REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, O'KUBASU & DEVERELL, JJ.A.)

Criminal Appeal 118 of 2002

BETWEEN

SIMON MUCHINO THIAKA …….. APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Justice Oguk & Mitey) dated 1st November, 2000

in

H.C.CR.A. NO. 1410 OF 1996)
****

JUDGMENT OF THE COURT

The appellant, ***Simon Muchino Thiaka,*** was convicted of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death by the learned Chief Magistrate at Nairobi (Mr. P.N. Mugo). The particulars of the offence were that:-

> ***"On the 28th day of February, 1995 at Pangani Estate Chai Road within the Nairobi Area, jointly with another not before court, while armed with a knife robbed LYDIA WAIRIMU a Television Set Great Wall (?) a sanyo radio Phillips, radio cassette, electric iron box, 17 pairs of shoes, 7 bed sheets, 8 blankets, 12 trousers, 15 shirts, 8 T-shirts, 6 pairs of socks,***
>
> ***6 pillow covers, 24 plates, 12 tea cups, 35 spoons, 24 forks, 8 table clothes, 2 air fans, 6 sufurias, one box, a godfather hat and documents all valued at K.Shs.45,0001= and at or immediately before or immediately after the time of the robbery caused the death of the said LYDIA WAIRIMU.***

There was an alternative charge of handling stolen goods contrary to ***section322(2)*** of the Penal Code but that will not concern us since the appellant having been convicted on the main charge there was no finding on the alternative charge.

On the morning of 28th February, 1995, ***John Kirumba Kerre (***PW1) and his wife ***Irene Wambui (***PW2) left their house in Pangani area for work leaving behind their house girl, Lydia Wairimu (deceased) and their two school-going children. The house girl used to take the children to school and bring them back in the evening. The complainant, Kerre (PW1) was running a hotel business at Machakos bus stage, where he had employed a few people including the appellant, Thiaka. The appellant was said to be a good worker who was trusted by his employer, the complainant herein. For that reason, the appellant used to be sent to collect the complainant's children from school and then take them home after collecting the house keys from the kiosk of a neighbour, **Simon Njuguna Mugo** (PW5). It was the evidence of Mugo (PW5) that on the material day (28th February, 1995) at about 2:10 p.m. the appellant whom he knew very well went to his kiosk and told him that he had been sent by his employer to fetch some goods from the house. The appellant asked for an empty bag in which to carry the goods but as Mugo did not have such a bag the appellant obtained one from the next kiosk. Mugo (PW5) saw the appellant enter the complainant's house as his kiosk was not far from the complainant's house. After a few minutes, the appellant came back carrying a bag and told Mugo that he (appellant) had collected the items he wanted. The appellant then handed over the house keys to Mugo saying that the house girl had gone to pick the children from school.

When the complainant and his wife came back to their house at about 8:00 p.m. on that same day they found the house locked and their children and the house girl were nowhere! The worried couple rushed to the school where they found their two children stranded. It appeared the house girl had not gone to pick up the two children. Now relieved that the two children had been found the couple proceeded back home and on their way passed at Mugo's kiosk who handed to them the keys that the appellant had left to him. On hearing the story from Mugo as regards the appellant's conduct during the day, the complainant and his wife became worried since it was only a few days prior to that day that they had sacked the appellant from employment. Using the keys handed to him by Mugo, the complainant opened the door to his house. On entering his house the complainant and his wife were shocked to find the house girl Lydia Wairimu lying dead on the sofa set with three stab wounds on her neck! The house had been ransacked as all the items set out in the particulars of the charge had been stolen. The matter was immediately reported to the police who commenced investigations.

