



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**CRIMINAL APPEAL NO. 37 OF 2019**

**COLLINS MIRUKA KIBERENGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[Appeal from the judgment of A. Mwangi, Principal Magistrate, in Kigumo Criminal Case No. 1428 of 2018 delivered on 10<sup>th</sup> July 2019]***

**JUDGMENT**

1. The appellant challenges his conviction and sentence for the felony of *robbery with violence*.

2. The particulars were as follows-

*That on 1<sup>st</sup> August 2018 at Sammer village in Maragua, Murang'a South Sub-County within Murang'a County, jointly with others not before the court while armed with offensive weapons, namely knives, robbed Laban Nduati Wambui of a motor cycle registration number KMCE 100H make TVS Star, mobile phone Techno and Kshs 850 all valued at Kshs 82,850 and at the time of the robbery used personal violence against the said Laban Nduati Wambui.*

3. The petition of appeal raises six grounds. I will condense them into four: Firstly, that the investigations into the offence were inconclusive and shoddy; secondly, that the evidence did not establish the offence; thirdly, that his defence was disregarded; and, fourthly, that he was not positively identified.

4. At the hearing on 16<sup>th</sup> March 2022, the appellant relied wholly on his written submissions filed on even date.

5. The Republic contests the appeal. The case for the State is that all the ingredients of the offence were proved; and, that the sentence meted out was lawful.

6. This is a first appeal to the High Court. I have *re-evaluated* all the evidence and drawn *independent* conclusions. I remain cognizant that I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.

7. The complainant, Laban Nduati (PW1), was a *boda boda* operator. The motor cycle belonged to his employer, Charles Kamau (PW2) who produced the logbook and sale agreement.

8. On the night of 1<sup>st</sup> August 2018, the complainant was hired by the appellant and another person. He had known the appellant as his customer for about five months but did not know his name. The complainant did not know the other passenger.

9. The complainant stopped along the way to re-arrange the load of bananas. It is then that the appellant attacked him with a knife. He shielded the attack but was cut above the eye. The appellant and his accomplice beat him up and submerged him into a dam. They then tethered him onto a tree, stole his phone, Kshs 850 and escaped with the bike. The complainant managed to untie himself and sought help. One of the persons who helped him was another *boda boda* rider, Nephath Kamau (PW3) who took him to file a report with the police.

10. In cross examination, the complainant was emphatic that he had ferried the appellant on a number of occasions in the last five months; and, that it was the appellant who requested him to transport him, his accomplice and the bananas.

11. The police circulated the details of the bike. The motor cycle was recovered by Corporal John Kibet (PW4) on 6<sup>th</sup> August 2018 in the

appellant's home at Vihiga County. Although the appellant claimed he had bought it, he was unable to produce any ownership documents. He was thus arrested and booked at Sereni Police Station, Vihiga. He was brought back to Murang'a by Corporal Harun Kamrer (PW5) and charged.

12. PW6 was Anthony Mwangi. He is a clinical officer and examined the complainant on 8<sup>th</sup> August 2017. He produced the P3 Report (exhibit 2). The complainant suffered cut wounds on the eye-lid, wrist joint and right leg. He also had swollen and tender upper and lower jaws; and, tenderness on both sides of the chest. He assessed the degree of injury as *harm*.

13. In his defence, the appellant made an unsworn statement. He claimed that he was asleep in his house at Vihiga when he was arrested. He stated that the police framed him up. He denied that he was in possession of the bike and claimed he could not ride one.

14. In our criminal justice system, the legal burden of proof lay throughout with the prosecution. **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332.

15. From my re-appraisal of evidence up to this point, I am satisfied that the appellant was *positively identified* by the complainant. It is true that it was at night. It is also true that the complainant did not know the appellant's name. But he knew him well as he had ferried him on his bike on a number of occasions for about *five months*. Furthermore, on the material night, the appellant asked for the service from the complainant. They spent a considerable time together as they had to pass through appellant's place of work to pick the load of bananas before they embarked on the journey.

16. I am thus satisfied that this was evidence of *recognition*; stronger than mere *identification*. **Wamunga v Republic** [1989] KLR 424, **Maitanyi v Republic** [1986] KLR 198 at 201.

17. Granted those facts, it was *unnecessary* to conduct an identification parade as argued by the appellant. That ground of appeal fails.

18. I am also unable to say that the police investigations were shoddy. They received a complaint from PW1 of the robbery. From the documents submitted by PW2, the bike belonged Charles Kamau. The police circulated the details of the stolen two-wheeler. It was recovered miles away in Vihiga County in possession of the appellant. That was only five days after the robbery.

19. The appellant claimed without any evidence that he had bought it. That was a matter *especially within his knowledge*. He was unable to back it up or to demonstrate that he was being framed up by the police.

20. Furthermore, I find that the doctrine of *recent possession* fits squarely in this case. Firstly, the property was found with the appellant; secondly, the property was positively identified by the complainant; and, thirdly, the property was stolen from the complainant just *five days* earlier. See **Samson Nyandika Orwerwe v Republic**, Court of Appeal, Nairobi, Criminal appeal 16 of 2013 [2014] eKLR, **Erick Gangai v Republic**, Kitale, High Court Criminal Appeal 125 of 2011 (unreported).

21. I will now turn to the elements of the offence. Section 296 (2) of the **Penal Code** provides-

*If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death. [underlining added]*

22. From the evidence of PW1, PW3 and PW5, I readily find that the appellant robbed the complainant of the motor cycle, money and cellphone and injured him during the robbery. The appellant was in the company of *another assailant*. They had an *offensive weapon*, namely a knife. As I have stated, the motorcycle was recovered from the appellant at his Vihiga home five days later.

23. From my analysis of the evidence and the law, the defence tendered by the appellant was bogus. I thus readily find that all the elements of the offence of robbery with violence were proved beyond reasonable doubt.

24. In the end, I concur with the learned trial magistrate that the offence was proved beyond reasonable doubt.

25. I will now to turn to the sentence. The appellant was imprisoned for *thirty years*. The appellant showed *no* remorse. In fact, he declined to offer mitigation. The offence carries a *mandatory* sentence of death. Since no notice to *enhance* the sentence was served; and, no warning was given, I will not disturb the sentence.

26. The upshot is that the appeal on both the conviction and sentence is hereby *dismissed*.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG'A this 21<sup>st</sup> day of April 2022.**

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of-**

Appellant (in person)

Mr. Waweru for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms. Susan Waiganjo, Court Assistant.