



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 98 OF 2019

JAMES MATIVO KIUVU.....APPELLANT

-VERSUS-

REPUBLICRESPONDENT

(Being an appeal from the original Judgment of Hon. C. A. Mayamba (SRM) in Kilungu Senior Resident Magistrate's Court Criminal Case No. 776 of 2018 delivered on 17th April, 2019).

JUDGMENT

1. **James Mativo Kiuvu** the Appellant herein was charged and convicted of the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars were that on the 7th day of November 2018 the Appellant with others at Kasikeu Kaluko bridge, Kasikeu location Mukaa sub-county within Makueni county jointly with another not before court while armed with a knife robbed **Mulu Munalo** of cash money Kshs.100,570/=, a mobile phone make techno W-3, a black hand bag, a lessa and a bunch of keys all valued at Kshs.111,720/= and immediately before the time of such robbery injured the said **Mulu Munalo**.

2. The prosecution case is premised on the evidence of six (6) witnesses. The defence called three (3) witnesses including the Appellant and his co-accused.

3. Upon conviction the Appellant was sentenced to serve seven (7) years imprisonment. He was dissatisfied and appealed against the sentence **only** on the following supplementary grounds which were filed later;

a. That, the court to invoke section 333(2) of Criminal Procedure Code.

b. That, he is a first offender hence prays for leniency.

c. That, he is deeply remorseful, dependent of his action and regret.

d. That, the Hon. court be pleased to consider his health status, age and general life expect which falls within mitigating factors.

e. That, prior to his conviction and arrest, he was the sole bread winner of his family with heavy responsibility of taking care of his six (6) siblings and aged parents.

f. That, he has learned values of patience and moral uprightness.

g. That, he prays this Hon. court entirety the entire period in custody as punishment already and reduce the sentence to the period served.

h. That, he is ready to carry on the newly acquired virtues to the society if granted a second chance.

i. That, may this court issue other orders it deems fit in his circumstance of which he promise to abide by.

4. A summary of the case is that Pw1 **Mulu Munyalo** and others had just had their Twaweza women meeting on 7th November 2018 at 1:00 pm in Sultan Hamud. During the meeting they collected a total of Kshs.100,570/= cash, and Pw1 was the one handling the money. The secretary called a motorbike rider to take her to Kasikeu to deposit the money. He came and the time was 5:00 pm. The fare for the return

journey was agreed at Kshs.200/=. Upon leaving, the rider whom she identified as the Appellant was stopped by another man (*who was the Appellant's co-accused*).

5. The passenger said he was going to kwa King'otole but when they reached there the Appellant did not stop. On reaching a river towards Sultan the passenger insisted he wanted to alight. The Appellant and the passenger fought over his fare of Kshs.20/=. It was then that the passenger jumped on Pw1 and stabbed her on the chin. He snatched from her the money Kshs.100,570/= plus her techno phone valued at Kshs.9,000/=, which were in her purse.

6. As she was being robbed the Appellant just stood on his motorbike offering no assistance at all. Pw1 screamed for help as the robber ran into the forest. People who heard came riding motorbikes. The Appellant was arrested by those responded to her cries while the robber was arrested the next day. Pw1 reported the matter to the police the same day and was issued with a P3 form.

7. Pw2 **Janet Kamene** a member of Twaweza women group confirmed that the group had raised Kshs.100,570/= on 7th November, 2018 after their meeting. She said the money was given to Pw1 to take to the bank. They received a report of the theft of the said money.

8. Pw3 **Gibson Wambua Masila** confirmed that the Uvaleni community health volunteers owned a motorbike registration No. 17CG 287A. The rider of the motorbike on hire was **James Mativo Kiuvu** the Appellant. They received a report that the motorbike had been impounded and was at Sultan Hamud police station. He identified it in the photos EXB1a – d.

9. Pw4 **No. 2017037831 APC Makau Musembi** and Pw5 **No. 59086 corporal Richard Langat** are police officers who were involved in receiving the reports and carrying out investigations in this matter. Pw4 received the report from Pw1 while at Kasikeu A.P post. The Appellant who was the rider was arrested. Apparently the Appellant knew the robber he had carried on his motorbike. Their homes are less than a kilometer apart.