The appellant was, naturally, the main suspect. That same night the appellant was arrested from a lodging room at Nyakiango bar in company of a certain lady. Inside that room the police recovered a hat (Exhibit 2) which was later identified by the complainant as one of the items earlier stolen from his house. In the course of investigations, the appellant led the police to Ngara Open Air Market where he pointed out a Sanyo radio (Exhibit 3) and two fans (Exhibit 5) which items were identified by the complainant as some of the items stolen from his house on the material day. The appellant recorded a statement under inquiry in which he admitted having been found in possession of the complainant's hat. The appellant repudiated that statement which was admitted in evidence after the trial magistrate had conducted a trial within the trial to determine admissibility of the said statement.

When put to his defence, the appellant stated that he had been employed by the complainant at his hotel business at Machakos bus stage and that on 26th February, 1995 he had left employment since the complainant had not paid him his arrears of salary of four months. The appellant went on to explain that the wife of the complainant had wanted the appellant to be her lover but the appellant would have none of it on the ground that her husband had known about the looming illicit relationship. It was the appellant's defence that when he left complainant's employment, he went to his home in Limuru on 27th February, 1995. He came back to Nairobi on the evening of 28th

February, 1995; and went to Nyalciango bar where he met his girl friend. The two booked a room in the said bar from where the police arrested the appellant. The appellant was found with a hat which he had bought at Machakos bus stage.

In convicting the appellant, the learned trial magistrate stated as follows in his judgment:-

"The charge I am hearing is not murder. It is robbery. What needs to be proved is robbery with violence not murder with premeditated intention or knowledge aforethought. In short we have PW5 who says accused is the one who entered PW1 house and borrowed a bag to carry goods from PW1 house and indeed he (accused) carried some goods from PW1 house. Then we have evidence that accused is the one who lead (sic) police to Ngara Market where PW1 goods which had been stolen at the time of robbery were recovered. There is no dispute that the lady was killed. There is no dispute that PW1 goods were stolen. Again **we have accused confession that they murdered this maid in the process of stealing. All these confirm that the accused is the person who with others not before court committed this offence of robbery with violence."**

Having stated so, the learned trial magistrate convicted the appellant and sentenced him to death as mandatorily provided by the law.

The appellant was naturally dissatisfied with this conviction and sentence by the learned trial magistrate and chose to exercise his right of appeal to the High Court. His appeal was considered by the High Court and in a very well considered judgment the High Court (Oguk and Mitey JJ) dismissed the appellant's appeal by stating thus:-

"We find the fact of recovery of the said godfather hat (ex.]) in possession of the Appellant on the same night of the robbery and the subsequent recovery of the Sanyo radio (ex 3) and the two fans (ex 5) with his assistance two days after the said robbery clearly shows that the appellant must have been involved in the said robbery at the house of the complainant and further corroborates the evidence of Njuguna Mugo (PW5) that he had actually seen the Appellant entering the house of the complainant and he came out with certain goods in a sack at the time he handed over to him the keys to the complainant's house.

The circumstantial evidence in this case relied upon by the prosecution in our view, irresistibly points only at the appellant and to no other person as the one who had committed the said robbery in the course of which the complainant's house servant Lydia Wairimu was killed.

Upon our consideration and evaluation of the recorded evidence, we are satisfied that there was sufficient evidence on record upon which the conviction of the appellant could be safely based. We uphold his conviction for the offence charged. The sentence of death that was imposed on the appellant upon such conviction was mandatory and we cannot therefore interfere".

The appellant now comes to this Court by way of second appeal and has, through his lawyer, filed two main grounds of appeal viz:-

1 THAT learned 1st Appeal Judges erred on a point of law in upholding the trial court's judgment whilst the evidence on record failed to prove the charge leveled against the appellant.

2 THAT the learned 1st Appeal Judges erred on a point of law in failing to consider the charge sheet as the same is ambiguous and does not disclose an offence of robbery with violence.

"When this appeal came up for hearing before us, Mr. Onalo, the learned Counsel for the appellant, argued the two grounds of appeal together. Mr. Onalo appeared to confine himself on the issue of the charge sheet being ambiguous in that it did not state that the appellant was armed with dangerous weapons. It was Mr. Onalo's submission that the particulars of the charge did not refer to the offence allegedly committed.

