



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL APPEAL NO. 13 OF 2019**

**MESHACK WANDERA BARASA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in Criminal case No.534B of 2018 of the Chief Magistrate's Court at Busia by Hon. P.Y. Kulecho–Senior Resident Magistrate)*

**JUDGMENT**

1. **Meshack Wandera Barasa**, the appellant herein, was convicted for the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code.

2. The particulars in count one were that on the 20<sup>th</sup> September 2018 at Bufuma village, Nangosia location within Busia County, jointly with another not before court while armed with dangerous weapons robbed **Urban Alfuncis Wandera** of a pair of open shoes, a pair of closed shoes, one padlock, one torch, two curtains, two wall nets, one walking stick and at or immediately before or immediately after the time of such robbery used actual violence to the said **Urban Alfuncis Wandera**.

3. The appellants were convicted and sentenced to suffer death as prescribed by the law.

4. The appellants raised several grounds of appeal that can be summarized as follows:

- a. The learned trial magistrate erred in law and in fact by convicting on a defective charge.
- b. The learned trial magistrate erred in law and in fact by denying him a fair hearing.
- c. The learned trial magistrate erred in law and in fact by convicting him on contradictory evidence.
- d. The learned trial magistrate erred in law and in fact by rejecting his alibi.

5. The appeal was opposed by the state through Mr. Omutelema, learned counsel who contended that the evidence was overwhelming.

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. The issues for determination in this appeal are:

- a. Whether the rights of the appellant to fair trial were breached or not; and
- b. Whether the evidence on record supported the charge.

8. The appellant contended that he was not informed of his right to legal representation. Article 50 (2) (h) of the Constitution of Kenya states:

**Every accused person has the right to a fair trial, which includes the right-**

**h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would**

**otherwise result, and to be informed of this right promptly;**

This has been a subject of several legal opinions and the common thread is that it may become applicable if substantial injustice would otherwise result and the accused person has not able to hire an advocate. This therefore means that an accused who is unable to hire the services of an advocate may apply to be provided with one by the state. The current appeal cannot therefore turn on this ground.

9. In the celebrated case of **R. vs. Turnbull and Others [ 1976] 3 All ER 549** Lord Widgery CJ stated as follows:

**Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.**

In the instant case, I will endeavor to find how the complainant purported to identify the appellant.

10. The evidence of the complainant (PW1) is that when his lights went off, he went out to check. He realised that the same had been switched off at the main switch. He put them on and returned to his house. When he went into his bedroom, he saw a machete dangling behind the door. He went and held the machete and a struggle ensued. In the process, he sustained injuries on both hands. He said the person with the machete was the appellant whom he had known for 20 years. When he called him by name he ran away.

11. This evidence raises two issues; that of identification and whether robbery was perpetrated.

12. It was incumbent on the prosecutor to elicit evidence of at what juncture he was able to recognize the person he claimed was the appellant. This was not done. The court was not told whether the intruder had covered his face or not. This was insufficient evidence for that court to conclude that the attacker of the complainant was the appellant.

13. The complainant did not testify of anything having been stolen. Section 295 of the Penal Code defines robbery in the following words:

**Any person who steals anything, and, at or immediately before or immediately 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 the felony termed robbery.**

14. For an offence of robbery to be committed, there must be theft. The complainant having not testified that the appellant ran away with anything. Even if there were recoveries, it would appear that the theft was not committed on that day. I find that the evidence on record does not support the particulars of the charge. When the evidence and the particulars of the charge are at variance in material particulars, an accused is entitled to an acquittal.

15. The evidence on record did not disclose the offence of robbery. The conviction against the appellant cannot be sustained. I accordingly quash it and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

**DELIVERED and SIGNED at BUSIA this 24<sup>th</sup> Day of March, 2020.**

**KIARIE WAWERU KIARIE**

**JUDGE**