



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL 444 OF 2013

ANTHONY MWANGI IRUNGU ALIAS TONY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction in Kigumo Criminal Case No. 549

of 2012 by S. Mbungi, Chief Magistrate, dated 24th May 2013]

JUDGMENT

1. The appellant was convicted for *robbery with violence* contrary to section 296 (2) of the **Penal Code**. He was sentenced to suffer *death*.
2. The particulars of the charge were-

“On the 2nd day of May 2012 at Maragua Township within Murang’a County jointly with another not before court; being armed with a dangerous weapon namely a wooden bar robbed Peter Karanja Elijah of his mobile phone make FORME valued at Kshs 2,850 plus [cash] Kshs 3,900 and at or immediately after the time of such robbery used actual violence to [sic] the said Peter Karanja Elijah by occasioning him actual bodily harm.”
3. The appellant is aggrieved by the conviction and sentence. At the hearing of the appeal, the appellant relied on *amended* grounds of appeal filed with *leave* on 7th February 2019.
4. There are *four* amended grounds of appeal: Firstly, that the charge was not proved the beyond reasonable doubt; secondly, that the evidence was contradictory and unreliable; thirdly, that the appellant’s right to a fair trial was violated; and, lastly, that the sentence of death should be *reviewed*.
5. At the hearing of the appeal, the appellant relied entirely on the written submissions filed on 7th February 2019.
6. The Republic contests the appeal. The position of the State is that all the ingredients of the offence were proved.
7. This is a first appeal to the High Court. I have *re-evaluated* all the evidence on record and drawn *independent* conclusions. I am mindful that I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
8. The complainant (PW1) is an egg vendor. At 8:00 p.m. on the material day, he found the appellant and his friend, *Mzungu*, at Mahewa Club in Maragua town. He knew both of them. When he stepped outside to the verandah, the two followed him. He said that Mzungu asked him *“whether the eggs belonged to him or a hen”*. Mzungu said that the appellant’s answer was insulting.
9. Mzungu then grabbed the appellant’s *bakora* and hit the complainant on the hand. The complainant’s phone fell down. Mzungu held the complainant down; he lay atop him. The *appellant* then took the cellphone (exhibit 1) and Kshs 3,000. The complainant produced the purchase receipt for the phone for Kshs 2,850 (exhibit 2). Members of the public intervened and rescued the complainant.
10. The complainant did not visit the hospital until the next day. He was advised to first report to the police. He was issued with a *P3 Form* (exhibit 5) which was filled out at Maragua District Hospital several days later.
11. On cross examination he said there was electric light on the verandah. PW1 claimed the cellphone was recovered from PW2 who bought it from the appellant for Kshs 800. PW2 said the appellant approached him on 3rd May 2012 and sold him the phone. He knew the appellant.

Two days later, PW2 was informed by the police that the phone was stolen from PW1.

12. PW3 was Police Constable Owino. He was the investigating officer. He said that the appellant denied committing the offence. But after further interrogations he led PW3 to PW2 who had bought the stolen phone. He said that the appellant at first led him to Jane Wanjiku (PW4) and finally to PW2. Mzungu went into hiding after the incident. Upon cross examination he said he never recovered the *bakora*.

13. PW4's evidence however made no mention of the *bakora*. Her evidence was that on 2nd May 2012 at about 10:00 p.m. she was entering Mahewa Bar. She saw the appellant wrestle the appellant to the ground and sit on him. She did not intervene in the matter. She did not see the appellant steal the phone or the money.

14. PW5 was Charles Kamotho. He is a clinical officer at the Maragua District Hospital. He examined the complainant on 6th May 2012. He produced the treatment notes (exhibit 4) and the *P3 Form* (exhibit 5). There was tenderness and swelling on the right wrist. The complainant had pain in the hip joint. He formed the opinion that the injury was caused by a blunt object. He classified the injuries as *harm*.

15. The appellant gave sworn evidence. He said the charges were fabricated. He stated that-

“I used to operate a video. On 3/5/12 at around 11:00 a.m., I was arrested by police officers.....the case is a frame up [sic]. I deny the offence. That is all.”

16. A number of matters arise from that evidence. The first relates to identification. The offence took place at a verandah at *night*. I am satisfied there was *electric light*. Furthermore, the complainant and the two assailants were *not* strangers. He had seen them earlier in the bar as he hawked eggs.

17. That is evidence of *recognition*; stronger evidence than mere *identification*. **Wamunga v Republic** [1989] KLR 424, **Republic v Turnbull & others** [1976] 3 All ER 549. The appellant was thus *positively* identified by PW1.

18. The next key question is whether *all* the ingredients for the offence of *robbery with violence* were established. Section 296(2) of the **Penal Code** provides-

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

19. From the evidence of PW2, it is clear that the appellant *sold* the cellphone to PW2. The sale took place the day after the attack. The appellant led the police to PW2. I entertain no doubt that the appellant is the person who *stole* the appellant's cellphone when it *fell* from his pocket. He also *stole* the Kshs 3,000. The appellant may not have hit the complainant, but he and *Mzungu* acted in *concert*.

20. The complainant said that *Mzungu* quarreled with him outside the bar. He then grabbed the appellant's *bakora*; hit him on the hand; took him down and lay on top of him. PW4 on the other hand said she saw the *appellant* wrestle someone adorning an *Akorino cap* to the ground. The assailant sat on him. PW2 made *no* mention of the *bakora*.

21. I agree on that point with the appellant: the evidence is *contradictory*.

22. The particulars in the charge sheet were that the appellant was “armed with a *dangerous weapon* namely a *wooden bar*” [*emphasis added*]. But the evidence was that the “weapon” was a *bakora*, a Kiswahili word for a *walking stick*. Neither the *wooden bar* nor the *bakora* was produced in evidence.

23. There is material variance between the charge and particulars. I held recently in **Paul Kamau Irungu v Republic**, Murang'a High Court Criminal Appeal 117 of 2015 [2019] eKLR that a *walking stick* is *not* a dangerous or offensive weapon.

24. The complainant went to *bed* after the incident. He was not examined at the hospital until the 6th May 2012. The attack took place over *three days* earlier on the night of 2nd May 2012. I have no reason to doubt the conclusions by the clinical officer. But the long period between the incident and the medical examination raises some doubt about the injuries suffered on the *material night*.

25. The legal burden to establish all the elements of the offence fell upon the prosecution. **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332.

26. I find that vital *ingredients* of the offence of *robbery with violence* were *not* proved beyond reasonable doubt. I *set aside* the original conviction and sentence.

27. However, I find on the totality of the evidence that the appellant was *guilty* of the lesser but cognate offence of *robbery* contrary to section 295 as read with section 296 (1) of the **Penal Code**. I *convict* him accordingly.

28. The felony attracts imprisonment of up to *fourteen years*. The sentence imposed on an offender must be *commensurate* to his moral blameworthiness. **Macharia v Republic** [2003] 2 E.A 559.

29. I have noted the appellant was a *first offender*. I have also paid heed to the *mitigation* tendered in the lower court: that he is an orphan;

and, his siblings looked up to him for support.

30. I sentence the appellant to serve *seven (7) years imprisonment*. For the avoidance of doubt, the term of imprisonment *shall* take effect from *24th May 2013*, the date of his original conviction.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 26th day of February 2019

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant (in person).

Ms. Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.