The learned Principal State Counsel, Mrs. Murungi, submitted that there was nothing wrong with the charge as, in her view, all the ingredients constituting the offence of robbery with violence were clearly set out in the charge. She went on to state that the charge was proved since violence was proved which led

to the death of the deceased. She therefore asked us to uphold the appellant's conviction.

This being a second appeal only matters of law fall for consideration see ***section 361*** of the ***Criminal Procedure Code*** (Cap. 75 Laws of Kenya). As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings see ***CHEMAGONG V. R [1984] KLR 611.***

On the issue of facts, there can be no doubt that there was clear evidence that the appellant had been an employee of the complainant and that he had either been sacked or for some other reasons left employment. There was also no dispute that he was seen on the material day when he went to the complainant's house from which he carried various items on the pretext that he had been allowed to do so by the complainant. It was on that same day that the complainant's house was found ransacked and the maid killed and dumped on a sofa seat. That same evening, the appellant was found in possession of a hat which was part of the property stolen during the day. As if that was not enough, the appellant later led the police to where more items were recovered. Taking into account the evidence of Mugo (PW5) and what had happened before and after the day in question, there can be no doubt that the appellant was involved in this incident. The circumstances of the case were such that there could be no any other explanation than that it was the appellant who committed the offence. Here, we have circumstantial evidence pointing at no any other person but the appellant. In **R V. TAYLOR, WEAVER AND DONOVAN (1928)** 21 Cr. Appl. R2 the principle as regards the application of circumstantial evidence was enunciated in these words:-

> **"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial. "**

Having considered the findings of fact by the two courts below, we are satisfied that there can be no justification in interfering with those findings

What about the charge sheet? Mr. Onalo raised the issue of the charge sheet as being defective. We have on earlier occasions commented on the issue of a charge of robbery with violence contrary to section 296(2) of the Penal Code and we think it may be useful to revisit this matter. What are the essential ingredients of the offence under section 296(2) of the Penal Code? In JOHANA NDUNGU VS. REPUBLIC -

Criminal Appeal No. 116 of 1995 (unreported), this Court stated:-

> **"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 o 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 presupposed 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**
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> **weapon or instrument, or**
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> **(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, beats, 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 he offence under sub-section (2) and it is mandatory for the court to so convict him. inthe same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery theoffender 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 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 reproduced at the beginning of this judgment state that the appellant armed with a knife "robbed" **Lydia Wairimu** and that immediately before or immediately after the time of the robbery caused the death of the said Lydia Wairimu. 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 the offender is in company with one or more other person or persons that would constitute the offence. 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 **OPOYA V. UGANDA** [1967] E.A. 752 the predecessor of this Court held that the term **"robbed"** was a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use of or threats of use of actual violence to any person. In the present appeal, the evidence adduced and accepted by the two courts below was to the effect that the house maid had three stab wounds on her neck and that she died as a result of these wounds. Clearly, the offence of robbery with violence was committed.

In view of the foregoing, we are satisfied that the charge was not defective since the prosecution relied on the fact that the appellant was not only armed with a knife but seriously wounded the victim (**Lydia Wairimu)** leading to her death. Experience has shown that most robberies are committed by gangs of people who are dangerously armed and that they invariably wound their victims leading to death such as in the present case. We must emphasize here once again that any of the three sets of ingredients would be sufficient to constitute the offence of robbery with violence under section 296(2) of the **Penal Code.**

We think we have said enough in this appeal. It is our view that the appellant was convicted on very sound evidence. We discern no fault in the findings of the two counts below and we therefore order that this appeal be and is hereby dismissed.

DATED and DELIVERED at NAIROBI this 10th day of February, 2006.

P.K. TUNOI

JUDGE OF APPEAL

E.O. O'KUBASU

JUDGE OF APPEAL

W.S. DEVERELL

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR