



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 31 OF 2019

ALEX YOWASI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(From the original conviction and sentence in Criminal case No.1179 of 2018 of the
Chief Magistrate's Court at Busia by Hon. P.Y. Kulecho–Senior Resident Magistrate)*

JUDGMENT

1. **Alex Yowasi**, the appellant herein, was convicted for the offence of robbery with violence contrary to section 295 as read with 296 (2) of the Penal Code.
2. The particulars were that on the 26th July 2018 at Sofia area in Busia Township Location, within Busia County, jointly with others before court while armed with a metal a machete robbed Tobias Wafula Onjere of his motor cycle registration number KMEF 280G valued at KShs. 100,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Tobias Wafula Onjere.
3. The appellant was convicted and was sentenced to hang as provided for under the law. He now appeals against both conviction and sentence.
4. His grounds of appeal can be summarized as follows:
 - a) The learned trial magistrate erred in law and in fact by convicting him on fatally defective charge.
 - b) The learned trial magistrate erred in law and in fact by ignoring that the alleged scene was outside Kenya.
 - c) The learned trial magistrate erred in law and in fact by relying on insufficient evidence.
5. The appeal was opposed by the state through Mr. Gacharia, learned counsel who contended that though the offence committed in Uganda, it commenced in Kenya.
6. 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**.
7. There are two main issues for my consideration as follows:
 - a) Whether the learned trial magistrate had sufficient evidence at her disposal to convict the appellant; and
 - b) Whether the trial court had jurisdiction.
8. One of the complaints raised by the appellant is that the charge was fatally defective. The charge was framed as follows:

Robbery with violence contrary to section 295 as read with 296 (2) of the Penal Code.

There have been a myriad of authorities on this kind of framing of a charge. The Court of Appeal has underscored prejudice as the only reason a conviction could be set aside. In the case of **Paul Katana Njuguna vs. Republic [2016] eKLR** at paragraph 23 the Court of Appeal stated:

The particulars as stated are clear and do support the offence of aggravated robbery. The defect is alleged to be in the statement of the charge in the count in which the appellant was charged with robbery with violence contrary to Section 295 as read with Section 296 (2). Is that fatal? We think not.

I agree with the superior court. The appellant in the instant case was not prejudiced.

9. Section 5 of the Penal Code provides:

The jurisdiction of the courts of Kenya for the purposes of this Code extends to every place within Kenya, including territorial waters.

10. It was argued and conceded that the scene of the offence was in Sofia, Uganda. Indeed the evidence of Tobias Wafula Onjere (PW1) was clear on this point. He testified:

Once we got to Sofia-Uganda the accused asked me to stop so that he could alight. He gave me a Kshs. 100 note, as I was trying to get him change he suddenly attacked me, he hit me on the head using a machete. I fell down and lost consciousness. I found myself at Busia County referral Hospital where I was admitted for four days. The motor cycle was never recovered.

The contention by Mr. Gacharia that the offence was partly committed in Kenya is not supported by the evidence on record. Had this been proved, then the provisions of section 6 of the Penal code could have applied. It provides:

When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction.

In the instant case I find that the learned trial magistrate lacked territorial jurisdiction to hear and determine the case against the appellant. This was therefore a mistrial.

11. I therefore set aside the conviction and sentence imposed on the appellant and order that if the complainant is desirous of pursuing the matter, the appellant to be tried by a Court with the requisite territorial jurisdiction.

DELIVERED and SIGNED at BUSIA this 20th Day of February, 2020

KIARIE WAWERU KIARIE

JUDGE