



**REPUBLIC OF KENYA**

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

**HCCRA NO. 45 OF 2018**

**BRIAN SIGILAI KITILIT.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Criminal Case no. 411 of 2017 delivered on the 13<sup>th</sup> day of June, 2018 by Hon. J. Nthuku, SRM]**

**JUDGMENT**

[1] The appellant was convicted and sentenced to imprisonment for fifteen (15) years for the offence of robbery with violence contrary to section 296 (2) of the Penal Code whose particulars were that he had “on the night of 25<sup>th</sup> and 26<sup>th</sup> day of June 2015 at Mogurin Shopping Centre in Mogotio sub-County within Baringo County jointly with another not before the court, being armed with dangerous weapons namely rungu and stones robbed John Kitilit of cash Ksh.210,000/-, one torch valued at ksh.150/- , one Techno phone valued at Ksh.2000/- all valued at Ksh.212,150/- and immediately before the robbery wounded the said John Kitilit.”

[2] By his grounds of appeal, the appellant challenged the finding and sentence of the trial court on insufficiency of evidence to prove the charge and inconclusiveness of the identification and contradictions and in-consistencies in the prosecution evidence, and filed written submissions in support thereof.

[3] The DPP did not oppose the appeal and in oral submissions before the court urged that the appeal be allowed, as follows:

**“Appellant**

*I have written submission with reply to the DPP submission.*

**DPP**

*Appeal is not opposed*

*Appellant convicted of robbery with violence contrary to section 296 (2) of the Penal Code sentenced to serve 15 years on 7/7/2018.*

*Pw1 and Pw2 were husband and wife and the only witnesses who identified the appellant on the material date.*

*Pw1 testified that he is a businessman trading in Petroleum and had 2 petrol stations on in Mugurin and one in Mogotio.*

**On 25/6/2015, the (pw1) went home in Mogorin from his petrol station at about 9.30pm. He had Ksh 175,000/= which he placed in a metal box in his bed room and then he went to take supper.**

*At around 10.30pm, he went out for a short call while armed with a torch as there was a black out. **He met 2 people outside the house and shone the torch on them. He said he recognized the appellant herein who is his step brother but did not identify the 2<sup>nd</sup> person.***

**He asked the appellant what he was doing at night in his homestead and that is when the 2 men approached him with lifted runqus.**

*He sensed danger and ran away as he shouted to his wife who was inside the house to lock the door.*

*He jumped over the fence and came back again to protect his wife and that is when he was attacked.*

*He testified that the appellant hit him on the hand with a panga and the other man joined in. They beat him till he was unconscious.*

*When he regained conscious he saw his wife who was washing his face. He was bleeding from his nose and mouth and 2 of their neighbours had also arrived.*

*Pw2 is the wife of Pw1 testified that on the material date she came home with Ksh. 35,000/= and she put the money on the table in the sitting room page 13 line 21.*

*She testified that on that day Pw1 went out to answer a call of nature and she heard people running outside the house and opened the door. She asked what the problem was and shone a torch towards the gate.*

*She saw 2 people who were approaching the house. She identified one of them as the appellant.*

*The 2 men approached her with hands behind their back and she ran behind the house through the fence to the neighbour's house. She left the door of the house open.*

*The circumstances under which the Pw1 and Pw2 identified the appellant is insufficient as it was about 10.30pm and there was a blackout.*

*They only identified the appellant by shining their torches on him.*

*Pw2 further claimed to have known the colours of the jacket and trouser that the appellant was wearing which cannot be free from doubt considering the circumstances of identification.*

*Pw2 at page 13 line 22-23, stated that the torch with 150/= that she had left it at the bedroom while alight and a Techno phone 2000/ when she went back to the house, the two were missing. Earlier in the evidence she stated that she had shone the torch to the appellant before she ran behind the house to the neighbours. It is not clear when she went back to the house and left the torch which she claimed was missing. On the same page 13 line 24 she said that she saw the money that Pw1 had put on the table which was not counted and Pw1 also had some money in the pocket.*

*This contradicts the evidence of Pw1 that the money that he had put it in the bedroom. The money that Pw2 saw on the table was after the assailants had left. If the money on the table was the one placed by Pw1 it raises questions as to what money had been stolen.*

*While Pw1 stated that he had placed the money in a box in the bedroom, Pw2 does not mention the said the box and only states that she saw the money on the table after assailants had left.*

*At page 9 line 22-23, Pw1 stated that his wife had told him that she had on come with money home Ksh.35,000/= and placed it in the box which was in the bedroom and that the said money was missing. Pw1 and Pw2 were the only people at the scene when the assailants came. None of the two testified that they saw the said assailants entering the house. Their evidence on the money that was stolen on the material day and where it was is contradictory. The circumstances for the identification of the appellant are also not safe.*

*The evidence on record brings out bad blood between appellant and Pw1. The appellant was previously an employee of Pw1.*

*The contradiction should be used for the benefit of the appellant and I urge court to allow the appeal”.*

### **Issues for Determination**

[4] The questions for determination are whether theft as ingredient of robbery with violence was proved and whether the appellant was positively identified as the thief/assailant.

### **Determination**

[5] In accordance with the duty of a first appellate court (see **Okeno v. R** (1972) EA 32), this court has considered the evidence presented before the trial court which was as follows:

#### **“PW1**

*I come from Mugurin Trading Centre and I am a business man trading in petroleum and I have two petrol stations one in Mugunin and Mogotio and one private just known as filling station. On 25<sup>th</sup> June, 2015 at 9:30 pm I do recall I was from work in Mogotio and returning home in Mugurin and **I had Kshs. 175,000 cash in my pockets and went to put it in my bedroom which is next to the dining room and I had not put it well in a metal box which I did not lock and I went back to take supper and I went outside for a short call around 10:30 pm** and inside was my wife Monica Kimaywa and my young child. **It was very dark and there was a blackout and I was holding a torch and outside.** I met two people besides the wall of the house and both had each a rungu in the*

hands and I reflected on them so to identify them and first recognized the first person who was Brian Sigilai Kitilit my step brother accused herein and the other one I could not identify him as never used to know him and that other person was Sigilai shorter than Brian around a 5 feet and not fat nor slender and was brown in skin colour.

Since I had identified my brother I was not in fear and I asked him what he was doing there at night and I was not suspicious and suddenly both left the wall approached me and lifted the rungu and sensed danger and I ran while screaming and I shouted to my wife to lock the door and I jumped over the fence but I decided to come back protect my wife and the two men were outside the house standing and I had heard the door being opened and the door was open and I suspected my wife must have left the house. When they saw me come back and I was looking for a stone to try defend myself and I was still screaming for help. As I was alone and I had not gotten a stone and they nearer and could not escape and it was Brian who hit me on the head with a rungu (scar shown on the head) and both of them continued hitting me on the head and I lost consciousness I was still sleeping outside the house and my wife was around and my head was filled with blood and I was bleeding from the nose and mouth as well and she brought me water to wash off the blood and changed my clothes and two others who had arrived were James Chebet and one Kipsambu a driver who are neighbours and others had come but I could not identify. I had gone inside the house to change clothes and I asked my wife to check on the Kshs.175,000. My wife told me she had come with Kshs.35,000 from Mugurin and she had also put in the box and she said it was also missing and in total Kshs.210,000 was stolen from the metal box.

It was still dark in the night when I regained consciousness and the blackout was still there and I could not tell exact time.

I asked my wife to check if the Kshs.230,000 which I had hidden in a separate box and she found it all and I asked her to give me Kshs.80,000 which I put in pocket so to be taken to hospital and Kipsambu then drove me to hospital in my car and Jane's was supporting me and I was brought to Mercy Hospital that night as my wife remained behind and I was done first aid and referred me Mediheal Hospital Nakuru and arrived there in early morning where a head scan was done and showed a fracture in the head and that I was to undergo operation and needed a deposit of Kshs.300,000 which I could not afford and a friend who was a doctor referred me back to Provincial Hospital Annex which was cheaper and it was on 26<sup>th</sup> June, 2015.

The treatment notes from Mediheal hospital – MFI 1.

I was admitted at Provincial General Hospital Annex and discharged on 4<sup>th</sup> July, 2015 and I have the discharge summary – MFI 2.

I returned home and continued with medication until 11<sup>th</sup> July, 2015 when I went to report at Mogotio Police Station and I was issued with a P3 form which was duly filled at PGH-Nakuru – Dr. Mungitara on 4<sup>th</sup> July, 2015 – MFI 3.

Later I was informed Brian had been arrested in Narok County and brought to Eldama Ravine Law Courts and I saw him in Court. The deceased is my step brother and infact I had employed him at my Mogotio Petrol Station from June 2014 to December 2014.

At time of attack and since I had stayed with Brian he was wearing a brown jacket I used to see him with and a black trouser and he had a red scarf around the head – MFI 4 and infact after they escaped the scarf was found at my compound. The accused is the one before Court (points out).

**Hon. R. Yator – SRM**

18.07.2017

#### Cross examination by accused

On 25<sup>th</sup> at 10:00 pm you came to attack me. I was around 2 feet from the corner you were standing the two of you. I used torch to identify you. You had tied the scarf from the head and not your face hence your face was clear. I identified you from looks and clothes you wore. You were having a rungu but I was the one looking for a stone to defend myself. It's only scarf that was recovered and not rungu as I had fallen unconscious. I was screaming asking my wife to lock the house as you were aiming to attack me with rungu and it was not normal and you were not intending well and I told her to lock as I had not kept the money safely and it's because you knew I used to have money and it's because I usually come back at night with the monies I collect during the day and I suspected you were coming for the money as I had not banked during the day.

When I came back towards the house and I thought she could have been attacked and I was struggling with you. It's you who took my money as it disappeared immediately after you attacked me. It cannot be my wife who took the money as she could not have returned to do first aid and rescue me and infact she had separated money and I usually had the money and it could not be James and Kipsambu but it's the reasons you came to attack me. I did not witness you steal but when I regained consciousness it was missing. It's not possible that you could just attack without stealing from me. We had a grudge before date of offence and I had sacked you after some money went missing from my work and you took it to do you business but I decided to forgive you without reporting to Police. I had employed you from June to December 2014. I did not sack you in April 2015 as infact I opened the Punap Petrol Station on 4<sup>th</sup> August, 2014. There was no money that you were claiming from me and you were not demanding any balances and infact the highest paid employee was Ksh.8,000 per month and not Kshs.10,000. I did not frame you with the charges because of any monies I withheld for your payments as I do not owe you any money. I did away with the money you owed me as I thought by reporting I could lose time and money. I never told our father that I will go to Mombasa and I shall ensure you are no more and infact while you were involved in motor bike accident you had used some money for a debt you were to bring me and had accumulated to Kshs.15,000 and in fact I decided to leave you from my employment.

**Hon. R. Yator – SRM**

18.07.2017

**Re-examination**

**I had employed Brian from June 2014 to December 2014 and he left employment as I had left an accountant lady who used to do pump price which was not as per pump volume and hence he discovered money was missing as he was a pump attendant and Kshs.700,000 went missing from sales and I decided to dismiss him and my associate was as a brother to help and uplift him but he turned against him. The evidence is the whole truth.**

**PW2**

I come from Mugurin Centre and I am a shopkeeper in Petrol Station I work with other two employees and my husband (PW1) used to operate the filling station at Mogotio and he is one John Kitilit.

On 25<sup>th</sup> June, 2015 at 10:30 pm and 11:00 pm after taking supper at home and I was with my husband and the baby and before sleeping PW1 went to answer a call of nature when I heard people running outside behind the house and I opened the door asking what the problem was and at the door **I reflected with a torch towards the gate and two people came from the wall following each other towards door where I was and one ahead was short and brown as the one behind him had a red scarf of Arsenal around the head and I reflected and identified him as Brian Sigilai and he was tall and brother to my husband I used to know him well and he tried to bend and cover himself further with the scarf. He was wearing a brown jacket and black trouser.**

MFI 4 identified

They came with their hands behind their backs hence did not see anything and I did not talk to them and I ran behind the house through the fence to a neighbor and my husband called from a distance that I lock the door but **I had already ran to my neighbours place one Nancy as it's a plot and other people came out and we came back to our home and on entering the gate my husband was wearing only vest and buttons to trouser had come out and he was holding his trouser.** He was bleeding from head to face and I helped him to wash and took him to the house and gave him other clothes and **the money Kshs.35,000 I had put on a table at sitting room was missing.** As there was a blackout I found the torch for Kshs.150 I had left while lit was missing at bedroom plus Techno phone for Kshs.2,000. I saw some of the money he had put on the table which noted not yet counted and he also had some in the pocket.

I also called one James to take PW1 to hospital and he called a driver one Kipsamo who took him to hospital Eldama Ravine Mercy Hospital and I do not go with them and he was then referred to Provincial General Hospital Annex – Nakuru and I went to report on 27<sup>th</sup> June, 2015 to report to the Police and I took the scarf out to where my husband had fallen down when I came with neighbours he was already standing but blood had covered his eyes and was weak and I assisted him to walk. After recording my statement with Police, CID officers came home on 28<sup>th</sup> June, 2015 CPL Shirandula and James also did record his statement and later Brian was arrested in Maasai land Narok as the Chief who arrested him said he had opened a business at Narok and it was Chief of Simotue Location who went to arrest him in Narok and I identified him in Court and I infact before offence he was our employee and infact used to live with us in our house for close to a year and he is the one in Court (points out).

**Hon. R. Yator – SRM**

18.07.2017

**Cross examination by accused**

I came to the door when I saw two people following each other and the one ahead was short. I used light from the torch to identify you and the one ahead I could not identify nor his clothing. I could see your clothes as you were tall and had a brown jacket and scarf on the head and I could clearly see your face. Before you tried to hide your face with the scarf I had already reflected your face.

After I had seen your face I tried to look at you well as infact I did not know the one ahead.

I heard my husband scream from fence that I lock the door and I ran to my neighbor without locking and I could not use more than two minutes to arrive there and I returned to my home after ten minutes with neighbours and I found him already standing but staggering and not lying down. I came back with many neighbours before James and Kipsamo arrived and the two are only ones who recorded statements.

None of the other earlier neighbours recorded statements.

James was not far as he had just closed his business which is a meter away from our house and I called him while he was on his way home from business and came back with a motorbike.

**I did not see my husband remove the money but had left it on the table and mine was also on the table in the sitting room and not put yet in the box as we were yet to count all.** The door I was standing and the wall you were hiding was two steps away hence could spot you clearly I do not know if you were arrested with a torch nor phone.

**Re-examination by Prosecution**

When I reflected torch I could clearly see Brian and I was in shock and I had already identified him and did not concentrate on the one behind me as he was my brother in-law. My husband had put the money before we ate and I was concerned with serving him supper and I could not see him exactly remove money.

We had no grudge before offence but at one time he was sacked from working for us.

