



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Criminal Appeal 136 of 2004

JAMES NJILITHIAAPPELLANT

AND

REPUBLICRESPONDENT

*(Appeal from a judgment/sentence of the High Court of Kenya
at Meru (D. Onyancha & H. M. Okwengu, JJ) dated 1st July, 2004*

in

H.C.CR.A. NO. 394 OF 2001)

JUDGMENT OF THE COURT

This is a second appeal against the conviction and sentence to death of the appellant James Njilithia (hereinafter “*the appellant*”) of robbery with violence contrary to **section 296(2)** of the Penal Code.

The particulars of the offence stated in the charge sheet were:-

“On 26th day of July 2001 at Meru Township, Ntima Location within Eastern Province, jointly with others not before court armed with offensive weapons namely rungun and swords robbed Joseph Munene cash Kshs. 5,000/-, one jacket, wrist watch and cap all valued at Kshs. 6,650.00 and at or immediately before or immediately after the time of such robbery used personal violence to the said Joseph Munene.”

Joseph Munene, the complainant, was PW 1 at the trial before the Chief Magistrate Meru Law Court (A.O. Muchulele C.M.).

The evidence of **PW1** at the trial was given on 16th October 2001 as follows:-

“I am MANENE JOSEPH. I stay in Meru North, Tigania, Rware village. I work in butchery at Gakoromone in Meru Town. I recall on 26.7.01 at about 6.00 a.m. I was going to work from home. This is at Gakoromone. I was going to slaughter house to pick meat for the butchery. I reached Gatoto’s plot and heard footsteps behind me. I looked back and saw a person behind with rungu

raised. He was wearing a knitted hat (muffin) covering all head except for the eyes. He immediately struck me on front head with a rungu that had put (sic) (nut?) at tip. He struck me again on front head. He struck me two more times. I struggled with him and I held him by the neck and pulled out the hat. At that point other people came and put me down and took my Kshs. 5,000/=, wrist watch, jacket hat (cap). They all ran away. I identified my first attacker when I pulled off the knitted hat he had.

It is at that juncture that the others came and attacked me. The first attacker was the accused in the dock. He was familiar as I had seen him in Meru Town and he would be moving in Gakoromone Bus Park of near where I was working. I did not know what he was doing. I had been seeing him for about 8 months. I was left at scene unconscious. After some time I rose up and went back to my house. The other people who attacked me were two. I recognised only the accused.

I did not identify the other two. At my house I told JULIUS whom I stay with that I had been attacked. Another person came and I also told him. We went to Meru Police Station and reported. I was given note and went for treatment at Meru District Hospital. We went back to police station and recorded statement. I left with Police to go and look for accused whom I told Police I had seen. We looked for him but did not get him. Police asked that we look for him and if we get him we report to police. Same day we caught up with accused at Gakoromone and was helped by police to arrest him and we took him to Meru Police station where he was charged. Police took accuse to his home and later police showed to me my cap which had been robbed.

It is police who showed me the cap saying accused had led them to recover it. I can identify it by this tea (sic ? T?) inside it. I recorded a further statement. I was issued with P3 and on 2.8.01 it was completed. This is the P3 (MFI 3).”

In answer to cross examination by the appellant PW 1 said:-

“I had been seeing the accused in Meru Town. I am certain the accused the one who attacked me. I did not recover my other property. We arrested the accused for the robbery. I do not know what the accused does. Incident was at 6.00 a.m.

It was not dark. Day was breaking. I did not mistake the accused for my attacker but accused is my attacker. I did not find the accused with the cap.”

With regard to the recovery of **PW1**'s cap **PW4** being P.C. Weldon Koros explained in his evidence in chief as follows:-

“....I interrogated accused and he led me to the recovery of the cap. He led me to a place besides (sic) Kenya Commercial Bank where he had belongings in a manila bag and the cap came from that bag.”

In cross examination by the appellant **PW4** said:-

“..... Accused was brought to me under arrest. Complainant told me he recognised the accused in the attack. When accused was brought he had nothing. Complainant identified the cap as his and having been stolen in the attack.

It is the accused who led me to the cap. It is true accused did not lead me to the cap. I did not know the accused before. Accused took me to place where he operates from and in his bag was the cap. In the bag were other clothings which we showed complainant but they were not his. I did not plant the cap in (sic) the accused.”

This last paragraph of the record is somewhat confusing; the most likely explanation is that the negative “not” in the second sentence is an error since it is inconsistent with both the preceding sentence and with the immediate following sentence.

In considering the evidence it is necessary to avoid confusion between the “*muffin*” hat being worn by the appellant at the beginning of the attack and the complainant’s cap.

The learned Chief Magistrate analysed the evidence before him and he stated in his judgment that he was well aware that PW1 was the only witness to the attack and he cautioned himself that it was unsafe to convict of robbery on the evidence of a single witness to the attack and to the identification of the attacker.

The learned Chief Magistrate found PW1 “*truthful and firm about his recognition of the attacker as a person he had been seeing for a long time around Meru town.*”

The learned Chief Magistrate found corroboration of the identification of the appellant in the evidence that the accused led the police to the recovery of **PW1’s** cap in the bag to which the appellant had led the police later that day after the identification of the appellant.

The superior court (D.Onyancha and H.M.Okwengu J.J.) in its judgement re – evaluated the evidence and came to the same conclusion as the trial court.

There were therefore concurrent findings of fact upon which both courts below were able to convict the appellant as one of the several persons who joined in the robbery. The Chief Magistrate, in reaching his decision had the advantage of seeing the demeanor of the appellant and **PW1**. The principal points raised by Mr. P. Muchira, learned counsel for the appellant, in his submissions before us were that there was a misdirection by the superior court in relying on an identification of the appellant so early in the morning as day was breaking by **PW1**, when the appellant was wearing a knitted hat described as a “*muffin*” which covered his head and face except for his eyes.

However **PW1’s** evidence was that his recognition of the appellant’s face occurred after **PW1** was able to pull the appellant’s “*muffin*” off his head during the struggle between the appellant and **PW1** prior to the arrival of the other two attackers. It was not a situation where the identifying witness was some distance away from the person claimed to have been identified in poor light. It would have to be very dark indeed to be unable to recognise the face of a person seen during a hand to hand struggle.

Having considered all of the above we have discerned no point of law upon which the superior court’s decision can be successfully challenged.

We therefore hereby dismiss the appeal against both conviction and sentence.

Dated and delivered at Nyeri this 27th day of October, 2006.

P. K. TUNOI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR