



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 1 OF 2018

MESHACK OGOMA NYAUKE.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in criminal case No.1089 of 2014 of the Chief Magistrate's Court at

Homa Bay by Hon. Ndegwa – Principal Magistrate)

JUDGMENT

1. The appellant, Meshack Ogoma Nyauke, was convicted of the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code.
2. The particulars of the offence were that on the night of 15th October, 2014 at Wiga village, Homa Bay District of Homa Bay County, with others not before court, while armed with machetes and clubs, attempted to rob Daniel Onyango Odoyo of his household goods and at the time of such attempt wounded the said Daniel Onyango Odoyo.
3. The appellant was sentenced to suffer death. He has appealed against both conviction and sentence.
4. The appellant was in person. His grounds of appeal can be summarized as follows:
 - a) That the learned trial magistrate erred in law and in fact by convicting him without the production of an offensive weapon.
 - b) That the learned trial magistrate erred in law and in fact by convicting him without sufficient evidence.
 - c) That the learned trial magistrate erred in law and in fact by rejecting his alibi defence.
 - d) That the sentence was harsh and dehumanizing.

5. The state opposed the appeal through Mr. Ochengo, the learned counsel.

6. The facts of the prosecution case were briefly as follows:

At about 2:30 a.m. on 15th October, 2014, the complainant was roused from sleep by some noise from outside. He went out and found some three men. With the help of some security light, he saw two of them armed with iron rods while a third one who was next to the kitchen door had a club and a machete. By this time they trio had made a hole to the kitchen wall. He screamed and two of them ran away but the person who was next to the kitchen door did not. He held him and a struggle ensued until when help by members of public arrived.

7. In his defence, the appellant denied involvement in the offence. He contended that he was framed up in the offence after he refused to go by the schemes of the complainant. He said the complainant whom he had not met before, asked him to ferry him to Wiga on his boda-boda. On reaching there, the complainant bought some beer and suggested that they go to his house after he had called someone to take his motor cycle away for he was too drunk. The complainant then asked him to inherit his sister in-law so that he could erect his house where hers stood. When he declined, the complainant beat him up and raised an alarm claiming that he wanted to steal from him.

8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.

9. The complainant explained that the weapons that the appellant had, were taken away by members of public who responded to the alarm he raised. Failure by the prosecution to produce an offensive weapon cannot be the basis of allowing an appeal. The appeal cannot turn on this ground.

10. The evidence of Eli Odhiambo Oduyo (PW3) is that he found the complainant struggling with the appellant and together with other member of public managed to separate them. The complainant had been injured. This was the gist of the evidence of Elizabeth Atieno Otieno (PW4).

11. During cross examination, the appellant suggested to the complainant that he found him walking and alleged he had broken into and damaged his house. The learned trial magistrate was therefore justified to dismiss his defence for it was clearly an afterthought.

12. The sentence for the offence of attempted robbery is provided for under subsection 2 of section 297 of the Penal Code which provides as follows:

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 assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

The appellant was armed with a club and a machete. These are offensive weapons. He was also in company of two others and when his accomplices ran away, he inflicted injuries on the complainant. The ingredients of section 297(2) of the Penal Code were therefore satisfied. The sentence imposed by the learned trial magistrate was the only available legal sentence for the offence.

13. From the foregoing analysis of the evidence on record, there is no justification in faulting the judgment of the learned trial magistrate. The appeal is bereft of any merits. I accordingly dismiss it.

DELIVERED AND SIGNED AT HOMA BAY THIS 23RD DAY OF JUNE, 2021

KIARIE WAWERU KIARIE

JUDGE