10. Pw6 **Jackson Nzivi** who examined Pw1 confirmed that she had a deep cut wound on the lower chin measuring two (2) centimeters, bruises on her hands and knees. The probable weapon used to inflict the injuries was a sharp one. He produced the P3 form he filled and signed (EXB1).

11. In his unsworn defence the Appellant said he is a boda boda operator. On 7th November, 2018 he carried a lady and a boy as passengers. As they moved on the boy insisted on having his change and he had a knife. He took the Appellant's money and mobile phone and also picked the lady's handbag and ran away. They screamed for help. He ran away and proceeded to report at Mangala where he was locked up. His witness Dw3 **Joseph Kiuvu Kiseko** is his father. He received a report of the Appellant's arrest and went to the station. He found him injured.

12. The appeal was canvassed by way of written submissions. The Appellant submits that he is remorseful for his actions. That he has been in prison for several years. He further states that he has been trained while in prison. He has embraced Christian values. He therefore requests to be released from prison.

13. Learned counsel Mrs. Owenga for the DPP opposed the appeal. She submits that the prosecution proved its case to the standard required. The Appellant she says participated in the crime just as his co-accused. His role was so vital that without him the robbery would not have occurred or been executed with the amount of ease it was.

14. She has submitted that the sentence of seven (7) years is too lenient in the circumstances of the case.

Analysis and determination.

15. This being a first appeal this court is bound duty to re-analyse and re-consider the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and should give an allowance for that. See **Okeno –vs- R (1972) E.A 32**.

16. In **Kiilu & Anor. –vs- R (2005) 1 KLR 174** the Court of Appeal stated thus:

“1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

17. The same was reiterated in the case of **David Njuguna Wairimu –vs- R (2010) eKLR** where the Court of Appeal stated:

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the

correctness of the decision.”

18. I have considered the evidence on record, grounds of appeal the submissions and the law. The appeal by the Appellant is on sentence only. I am however obligated to satisfy myself on the soundness of the conviction. The Appellant was convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code.

19. From the evidence of both the prosecution and the Appellant in his defence the following are undisputed:

- The Appellant carried pw1 on his motor bike.
- He got another passenger who was a male.
- The male passenger robbed Pw1 of her handbag containing cash and other valuables.
- Pw1 was injured in the process of the robbery

20. Pw1 was very firm in her evidence in chief and cross examination that the Appellant never did anything to help her as his passenger robbed her. Secondly the said thief was to be dropped at kwa King’otole but the Appellant never stopped there. He instead passed the place, went and stopped near a river.

21. The Appellant disappeared from the scene leaving her alone. He never reported the incident at any police station. The learned trial Magistrate analysed the evidence very well and applied the law appropriately. He arrived at the correct finding that the Appellant and the robber were working in cahoots.

22. My finding is that the conviction is safe.

23. Upon conviction the Appellant was sentenced to serve seven (7) years imprisonment. He finds that prison term to be too harsh and excessive. The sentence for the offence of robbery with violence contrary to section 296(2) of the Penal Code is death and not life imprisonment as submitted by the State. The Supreme Court in the Muruatetu case did not outlaw the death sentence.

It only empowered the sentencing courts to exercise discretion by considering all the circumstances of the case and the mitigation before sentencing.

24. In the instant case the Appellant was allowed to mitigate and the court indeed noted that he is very young. The record shows that the Appellant was first arraigned in court on 9th November 2018. He was finally convicted on 17th April 2019 which is less than six (6) months since the date of plea.

25. I am satisfied that the learned trial Magistrate considered the period of six (6) months among the circumstances leading to the sentence he gave the Appellant. The changes he has undergone in prison are part of the rehabilitation.

26. In a nutshell I find the sentence meted out to be lawful and lenient and I find no reason to make me interfere with it.

27. The upshot is that the appeal lacks merit and I dismiss it. The conviction and sentence are confirmed.

Orders accordingly.

Delivered, signed & dated this 25th day of June 2020, in open court at Makueni.

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H. I. Ong’udi

Judge