



IN THE COURT OF APPEAL OF KENYA

AT NYERI

CRIMINAL APPEAL 10 OF 2002

HENRY KIMATHI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Juma & Tuiyot, JJ.) dated

13th September, 2001

in

H.C.C.R.A. NO. 235 OF 1998)

JUDGMENT OF THE COURT

Henry Kimathi, the appellant herein, appeals to this Court for the second time, his first appeal to the High Court having been dismissed by that court (*Juma & Tuiyot, JJ.*). This being a second appeal, only matters of law can arise. Mr. Mahan, learned counsel for the appellant, raised several matters, which he said, raised issues of law but we really do not think most of those matters can take the appellant anywhere. With respect to Mr. Mahan, we are not aware of any legal requirement that where the complainants are a husband and wife, their evidence requires corroboration from an independent person. Mr. Mahan was unable to show us any authority for that proposition. Nor can the contention by Mr. Mahan that threat to use violence in a charge of robbery does not and cannot prove a robbery charge. The offence of robbery is generally defined in **Section 295** of the Penal Code and there it is simply stated:-

“Any person who steals anything, and, at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen, or retained, is guilty of the felony termed robbery.”

That is the general definition of “**robbery**”; **section 296(1)** then sets out the penalty for that offence. **Section 296(2)** brings in other circumstances which may surround a robbery, such as that the offender may be armed with a dangerous or offensive weapon, or may be in the company of one or more other person(s) and so on. In the latter case, the penalty is death, but then it does not change the definition of the term robbery, which remains theft accompanied by use or threat to use violence. The cases of **GILBERT KIPKORIR KIMBOI V. REPUBLIC**, Criminal Appeal No. 173 of 2000 and **RAJAB SAID**

ABDALLA V. REPUBLIC, Criminal Appeal No. 86 of 1997 on which Mr. Mahan relied involved one lone person attacking tourists on a beach and in each case the prosecution had to prove either that the attacker was armed with a dangerous or offensive weapon or that during the robbery the attacker wounded, beat struck or used any other form of personal violence to their victims. In ***KIMBOI***'s case for example, Kimboi had a knife somewhere on his person but the victim of the robbery never saw the knife and had no knowledge that Kimboi had one. In those circumstances, it was held that the prosecution had failed to prove that the appellant had used or threatened to use the knife (violence) on the victim of the robbery, and an offence under **section 296(2)** of the Penal Code had not been proved but one under **section 296(1)** had been proved because the appellant had struggled with his victim in order to get the bag from her. The case of ***RAJAB SAID ABDALLA*** was dealt with on the basis that the P3 Form by which the prosecution had intended to prove the use of violence on the victim of the robbery had been produced by a police officer and the Court thought that the officer was not entitled to produce the P3 Form. The Court in that case relied on **section 33(b)** of the Evidence Act but it appears that the attention of the Court was not drawn to **section 77** of the same Act. With respect to Mr. Mahan, those two cases have no application to the appeal under consideration.

There is, however, one important matter of law to which we must now return. When put on his defence, the appellant is recorded as having told the Magistrate as follows:-

“ACCUSED 1:

I elect to give evidence on oath. I will call a Moyale person who (sic) I don't have the particulars”.

To this statement by the appellant, the Magistrate responded:

“COURT:

It is not possible to assist in calling a witness whose particulars and details are not known. The case shall therefore proceed.”

The case proceeded, the appellant gave his sworn evidence saying he was in Moyale during the time of robbery, that he was marooned there by heavy rains and was only able to return to his home area after a plane had lifted him to Nairobi from where he took a vehicle to his home area. He was arrested on his way from Nairobi. He also gave the name of one ***“Pastor” Mutuma*** who helped him in Moyale.

We note that the appellant had not asked the Magistrate's aid in calling his witness; the appellant could himself have called the witness without the assistance of the court. There is no legal requirement that a witness can only be called with the assistance of the court. After the appellant concluded his evidence, the Magistrate did not again ask him if he (appellant) still wanted to call his witness. The witness could well have been Mutuma and if he had been called he might well have supported the appellant's contention that the appellant was in Moyale at the time of the robbery. In rejecting his defence, the Magistrate stated thus:

“The Alibi given by accused 1 and accused 2 are unreliable. Accused 1 was not only clearly identified by PW1, but took time to have forced sex with PW2

The point is that the appellant wanted to call a witness in support of his alibi and the Magistrate did not accord him a reasonable opportunity to call the witness. That clearly amounted to a violation of his rights guaranteed by **section 77(1) (e)** of the Constitution. The superior court, on first appeal said absolutely nothing on the alibi and that the appellant had not been accorded a reasonable opportunity to call his witness in support of the alibi. That is the point of law on which we must allow the appeal. We do so with the result that we quash the conviction, set aside the sentence of death and order that the appellant shall be released from prison forthwith unless he be held for some other lawful cause. Those are our orders in the appeal.

Dated and delivered at Nyeri this 12th day of May, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR