



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO. 98 OF 2018**

**WILLIAM WENANI BWISA.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**(BEING AN APPEAL FROM THE DECISION OF HON. M. MORANGA**

**DATED 31<sup>ST</sup> AUGUST 2018 IN CRIMINAL CASE NO. 1882 OF 2015 AT KITALE)**

**JUDGEMENT**

1. The Appellant was charged with the criminal offence of **Robbery with Violence contrary to Section 296(2) of the Penal Code**. The particulars of the charge were that **on the 28<sup>th</sup> day of April 2015 at Nyasi farm within Transnzoia County jointly with others not before court and while armed with offensive weapons namely panga robbed STEPHEN WAFULA of Kshs. 10,000 and immediately after the time of such robbery used actual violence to the said STEPHEN WAFULA**.
2. The Appellant was convicted and sentence to 25 years' imprisonment hence this appeal. The substance of the grounds raised by the Appellant in his petition are generally a challenge to the entire Respondents evidence to wit that the case was not proved beyond reasonable doubt, the court failed to take into consideration the appellant's defence and that the evidence as presented was full of contradictions.
3. The summary of the evidence as presented during trial is worth at this juncture before delving into the issues raised in the petition.
4. **PW1 STEPHEN WAMALWA WAFULA** the Complainant testified that he was at home with his wife at around 9.30 pm on the material day preparing to sleep when they heard a huge bang at the door. The door was smashed and three people entered the house and one was armed with a panga. He was able to identify one of them as the kerosene lamp was still on.
5. He recognised the appellant as he was a common person at Inyasi area and he had known him for over 10 years. He had not also covered his face. They demanded money from him and they proceeded to assault him using the panga. His wife managed to give them Kshs. 10,000 which was in different denominations. The assailants as well assaulted his wife using the panga. The complainant sustained panga cuts as well as an injury to his finger which was beaten by one of the assailants.
6. They screamed but nobody came to their aid but after the robbers left they went to the village elder and made the report. They also went to the Appellant's house where they met his mother but she was not of much help. They did not also get the appellant at home. The following day they reported the matter at Kiminini police patrol base as they went to seek treatment at Matunda hospital. They were also issued with a p3 form at the police post which was filled and he did identify it.
7. When the Appellant was arrested a search was conducted by the police in his house and a panga which had bloodstains recovered. He said that he had no known difference with the appellant who lived 100 metres from his home.
8. When cross-examined by the appellant he maintained that he was able to identify him courtesy of the kerosene lamp had been light and was not put off during the ordeal.
9. **PW2 ROSELINE NALIKA** the complainant's wife said that they were preparing to go to bed that night when the door was forcefully broken and three men entered the house and she was able to recognise the Appellant as her sister was married to his elder brother. She was not able to identify the other 2 assailants. The appellant then took out a panga from his trouser and began attacking PW1.
10. They then demanded money from them and she removed Kshs. 10,000 which was of different denominations from her purse. As they

left she was as well assaulted by the appellant after mentioning his name. She sustained injuries on her thighs. They sought assistance from the local vigilante that night although they were unable to apprehend the assailants and the following day they sought treatment.

11. The following day they went to Kiminini police post to report the matter and record their statement and they as well went to Matunda Health centre where they were treated. The panga and the clothes worn by the appellant that night were recovered when a search was conducted in his house.

12. On cross examination she was adamant that it was the Appellant who had robbed them as he had come to her house twice and that he was a person well acquainted to her. She also said that they had gone to the Appellant's mother that night so that she could assist in their treatment.

13. **PW3 PC GEORGE OGINA** from Kiminini police post was the investigating officer. He received the complaint from PW1 and 2 on 29/4/2015. Both had physical injuries on their bodies and they explained to him what had transpired the previous night. He sent two police officer to the complainant's home where they saw the scene but were unable to arrest the appellant that day. He was however arrested after two days.

14. He issued them with P3 forms which were filled and returned. He said that the other accomplices were still at large. He was later recalled to identify and produced the panga which still had some blood stains.

15. **PW4 FREDRICK KIMOSOP** a clinical officer from Matunda Sub County hospital examined the complainants and filled the P3 forms. He classified the injuries which include a cut on his head as grievous harm. He produced the said P3 form.

16. He also examined and filled the p3 form in respect to PW2 which indicated that she had injuries on her stomach and thighs and he classified the injuries as harm and he produced the p3 form as well.

17. When placed on his defence the Appellant gave sworn evidence denying the charge. He said that on the 29<sup>th</sup> day of April 2015 there was a funeral and he had gone to buy a cow. He arrived home with the cow at 12.30 pm when some police officers arrived and were looking for changaa and they managed to recover 20 litres from his mother's house.

18. They arrested him and others and were taken to Kiminini police post where the police demanded Kshs. 10,000 which he did not have. He was held till 3/5/2015 and thereafter taken to court and charged. He denied that he was involved in any robbery and as far as he was concerned his arrest was to do with the changaa.

19. On crossed examination he denied that PW2 is married to his brother and he categorically denied knowing the Complainants.

20. **DW2 JOHN WEKESA** testified that he was a *nyumba kumi* mzee at Inyasi area and he knew the Appellant as he resided within his jurisdiction. He said that there was a funeral at the Appellant's home on the material day and the Appellant had been send to buy a cow.

21. As they sat there police officers came looking for changaa led by the Investigating Officer herein. They arrested many people including the appellant. The Appellant's mother escaped. Other persons were released as the police demanded Kshs. 10,000. The appellant was later taken to Kitale and charged with an offence he did not know about.

22. On cross examination he said that the Complainants were people he knew as they were his subjects. He said that he did not know anything about the robbery on 28/4/2015.

### **ANALYSIS AND DETERMINATION**

23. The parties were ordered to file their written submissions which was apparently filed by the Respondent alone as at the time of writing this judgement there is no evidence that the counsel for the Appellant has complied. Be it as it may this court shall proceed to re-evaluate the evidence afresh noting that it did not have the benefit of seeing the witnesses and their demeanour like the trial court. **(SEE OKENO V. REP. 1972 EA 32.)**

24. The Court of Appeal in the case of **JOHANA NDUNGU V. REPUBLIC, CRIMINAL APPEAL NO.116 OF 1995** clearly spelt out the ingredients required to sustain the charge of robbery with violence. The stated as hereunder;

*“In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in S.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:*

*1. If the offender is armed with any dangerous or offensive weapon or instrument, or*

*2. If he is in company with one or more other person or persons, or*

*3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”*

25. In the case at hand there is sufficient evidence to demonstrate that the assailants were three in number as per the testimony of the witnesses. The assailants were armed with weapons, namely, a panga which was used to inflict injuries upon the complainant and his wife as was exemplified by the production of the P3 forms. The nature of the injuries was classified as grievous harm by the Clinical Officer.

26. In light of the above authority and the findings by the trial court can it be reasonably said that the appellant was involved in the robbery? The evidence on identification in this regard is paramount. Both PW1 and 2 testified that they were preparing to go and sleep when they were attacked. There was a kerosene lamp which was still light and this helped them identify one of the assailants who in this case was the Appellant.

27. They further testified that the Appellant had not covered his face and they knew him as he stayed 100 metres away from their house. As a matter of fact, he was a relative to PW2 as his brother had married his sister although it appears the marriage was no longer in existence.

28. After the robbery, together with the vigilante the Complainants went to the home of the appellant where they met her mother but were unable to find the Appellant. The Appellant's mother was not able to help them meet the cost of their treatment. Thereafter they went the following day to the hospital as well as to the police station and were able to explain to the police the identity of the assailant.

29. In the opinion of this court all the above acts by the Complainants clearly pointed out to the fact that they were able to recognise the assailant who in this case was the Appellant. As indicated in the evidence there was no attempt by the appellant in particular to cover his identity during the time of the robbery.

30. The defence offered by the appellant in my view does not hold water. He concentrated on the period of his arrest and cantered on the changaa issue. His witness DW2 did not help much as he also dwelt on how the Appellant was arrested. He admitted that he knew nothing about the robbery incident.

31. This court therefore does not find any merit in this appeal. The elements provided under Section 295 and 296 of the Penal Code were clearly proved. Actual harm was done on the Complainant and theft of their items in this case money was stolen. The same was not recovered.

32. The weapon used was recovered from the Appellant's house when the police conducted a search and there was no evidence indicating that it was obtained elsewhere.

33. Turning to the question of sentence, the same is usually the discretion of the court. This court shall only interfere if the same was arrived on under wrong principles or is excessive in the circumstances. The authority of **Francis Muruatetu and Others** by the Supreme Court of Kenya relied on by the trial court fitted well in this matter. The only issue that the court needed to take into account is the gravity of the offence viz a viz the nature and the circumstances of the injuries.

34. The sentence of 25 years meted against the appellant was excessive in the circumstances considering the extent of the injuries sustained by the witnesses. This in no way minimises the offence as such but the gravity of the injuries inflicted upon the victims ought to be taken into account.

35. In the circumstances while dismissing this appeal this court hereby reduces the period from 25 years to 12 years' imprisonment from the date of the lower courts judgement. This in my view is commensurate in the circumstances.

36. The appeal is otherwise dismissed save for the reduction of the sentence.

37. Orders accordingly

**Dated, signed and delivered at Kitale via zoom this 28<sup>th</sup> day of May 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**28/5/20202**