence of grievous harm. In the end he said that he did not support the conviction.

We have considered the submissions by both sides and we are of the view that the complainant was, indeed, assaulted in the manner described in her evidence. We are, however, not satisfied that the ingredients of the offence of robbery with violence were proved. The record shows that the complainant was cut with a panga on the neck while in a place where she was excavating for gemstones. She surrendered her key to the manyatta. But in view of her relationship with the appellant (and the deceased) it cannot be said that she was a victim of robbery. Her belongings were in a manyatta some distance from the place where she had been assaulted. In **AJODE V. R. [2004] 2 KLR 81 at pp. 88-90** this Court said:-

“We do repeat here what this Court stated in the case of JOHANA NDUNGU V. REPUBLIC (Criminal Appeal No. 116 of 1995 (unreported)). It was stated inter alia as follows:-

“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 ingredients of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or after and further in any manner of act of stealing. Thereafter the existence of the afore-described ingredients constituting robbery are presupposed in three sets of circumstances prescribed in section 296(2) which we give below and any one of which if proved will constitute that offence under subsection.

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 wounds, beats, strikes or uses any other violence to any person.*

Analysing the first set of circumstances, the essential ingredients apart from the ingredients including the use or threats to use actual violence constituting the offence eg. 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 aforesaid then he is guilty of the offence under subsection (2) and it is mandatory for the Court to so convict him.”

In view of the foregoing, we are satisfied that the offence of robbery with violence contrary to **section 296(2)** of the Penal Code was not proved. We are however satisfied that what was proved was the offence of grievous harm contrary to **section 234** of the Penal Code, as conceded by Mr. Gumo.

In view of the foregoing, the conviction for robbery with violence and the sentence of death are set aside. In its place we substitute a conviction for the offence of grievous harm contrary to **section 234** of the Penal code. We note that the appellant has been in custody since 27th July, 2000. We therefore order that the appellant is sentenced to such period that will result in his immediate release from prison.

Dated and delivered at Nakuru this 3rd day of October, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR