



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CRIMINAL APPEAL NO. 16 OF 2019**

**FRANCIS NYANG'ATE.....APPELLANT**

**VERSUS**

**THE STATE.....RESPONDENT**

**{Being an Appeal against the Conviction and Sentence of Hon. B. M. Kimtai – SRM Keroka dated and delivered on the 14<sup>th</sup> day of February 2019 in the Original Keroka Principal Magistrate's Court Criminal Case No. 312 of 2017}**

**JUDGEMENT**

The appellant was the 4<sup>th</sup> accused in the case in the court below. Together with his co-accused he was charged with three counts of **Robbery with violence contrary to Section 295 as read with 296 (2) of the Penal Code** and separately with an alternative charge of **Handling stolen goods contrary to Section 322 (1) (2) of the Penal Code**. The particulars of the charges were as follows: -

**Count I**

On 7<sup>th</sup> of April 2017 at Metamaywa Shopping Centre in Masaba North Sub-county within Nyamira County, jointly with others not before court while armed with offensive weapons namely pangas and machetes they robbed Veronica Kerubo Peter of Kshs. 50,000/=, three mobile phones namely Nokia, Tecno, Samsung, one lesa and a torch and immediately after the time of such robbery beat up the said Veronica Kerubo Peter.

**Count II**

On 7<sup>th</sup> April 2017 at Metamaywa Shopping Centre in Masaba North Sub-county within Nyamira County, jointly with others not before court while armed with offensive weapons namely pangas and machetes they robbed Mary Kerubo Nyakundi of Kshs. 23,800/= and immediately after the time of such robbery beat up the said Mary Kerubo Nyakundi.

**Count III**

On the 7<sup>th</sup> April 2017 at Riabore village in Masaba North Sub-county within Nyamira County jointly with others not before court while armed with offensive weapons namely pangas and machetes, robbed Teresa Bosibori Ogeto of Kshs. 2,500/=, one M-kopa solar panel, one radio make Aitkenson AT-7350R, two mobile phones make Tecno and Itel and immediately after the time of such robbery beat up the said Teresa Bosibori Ogeto.

**Alternative Charge**

On 8<sup>th</sup> April 2017 at Gesima Shopping Centre in Masaba North Sub-county within Nyamira County otherwise than in the course of stealing dishonestly retained one lesa and one radio make Aitkenson AT-7350R knowing or having reason to believe the same to be stolen.

The prosecution called six witnesses to wit the complainants (Pw1, Pw2, & Pw3) in the three principal counts, a clinical officer (Pw4), two arresting officers (Pw5 & Pw6), the investigating officer (Pw6) and the owner of a motor cycle that the appellant was allegedly driving at the time he was arrested (Pw7).

On his part, the appellant made an unsworn statement in which he stated that he was coming from work when he was arrested and contended that he was a pillion passenger but not the driver of the motor cycle.

After evaluating the evidence of the prosecution witnesses and the appellant's defence, the court rejected the defence and found that two

counts – Count I and III had been proved against the appellant beyond reasonable doubt. The trial Magistrate upon convicting the appellant then sentenced him to imprisonment for twenty (20) years on each count. This appeal is against the conviction and sentences. The gist of the appeal is that the conviction was against the weight of evidence and that the sentences were manifestly excessive.

At the hearing of the appeal the appellant relied on written submissions prepared by himself to which Counsel for the respondent replied orally. The rival submissions have been considered fully.

Having analysed and re-evaluated the evidence myself I have no doubt that on the material night a spate of robberies that affected the three complainants were committed. The three complainants told the court that about four attackers armed with pangas broke into their houses that night and took their cash and other properties after beating them. The clinical officer (Pw4) confirmed that he examined the complainants in Count I and II on 9<sup>th</sup> April 2017 and confirmed they had sustained injuries which for both were 2 days old. He reduced his findings in P3 Forms which he tendered in evidence together with treatment notes although the same are missing from the file. There was therefore evidence beyond reasonable doubt that theft took place at the homes of the three complainants; that the said theft was perpetrated by more than one person; that the attackers were armed and that during or immediately before or after the robbery they used actual violence against the complainants. The elements of the offence of robbery with violence were therefore proved. The three complainants did not identify the appellant. Indeed, his conviction revolved around the evidence by APC Dennis Makori (Pw5), then of Gesima Police Post, that on 8<sup>th</sup> April 2017 the appellant was found in possession of a lesa and a radio stolen during the robberies. The lesa was alleged to have been stolen from and identified by the complainant in Count I and the radio from the complainant in Count III. A closer examination of the evidence regarding those exhibits however completely negates the prosecution's case. In my view there is no evidence that the radio and lesa found with the four men with the motor cycle one of who was undoubtedly the appellant were the same ones stolen from the victims of the robbery. I say the appellant was undoubtedly one of the four men and that he was in fact the one riding the motor cycle because firstly he admits he was on a motor cycle when he was arrested and secondly because the owner of the motor cycle, who testified as Pw7 though wrongly assigned Pw3, confirmed that he had employed him to drive the motor cycle. On the other hand, I find that the lesa and radio could not have been the ones stolen from the victims because of the following reasons:-

**(i) In court the complainant in Count I described her lesa as blue with a white dot. The lesa put to her was marked MFI-1. This is in contrast to the one identified by Pw5 which he described as bluish with white marks/stains and which was marked as MFI-6.**

**(ii) The testimony of the complainant in Count III was that the radio stolen from her house was in its box. She identified that radio and box as the ones put to her in court and which were labelled X-BASS. The same were marked as MFI 3 (A) and 3 (B) respectively. Contrast this with the evidence of Pw5 who stated that the radio found in the possession of the appellant was Altkeson which was marked as MFI-5. Notice that Pw5 did not make any reference to a box. Just as in the case of the lesa the two witnesses seemed to refer to two different radios.**

The lesa marked MFI-1 and radio & box marked MFI-3 (A) and 3 (B) were never put to Pw5 and similarly the radio marked MFI-5 and lesa marked MFI-6 were never put to Pw1 and Pw3 for identification. One could easily ignore the above discrepancies as a typographical or clerical error on the part of the court. However, it is not possible to do so in the face of evidence that Pw5 and his colleagues had been called to another scene of crime when they spotted a motor cycle which was being driven by the appellant. It is very possible that the radio and lesa had been stolen from that scene but not from the complainants in this case. The fact that the appellant was found with property stolen from elsewhere would not be evidence that he committed the robberies herein. The prosecution was required to prove its case beyond reasonable doubt but I find that the discrepancies in the evidence of Pw1, Pw2 and Pw5 casts reasonable doubt upon the case. The appellant is entitled to the benefit of the resultant doubt.

Accordingly, this appeal is allowed. The conviction on the two counts of robbery with violence are quashed and the sentences of imprisonment for twenty (20) years are set aside. In any event, the sentences should have been ordered to run concurrently as the offences were committed in the course of the same transaction. The appellant should, unless he is otherwise lawfully held, be set at liberty forthwith. It is so ordered.

**Dated, signed and delivered in Nyamira this 26<sup>th</sup> day of September 2019.**

**E. N. MAINA**

**JUDGE**