



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(CORAM: OMOLO, LAKHA & O'KUBASU, J.J.A.)
CRIMINAL APPEAL NO. 168 OF 2000
BETWEEN**

**JOHN ODIERO NYANGEA.....APPELLANT
AND
REPUBLIC.....RESPONDENT**

(Appeal from a Judgment of the High Court of Kenya at Mombasa (Hayanga & Mitey, JJ.) dated 4/8/99
in
H.C.CR.A. NO. 30 OF 1997)

JUDGMENT OF THE COURT:

This is an appeal by John Odiero Nyangea who was tried and convicted by the Principal Magistrate's Court at Malindi of robbery with violence contrary to section 296(2) of the Penal Code, particulars of the offence being that:

"On the 7th day of November, 1996 at Kisumu Ndogo area in Malindi Location within Kilifi District of the Coast Province, jointly with others not before court while armed with Masai sword and rungus robbed CHARO KARISA CHATU of a bicycle make Atlas F/No. 3224266 valued at K.Shs. 5,500/- and at, or immediately before or immediately after such robbery, wounded the said KARISA CHARO CHATU."

During the trial the prosecution called three witnesses to testify against the appellant. Prosecution case was based on identification and recent possession.

The complainant Karisa Charo Chatu (PW1) stated how on the morning of 7th November, 1996 at about 4.00 a.m. he was going to his house on a bicycle when three people confronted him. They attacked him with sticks and one of them had a panga. The complainant fell down as one of the attackers took the bicycle and set off followed by others. PW1 made noise which attracted his relatives and neighbours who came to the scene. One of those who came to the scene was Morris Wole Kombe (PW2) a brother of the complainant (PW1). From the scene PW1 and PW2 pursued the attackers who were found hiding in a bushy area where the appellant was found in possession of the complainant's stolen bicycle. The complainant was able to identify the stolen bicycle (Exhibit 2) as his.

When put to his defence the appellant in his unsworn statement stated that on the material day he was heading to a bus stop to catch a bus to Roka where he worked in a quarry. He saw two people who attacked him saying that he (appellant) was a thief. Police officers were called who arrested him and took him to Malindi Police Station from where he was subsequently charged with this offence.

The learned trial magistrate having considered the evidence before him came to the conclusion that the appellant committed the offence on which he had been arraigned before that court. In concluding his judgment the learned trial magistrate stated:-

"In spite of the defence raised, the evidence adduced by the above mentioned prosecution witnesses strongly indicate that the accused was among those that attacked and robbed the complainant.

The said evidence is not only overwhelming but also corroborative and reasonably credible. It is made up of both direct and indirect facts which point convincingly to the guilt rather than innocence of the accused.

Not only was he recognised as one of the attackers he was apprehended almost immediately after the attack and was found in possession of the bicycle stolen from the complainant."

The appellant having been convicted of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to suffer death as mandatorily prescribed by the law appealed to the High Court, where his appeal was heard by Hayanga and Mitei JJ. who having evaluated the evidence came to the conclusion that the appellant's conviction was proper and hence the trial court's findings were confirmed. In their conclusion the learned Judges of the superior court stated:-

"The appellant was found in possession of robbery item a bicycle within minutes of the robbery. That was very recent enough to anchor the presumption that he was one of the robbers."

Mr. Kiaragu for the appellant made brave attempt before us to show that the conviction of the appellant was unsafe. He stated that there was the issue of identification and recent possession and in his view there was no evidence that the appellant was arrested in possession of the bicycle. He also argued that PW1 and PW2 should not have been believed by the trial court and that the defence of the appellant was not considered. Mr. Gumo the learned Principal State counsel supported the conviction of the appellant and urged us to dismiss this appeal.

In this appeal there are concurrent findings by both the trial and superior courts to the effect that the appellant was identified during the robbery and that he was found in possession of the stolen bicycle (stolen in the course of the robbery) immediately after the event. Since the issue of ingredients constituting the offence of robbery with violence was alluded to by Mr. Kiaragu we think that it may be appropriate to say something on that important point. We can do no better than cite what this Court has already said in its decision in JOHANA NDUNGU V. REPUBLIC - CRIMINAL APPEAL NO 116 OF 1995 (unreported) in which it was stated inter alia:-

"In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the subsection 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 to further in any manner the act of stealing. Therefore the existence of the afore-described ingredients constituting robbery are pre-supposed in the 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 the sub-section.

- (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 he wounds, beats, strikes or uses any other violence to any person.

Analysing the first set of circumstances the essential ingredient apart from the ingredient 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 the offence under sub-section (2) and is mandatory for the court to so convict him."

The above is relevant to the present appeal since the evidence accepted by both the trial and the first appellate court was to the effect that the appellant was in the company of other people and that they were armed with offensive weapons when they pounced on the complainant (PW1). In our view the essential ingredients of the offence of robbery with violence contrary to section 296(2) of the Penal Code were clearly established and proved beyond any doubt.

Having considered all the relevant issues raised in this appeal we have no alternative but to dismiss the appeal. It is so ordered.

Dated and delivered at Mombasa this 25th day of January, 2001.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

E. O'KUBASU

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JUDGE OF APPEAL