



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 48 OF 2019

MUHAMUD SHURIYE YUSSUF.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence delivered

by Hon. Mugendi Nyaga (SRM) Wajir at the Senior Principal Magistrate's

Court on 18th October 2019 in Criminal Case No. 349 of 2019)

JUDGEMENT

1. The Appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

The particulars of the offence are that on 8th day of August 2019 at Adanawale Location in Wajir County, Wajir West Sub-County, Griftu Division, being armed with a panga the Appellant robbed Keynan Gabow Adan of Kenya Shillings 15,800/= and during the incident inflicted injuries upon the victim.

2. The Appellant also faced a second count of assault contrary to Section 251 of the Penal Code.

Particulars are that on 8th day of August 2019 at Adanawale Location in Wajir County he assaulted Keynan Gabow Adan with a panga.

3. He was convicted on both counts and sentenced to 10 years on the 1st Count and 5 years on the second Count.

4. Being aggrieved by the conviction and sentence the Appellant preferred an appeal to this court on two grounds as follows;

- **The case was not proved to the required standard &**
- **The trial court failed to consider his defence.**

5. As the first appellate court I am enjoined to consider the evidence afresh, examine and evaluate the same in order to arrive at an independent decision, at the same time bearing in mind that the trial court heard the evidence first hand and I must therefore take that into account. See the holding in **Okeno vs R [1972] E.A at 32.**

6. The Appellant and the victim **Keynan Gabow** an old man of 78 years are known to each other. The record indicates that they are indeed related. Indeed, the Appellant in his defence alleged that the victim owned him six months' salary.

7. The victim **PW1** informed the court that the Appellant attacked him as he was grazing his goats on the 8th of August 2019 and told him '*that was his last day*'. The appellant then hit him on the neck, hand and legs and he was rescued by a young man.

8. PW1's evidence was corroborated by PW2 who informed the court that he had just left PW1 grazing a few minutes before the attack and on hearing PW1's scream went back to the scene of crime and found that PW1 had been injured.

9. The injuries that PW1 sustained were further confirmed by PW3 a clinical officer at Griftu Sub-County Hospital who attended to the him and filled the P3 form. PW3 informed the court that the complainant's left cheek was mildly swollen and tender. The upper limb had a cut that was deep and he had to stitch the same. Equally the left lower limb had a deep cut on the thigh. He suspected that a sharp object was used.

10. At the close of the prosecution case the Appellant was found to have a case to answer. In his defence the Appellant raised the issue of his name stating that the name he was being referred to is not his name. Further he stated that the complainant owed him six months' salary and upon giving an indicating that he would sue the complainant's family attacked him and the complainant as well.

11. In contrast the arresting officer informed the court that the Appellant was attacked by residents of the area as he attempted to run away on being apprehended due to the incident.

12. The evidence mounted by the prosecution quite clearly dislodged the defence coupled with the fact that the Appellant did not in anyway dislodge the credible evidence of the prosecution witnesses. Identification was by recognition and the Appellant himself confirmed himself that he had an issue with the complainant, meaning that they were not strangers to each other.

13. Although there was no eye witness there is circumstantial evidence to corroborate the information given by the complainant who struck me as a truthful witness.

In **Kariuki Njiru & 7 Others vs Republic** the court stated inter alia,

“Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from possibility of error.”

In **Warunga vs Republic [1989] KLR** the Court of Appeal stated,

“It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine each evidence carefully and be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

In **Roma vs Republic [1967] E.A 583 at 584** the Court of Appeal of East Africa had this to say on the evidence of a single identifying witness and the danger thereon,

“A conviction resting entirely on identification invariably causes a degree of uneasiness.....

The danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.”

14. Having warned myself of the danger of relying on a single witness I am convinced that identification of the Appellant by the complainant was proper, the two had an opportunity to clearly see each other as the Appellant initially threatened to bring the complainant's life to an end. Further the two were known to each other and identification was by recognition. Further the attempt by the Appellant to ran away after the incident after the citizens' arrest fortifies that act of guilt on his part.

15. For the reasons stated above I find that the 1st count of robbery with violence was proved beyond reasonable doubt and I concur with both the conviction and the sentence.

16. The court takes note of the two counts that faced the Appellant. Section 295 of the Penal Code defines the offends of robbery as follows;

“Any person who steals anything, and, at or immediately before or 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 a felony termed robbery.”

Section 296 provides for the punishment

“(1) Any person who commits the felony of robbery is liable to fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person, 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.”

17. The ingredients of the offence of robbery with violence include stealing, or taking away in a manner that involves violence and/or wounding of the person or any other person as the item is being stolen.

18. The Appellant is said to have stolen Ksh.15,800/= from the complainant and during the incident threatened and wounded the complainant. Isn't this the reason then that he faced the offence of Robbery with violence? Why was then was there another count against him of assault? Is this not double jeopardy on the part of the Appellant? Was he not punished twice for the same offence?

19. My take is that the 2nd count was unnecessary in view of the first charge of robbery with violence and this amounted to “*double Jeopardy*”. The ingredient of the first count included both stealing and wounding the victim. Consequently, I will set aside both the conviction and sentence on the second count.

20. As for the name, the Appellant in the usual Kenyan tradition has been referenced with his first name and his surname.

21. However, having found that the evidence before court on the 1st count was sound and proper, I decline to set aside the conviction on the offence of robbery with violence. The evidence before court was beyond any reasonable doubt and I do concur with the trial court's findings on this count.

22. I find that in the circumstances of the case the punishment was most lenient the Appellant having viciously attacked a helpless, senior member of the society and having wounded him severely. There would be no basis therefore to interfere with either the conviction or sentence.

23. The appeal on the 1st count is consequently dismissed. As the sentences were to run concurrently, the Appellant will continue to service his jail term.

DELIVERED AND SIGNED AT GARISSA THIS 25th DAY OF FEBRUARY, 2021.

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ALI ARONI

JUDGE