



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 34 OF 2019

WILLIAM MUTHEE NDATHO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

((An appeal against the decision of Hon. P.N. MAINA (SPM) in Marimanti Principal Magistrate's Court Criminal Case No.28 of 2016 dated on 13/11/2019.)

J U D G E M E N T

1. **WILLIAM MUTHEE NDATHO**, the Appellant herein was charged vide ***Marimanti Senior Principal Magistrate's Court Criminal Case No.28/2016*** with the offence of Robbery with violence Contrary to **Section 296(2)** of the **Penal Code** with the particulars being that on 12th June 2016 at Maragwa Location, Tharaka North within Tharaka Nithi County, he robbed Moses Gitonga Gaichu, of his mobile phone ITEL make valued at Kshs.2,200/=, a motorcycle Tiger, Registration No.KMCA 643A valued at Kshs.92,000/-, a pair of sandals valued at Kshs.800/- all totaling to Kshs.93,000/- and immediately before the time of such robbery, wounded the said Moses Gitonga.

2. The Appellant was found guilty and convicted after trial and sentence to serve life imprisonment. The Appellant was dissatisfied with both conviction and sentence and filed this appeal raising 8 grounds namely:-

- i) That the learned trial magistrate erred in matters of law and fact by failing to note that the evidence adduced could not sustain a conviction.***
- ii) That the Appellant was fighting with another person called Mutiria and the case reported was an assault case not robbery.***
- iii) That the trial court erred by failing to note that the ingredient of robbery was not proved.***
- iv) That the prosecution's case was inconsistent and contradictory.***
- v) That the decision made by the trial court was not based on evidence.***
- vi) That the prosecution's case was fabricated, speculated and unreliable.***

3. Before I consider the above grounds of appeal, I will briefly look at the summary of the prosecution's case against the Appellant at the trial.

4. The evidence before the trial court reveal that complainant, Gitonga Gaichu (PW1) was attacked and injured on 12th July 2016 by the Appellant who shot at him with arrows 3 which land on his right arm, stomach and back respectively. He fled after the attack leaving behind a motorcycle belonging to David Njeru, his mobile phone and shoes. All the items were later recovered at the house of the assailant, the Appellant herein. He was later taken to Hospital where he was admitted for 4 days. In the meantime, the Appellant went on harassing anyone in sight and threatening them while armed with bows and arrows.

5. It transpired that the Appellant had earlier attacked the complainant's father in law and the complainant borrowed a motorbike belonging to David Njeru (PW3) in order to take his father in law to Hospital for treatment but as he struggled to start the motorbike, the Appellant emerged and attacked him and anyone in sight. Later the shoes, the motorbike and the phone belonging to the complainant were reportedly found at the Appellant's house.

6. The injuries sustained by the complainant were classified as harm through the P3 tendered as P. Exhibit 1.

7. When placed on his defence, the Appellant insisted that the offence facing him was assault and stealing which were later amended to robbery with violence. He denied committing the offence. He stated that he had fought with the complainant and many other people and that the motorcycle was abandoned at his house. According to him when he got a machete to defend himself, the complainant and David Njeru fled. He further insisted that he is the one who reported the incident to the police and alleged that he was framed. His evidence that he was the one attacked was supported by his wife (DW2) and (DW4).

8. In his written submissions in this appeal, the Appellant submits that the complainant was not robbed because the evidence tendered shows that he threw the motorbike he had and fled leaving behind his shoes and a phone which fell off.

9. The Appellant contends that the trial magistrate erred in concluding that the Appellant had been robbed when the evidence tendered indicated that there was a fight between him and the complainant. According to him the ingredients of robbery with violence were non-existent.

10. The Appellant avers that the learned trial magistrate failed to analyse the evidence tendered and points out that the evidence of PW2 shows that there was a fight and does not support the charges of robbery. He submits that the charge sheet was defective and that the initial charge was assault before the Respondent amended the charge.

11. The Appellant further submits that the prosecution's witness contradicted themselves pointing out that PW6 contradicted the complainant on the ownership of the motorbike. He faults the trial magistrate for misdirection as the trial court relied on evidence that did not support the charge and failed to consider his defence.

12. The Respondent has conceded to this appeal on grounds that the evidence tendered did not support the offence for which the Appellant was charged and convicted.

13. The Respondent has submitted that the Appellant should have been charged and convicted for a lesser offence and has urged this court to proceed under **Section 179** and convict the Appellant for the lesser offence.

