



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL NO.92 OF 2019**

**(Being an appeal from the decision of Hon. C. M. Kesse (SRM)**

**dated 14<sup>th</sup> August 2019 in Criminal case No.83 of 2019)**

**ABDUL NASSER OMAR ALIAS DIAMOND.....APPELLANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Appellant was charged with the offence of **robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars of the offence were that **on the 12<sup>th</sup> day of December 2018 at Botwa village in Trans-Nzoia County robbed Daniel Kipkosgei Langat of Kshs2000 and immediately after the time of such robbery beat the said Daniel Kipkosgei Langat**.
2. He was convicted and sentenced to 30 years' imprisonment hence this appeal. The summary of the evidence as presented at the trial court are as hereunder.
3. **PW1** the Complainant testified that on the material day at around 9 am he was heading to town and was crossing Sabwani river. As he continued with his journey the Appellant appeared suddenly from the bush and accused him of spreading rumours that he was carrying a gun. He descended on the Complainant and beat him up using a stick.
4. The Complainant said that he managed to scream and attracted one Barasa who was weeding his vegetables and who rushed to his rescue. By that time, he had lost consciousness and when he regained he found that he had lost Kshs 2000 which were in his shirt pocket.
5. He was later taken home by some good Samaritans and later to the hospital. He reported the matter at Sibanga police station. The Appellant was arrested after three days.
6. On cross examination he confirmed that he knew the appellant as he was a person he sees occasionally.
7. **PW2 WYLIFFE KIKWAN** testified that the Complainant was his neighbour and he knew the Appellant as well. He said that on the material day at around 9am he was doing his errands when he saw the Appellant assaulting the complainant. He rushed to the scene but the Appellant took off when he saw him. PW3 also came from the opposite direction and they found the complainant on the ground and in pain. They took him home and was thereafter taken to the hospital by his family. He told them that he had Kshs. 2000 in his pocket which was stolen by the Appellant.
8. When cross examined he said that he saw the Appellant standing and pw1 was on the ground as he assaulted him. Once he saw him he took off and disappeared into the bush.
9. **PW3 MARTIN BARAZA NANDI** testified that he knew both the accused and the appellant. He said that he was weeding his vegetables as he saw the Complainant cross the river while carrying a Jerrican. He then heard someone screaming and he rushed to the scene where he saw the Complainant on the ground and the appellant assaulting him. He said that the Appellant had a knife which was in a sheath. The Appellant did not run away when he saw him but took off when PW2 came. They helped the complainant to stand and he told them that he had lost Kshs 2000 which was in his pocket.
10. When cross examined by the Appellant he said that he had known him since he was a child and that he had so many other cases in the village. He said that he could not stop him as he was an old man.

11. **PW4 PC NELSON KIRONG** from Sibanga police post carried out the investigation after receiving the report from PW1. By then the Appellant had been arrested and was being held at Nyakinywa AP post where he went and picked him on 5<sup>th</sup> January 2019. He thereafter preferred charges against him.

12. **PW5 JOHN KOIMA** the clinical officer from Kitale County Referral hospital examined the complainant and found that he had injuries on the head, right chest, back of the head and wrist. He produced the treatment notes.

13. When placed on his defence the Appellant gave unsworn evidence denying the charge. He said that he was in his house with his wife and child when he was attacked by people who claimed to be police officers but were thugs. They assaulted them and one of them was the Complainant's son. They stole from him several assorted items and were tied and taken to the police station. He was informed that he was facing robbery with violence charges which he continued to deny.

#### **ANALYSIS AND DETERMINATION**

14. The grounds raised by the appellant in his appeal are that the evidence presented to court was inconsistent and weak to have sustained the charge. He further submitted that the charge of robbery was not proved as the ingredients were not established.

15. The learned state counsel supported the findings by the trial court. He said that the charges were proved as all the necessary grounds were established.

16. The court indeed agrees with the submissions by the learned state counsel that the identification of the assailant was proved. The incident took place at 9am on the material day. The Complainant, PW2 and PW3 clearly saw the Appellant. This was a fellow villager and they knew him very well. There was therefore no case of mistaken identity.

17. As to the injuries sustained by a Complainant, the evidence by all the witness clearly demonstrated that he was injured. The clinical officer produced the treatment notes to that effect as well as the p3 form. Pw2 and 3 assisted in taking him to the hospital.

18. Was the appellant armed? Yes, he was as per the testimony of the Complainant and his two eye witnesses. The Appellant had a stick which he used to assault the complainant. Although there was an allegation that he had a knife which was in a sheath, the same was not established. It was simply a believe on the part of the witnesses.

19. The Appellants defence is of not much probative value as it was unsworn. He generally dwelt on issues dealing with an attack on his family as well as himself by some criminals who included the Complainant's son. That was really an afterthought as it was not raised during cross examination of the witnesses. In essence the defence did not oust the Respondent's case.

20. The appeal is unmeritorious. The Appellant simply attacked an old man who was going his own duties. He stole from him kshs.2000 which was in his pocket. There was no reason for the trial court to have doubted this noting that it saw the witness and their demeanour.

21. On the question of sentencing the trial court did align itself with the principles enunciated in the *Muruatetu* case by the Supreme Court of Kenya. This was perfect save to state that it also on the same vein ought to have considered the gravity and extent of the injury suffered by the victim. This has been observed is critical in meting out the extent of the sentence.

22. In the case at hand the Complainant suffered what was classified as *harm* by the medical records. The sentence of 30 years was too high in the circumstances considering that the Appellant was a first offender.

23. In the premises, the appeal is hereby dismissed, the sentence of 30 years' imprisonment is set aside and substituted with a 5 years' imprisonment from the date herein.

**Dated, Signed and Delivered at Kitale this 29<sup>th</sup> day of October 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**29/10/2020**