



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. 4 OF 2018

VICTOR OTIENO NYAKWANA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.202 of 2017 of the

Principal Magistrate's Court at Mbita by Hon. Samson Ongeru-Principal Magistrate)

JUDGMENT

1. Victor Otiemo Nyakwana, the appellant herein, was convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.
2. The particulars in count one were that on the 17th August, 2017 at Kalek village, Nyamarandi sub location, Suba sub county within Busia County, robbed Prisca Achieng Nyandiwa of her purse containing National identity card, KCB ATM card, NHIF card, Tecno mobile phone, cash Kshs. 100/= and immediately before the time of such robbery beat the said Prisca Achieng Nyandiwa with a fist.
3. The appellant was convicted and sentenced to fifteen years imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He raised five grounds of appeal that can be summarized as follows:
 - a. The learned trial magistrate erred in law and in fact by convicting on insufficient identification evidence.
 - b. The learned trial magistrate erred in law and in fact by convicting him on contradictory evidence on exhibits.
4. The appeal was opposed by the state through Mr. Oluoch, learned counsel who contended that the evidence was overwhelming.
5. 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**.
6. The offence against the complainant was committed during day light at 11.30 am. However, the complainant was unable to recognize her assailant. The prosecution and the court did not rely on the evidence of identification.
7. During the robbery, the complainant was forced to write her security code and M-pesa PIN on her assailant's red rubber shoes.
8. The complainant went on to testify that after she left hospital she spotted the appellant as he entered into an M-pesa shop. This must be on suspicion for she had earlier testified that he was a stranger to her.
9. When the appellant was searched at Sindo AP camp, most items robbed of her were recovered on him. His red rubber shoes still had the PIN she had been forced to write.
10. Sergeant Julius Kiptanui (PW4) of Sindo AP camp testified of how they recovered the complainant's items from the appellant after he was arrested.
11. Though the appellant contended that there was contradicting evidence on exhibits, this was not supported by the evidence on record.

12. The evidence of recovery of the complainant's items on the appellant and the presence of the complainant's PIN on the shoe of appellant was very strong evidence against the appellant and whose defence did not displace the same.

13. Section 296 (2) of the Penal code states:

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.

14. The Court of Appeal in the case of **Johana Ndungu vs. Republic[1996] eKLR** stated:

If proved facts show that robbery under section 296(2) has been committed then the trial magistrate is obliged to convict the accused under this section and impose the sentence of death. Use of terms such as the one used in this case by the magistrate is not going to change facts so as to justify a conviction under section 296(1) when the proved facts show that the charge under section 296(2) has been proved. The same message also goes to the judges of the 1st appellate court who, because their judgments are binding authorities for the sub-ordinate courts to follow, have a duty to give correct guidance in strict accordance to law.

15. In the instant case, the appellant wounded the complainant herein. The offence of robbery under section 296 (2) of the Penal Code was therefore proved against him beyond any reasonable doubt. The sentence imposed herein was therefore illegal. Unless or until parliament amends section 296 (2) to provide for an alternative sentence, courts are called upon to be faithful in interpretation of the same. I accordingly set aside the sentence of fifteen years imprisonment and substitute it with death sentence.

16. The upshot of the foregoing is that the appeal is dismissed for want of merits.

DELIVERED and SIGNED at HOMA BAY this 26th Day of July, 2021.

KIARIE WAWERU KIARIE

JUDGE