



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYAMIRA**  
**CRIMINAL APPEAL NO. 23 OF 2019**

**JARED GISEMBA NYATUKA-----APPELLANT**

**=VRS=**

**THE REPUBLIC-----PROSECUTOR**

*{Being an Appeal against the Judgement of Hon. M. O. Wambani – CM Nyamira dated and delivered on the 13<sup>th</sup> day of June 2019 in the original Nyamira Chief Magistrate’s Court Criminal Case No. 608 of 2016}*

**JUDGEMENT**

The appellant was sentenced to life imprisonment for the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars of the offence were that on 26<sup>th</sup> May 2016 at Kebirigo town in Nyamira South Sub-county within Nyamira County jointly with others not before court, armed with offensive weapons namely pangas, axes and clubs they robbed Joel Atuti Ondicho of cash Kshs. 41,000/=, a Vitron television, LG DVD, 2 iron boxes, 2 pairs of Safari boots, 2 mobile phones make Itel and Nokia and immediately before the time of such robbery threatened to use actual violence to the said Joel Atuti Ondicho.

This appeal is against the conviction as well as the sentence and is premised on the following grounds: -

- “1. THAT my Lord I did not plead guilty to those charges and I strongly maintain the same.**
- 2. THAT my Lord the learned trial magistrate and both the appellant to a harsh sentence without evaluating and analysing the evidence on the record which was below the required standard.**
- 3. THAT the trial magistrate erred both in law and fact by failing to accord the appellant a fair trial.**
- 4. THAT the trial magistrate erred both in law and fact by failing to appreciate and consider that the prosecution case was riddled with contradiction.**
- 5. THAT my Lord the learned trial magistrate erred both in law and fact by failing to explain to the appellant a right of fair trial.**
- 6. THAT the learned trial magistrate erred both in law and fact by basing a conviction on a wrong section of the law and yet there was no evidence from the investigation officer leaning the appellant in question.**

**7. THAT the learned trial magistrate erred both in law and fact by basing conviction on a wrong section of the law and yet there was no evidence from the investigation officer in question.**

**8. THAT the learned trial magistrate erred both in law and fact by convicting the appellant on a non-active evidence.**

**9. THE overall effect is may the court be pleased to allow the appealed life sentence set aside the appellant to liberty.”**

The appellant argued the appeal through written submissions which he was allowed to highlight at the hearing. Miss Okok, Learned Prosecution Counsel opposed the appeal and urged this court to dismiss it.

I have painstakingly considered the submissions by the parties to the appeal and also re-considered and evaluated the evidence in the court below so as to arrive at my own independent conclusion. I have done so well aware that unlike the trial Magistrate I did not benefit from seeing and hearing the witnesses.

From the evidence there is no doubt that a robbery with violence occurred in the house of the complainant on the material night. The attackers were more than one and were armed with crude weapons and any one of those elements are sufficient to constitute the offence as defined in **Section 296 (2) of the Penal Code**. The gravamen of this appeal is that the evidence adduced fell short of the standard required to prove that the appellant was involved in the robbery. I have however analysed and evaluated the evidence myself and I am satisfied that the evidence tendered placed the appellant at the scene of the offence.

Firstly, there was evidence from the complainant (Pw1) and this was corroborated by his wife (Pw2) that the electricity light in their bedroom was on when the attackers struck. This was electricity which remained on throughout and I am satisfied the scene was therefore well lit. The complainant testified that the attackers' faces were not masked although two were wearing berets like the ones worn by the police. He could therefore see their faces clearly because as he stated he got out of bed and faced them and even conversed with them as they made the demand for money. He even stated that he was able to see that the appellant had a scar below his left eye. His wife (Pw2) stated that the ordeal lasted for about 30 minutes and in my view this was time enough for the complainant to make a positive identification of the attackers. Pw2 stated that although she saw the attackers she did not see their faces because she did not get out of bed and I find that plausible. She however corroborated Pw1's evidence that the electricity was on and that he himself got out of bed and hence he was in a position to see the attackers.

The investigating officer PC Robert Koech (Pw3) testified that in his first report the complainant disclosed that one of the attackers had a scar below the eye and this adds weight to the complainant's testimony that he identified the appellant. The complainant also identified the appellant at an identification parade conducted by Inspector Daniel Marucha (Pw4). This officer also confirmed to have been told by the complainant that one of the attackers had a scar below the left eye. Pw4 testified that the complainant easily picked the appellant at the parade.

In his submissions the appellant raised the issue of a contradiction between the evidence of the complainant (Pw1) and IP Marucha (Pw4) concerning the number of people that were paraded (members of the parade). I agree there was a contradiction as according to the complainant they were more than 15 but according to IP Marucha (Pw4) they were only 8. It is however instructive that the parade was conducted by Pw4 who had the authority on how it was constituted and conducted. The complainant being a lay person may not have been aware of what constitutes the members of an identification parade. I do not therefore consider that contradiction fatal.

Apart from evidence of identification, the appellant was connected to the robbery by the testimony of Reuben Karanja Sese (Pw6) who gave credible evidence that the appellant was the one who sold to him an Itel phone which was stolen from the complainant's wife (Pw2) during the robbery and which was tracked to Doris Kemunto (Pw7) by PC Koech (Pw3). Reuben Karanja Sese (Pw6) and the appellant were village mates and were known to each other prior to the time the latter sold the phone to him. There was

nothing in the evidence to demonstrate that Reuben Karanja Sese (Pw6) had any reason to lie against the appellant and I therefore believed him. Both Pw6 and Pw7 who were the other two people arrested in connection with the robbery were treated as witnesses and the appellant's submission that they should have been subjected to an identification parade has no basis. The phone recovered from Doris (Pw7) and which had been purchased for her by (Pw6) was positively identified by Pw2 as hers and also as being one of the items stolen during the robbery. This piece of evidence therefore corroborates Pw1's evidence that the appellant was one of the robbers and confirms that there was no possibility of a mistaken identity.

In his defence, the appellant alleged he was fixed by his uncle because of a land dispute. However, there is nothing in the evidence to demonstrate a nexus between his said uncle Thomas Gisemba and the complainant in this case. His arrest took place after the robbery and his allegation that he was drunk when arrested does not offer any rebuttal to the prosecution's case. His defence was farfetched and it could not resist the very credible and cogent evidence mounted by the prosecution and the appeal against conviction has no merit.

In regard to the sentence, the trial Magistrate considered the appellant's record and mitigation and sentenced him to life imprisonment instead of handing a death sentence. I am satisfied that the sentence is reasonable in the circumstances of the case and the attitude of the appellant to the offence. The appeal is dismissed in its entirety.

**Signed, dated and delivered in open court this 23<sup>rd</sup> day of January 2020.**

**E. N. MAINA**

**JUDGE**