14. This court has considered this appeal and the concession made by the Respondent. The Appellant herein was initially charged with the offence of assault actual bodily harm contrary to **Section 251** of the **Penal Code** which on basis of the evidence tendered was the proper charge because the evidence indicated that the Appellant had committed the offence but inexplicably, the State through the Director of Public Prosecution applied and was allowed to amend the charge on 3rd July 2016 to robbery with violence.

15. The definition of "**robbery**" under **Section 295** of the **Penal Code** is given as follows:-

“ 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.”

Pausing there for a minute, it is quite clear from the evidence that the Appellant was not out to steal either the motorbike or the mobile phone or the sandals worn by the complainant. PW1 told the trial court that the Appellant simply emerged and attacked him after attacking his father in law and as a result of the attack he threw the motorbike belonging to David Njeru (not the complainant) and as he was running he lost his shoes and a mobile phone that fell off as he fled from the scene of the attack. PW2 the owner of the motorbike was clear in his evidence about the motive of the attack and it was not to steal or rob anyone.

16. The evidence of PW1 & PW2 on the ownership of the motorbike and the motive of the attack clearly shows that the charge sheet amended on 6th July 2016 was defective and could not sustain a conviction.

17. It is given that the Appellant was charged and convicted of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. **Section 296(2)** of the **Penal Code** states;

“ If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more persons or persons or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strike or uses any other personal violence to any person, he shall be sentenced to death.”

18. From the above the key ingredients of the offence are;

- i) When the offender is armed with dangerous or offensive weapons.
- ii) In the company of one or more persons.
- iii) Attacks before or after the act of robbery or uses any other violence means.

It is apparent from the evidence tendered at the trial court that though the Appellant was armed with bows and arrows, there was no motive to steal/rob anything from the complainant or anyone. As conceded by the Respondent herein, there was no *mens rea* to commit robbery or theft and that was fatal to the charge facing the Appellant. The charge of robbery with violence was simply unsustainable in the absence of motive/intention to steal/rob.

19. The Appellant's defence was quite detailed and I agree with the Appellant that the trial court appears to have misdirected itself on the same because looking at what the Appellant (DW1), his wife (DW2), DW4 (the Area Chief William Kaumbuthu), (DW6) and PW8 told the trial court, there was every reason to doubt the prosecution's case particularly on the question of the charge facing the Appellant (robbery with violence). The chief told the trial court that he found the motorcycle abandoned at the home of the accused which in my view lends credence to the defence made by the Appellant that the complainant and PW3 (owner of the motorcycle) went to his house where a fight erupted which resulted to the injuries suffered by the complainant.

20. From the evidence tendered by both the prosecution and the defence, it was a misdirection by the trial court to find that the evidence tendered was sufficient to found a conviction on the charge of robbery with violence. That was erroneous because the evidence tendered did not support the said charge at all.

21. It is true that **Section 179(2)** of the **Penal Code** provides that an accused person may be convicted of a lesser offence other than the one he is charged with. The Section reads;

“ When a person is charged with an offence and the facts are proved which reduces it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

As I have observed above the record shows that initially the Appellant had been charged with assault causing actual bodily harm, the same was amended which amendment in my considered view was ill-advised.

22. I have re-evaluated the evidence tendered and it is apparent that the Appellant attacked and seriously wounded the complainant after reportedly attacking the complainant's father in law. The Appellant's claims he did so in self defence but the fact that he at the same time stated that he was very drunk explains why he went berserk attacking anyone in sight. Going by the P3 tendered as P Exhibit 1 by David Nyaga a clinical officer at Marimanti District Hospital, I am satisfied beyond doubt that the Appellant assaulted the complainant and caused him actual bodily harm. He ought to have been charged with that offence and given that he was not and the evidence adduced indicates he had committed that offence, this court under **Section 179(2)** hereby finds him guilty of that offence and is convicted accordingly.

In the end for the above reasons this appeal largely succeeds. The conviction of the Appellant on the offence of robbery with violence Contrary to **Section 296(2)** of the **Penal Code** is hereby set aside. The life sentence imposed on him is hereby reversed. This court further for the reasons advanced hereby finds that the Appellant was guilty of a lesser offence of assault causing actual bodily harm contrary to **Section 251** of **Penal Code**. He is hereby convicted accordingly and sentenced to serve 2 years imprisonment from the date he was convicted in the lower court (13th November 2019) to enable him reform and abandon his violent conduct.

Dated, signed and delivered at Chuka this 30th day of July 2020.

R. K. LIMO

JUDGE

30/7/2020

Judgment dated signed and delivered via zoom in presence of Appellant in person and in presence of Momanyi for the Respondent.

R. K. LIMO

JUDGE

30/7/2020