**Hon. R. Yator – SRM**

18.07.2017

**PW3**

I am Emmanuel Kipkorir. I live in Kikitor. I am a Petrol pump attendant at Kiptol Petrol Station. **On the night of 25<sup>th</sup> and 26<sup>th</sup> June, 2015 I was at work at night when Solangi came and brought fuel. He was on a motorbike. He came carrying a passenger who alighted and stood about 50 metres from where I was.** I fueled Solangi's motorbike at Kshs.150 and he rode off. I recorded my statement later after learning that a person had been attacked and robbed. His name is John Kitilit. **I later came to know Solangi's real name as Brian Kitilit a person I had known as Solangi for about one year.** That's him (points at accused).

**Cross examination by accused person**

I was at work on the night of 25<sup>th</sup> and 26<sup>th</sup> June, 2015. The incident happened two kilometres away.

**PW4**

I am James Kiproop. I stay in Makanin. I operate a hotel on the night of 25<sup>th</sup> and 26<sup>th</sup>, 2015 **John's wife Monicah called me on phone and told me that John had been beaten up** and she wanted me to help take him to hospital using a vehicle.

I went to her house and her husband was wounded on the face. He was bleeding. I called Kipsambu and we took him to Mercy Hospital Eldama Ravine. I don't know how he was wounded.

**Cross examination by accused person**

I closed my hotel at 10pm. John's house is 10km away. I didn't see John during the day or witness this offence.

**Court Prosecutor**

No re-examination.

**PW5**

I am No.48678 Corporal Laban Shirandula I work at CID Mogotio Sub-County. I am the Investigating Officer herein. On 27.06.2015 I was perusing the occurrence book when I saw this case minuted to me.

Monica had reported that on the night of 25<sup>th</sup> and 26<sup>th</sup> June, 2015 while at home in Mugunin with her family at midnight they were attacked by two people who wounded her husband and robbed them Kshs.210,000, torch valued Kshs.150, techno valued Kshs.2000 totalling Kshs.212,150.

**Court Prosecutor**

I make an application to amend the charge sheet to read Kshs.212,150 instead of Kshs.212,350.

**PW5 continues**

The following day I went to Makenin Shopping Centre in the reportee's house and recorded her statement. She said she had recognized Brian Kitilit (her husband's brother) as one of the attackers. **She gave me this red Arsenal scarf saying the said Brian wore it on the neck during the attack and he dropped it in their compound.** I visited the said John in Provincial General Hospital Annex and saw his injuries. He said he was attacked by his brother and another person. I recorded his statement and started looking for the suspect Brian.

On 5<sup>th</sup> July, 2015 I received tip off that the suspect was in hiding in Olorunga Narok. I and PC Festus Musango proceeded to Olorunga in Ikra house and found the accused operating a shop therein. We arrested him and brought him to Mogotio and I charged him with these charges.

Scarf – PMFI 4 – 1 produce it as exhibit – exb 4

I issued John with P3 form while in hospital and it is in Court – PMFI 3.

That's the person I arrested (points at accused).

**Court**

Accused identified by the witness. In the area Assistant Chief of the accused who accompanied us to Narok and pointed him out during the arrest.

**Cross examination by accused**

I visited the scene which is a shopping Centre. I interrogated PW4 who took the wounded person to hospital.

I didn't visit your house. None of the stolen items were recovered but both the complainant and his wife identified you during the robbery. I don't know of any grudges if you had with John that's why you attacked him.

**Court Prosecutor**

I pray for adjournment. The doctor was served with summons but he declined to attend Court saying he's in private practice. I pray for warrants of arrest. There's an affidavit of the Investigating Officer to show the frustration he has gone through with the said Dr. Mungatana.

Dr. Wangeci of Provincial General Hospital on the other hand refused to come to Court saying she can't come all the way to produce P3 forms.

**PW6**

I am Dr. Aziza Mungatana. I work at PGH Annex-Nakurur. I am a consultant surgeon. I have worked as a surgeon for six years and 15 years as a doctor.

On 26<sup>th</sup> June, 2015 I saw a patient John Kitilit at PGH Nakuru Annex. I treated him and this is the discharge summary;

IP NO.034288/15

He was admitted to hospital on 26<sup>th</sup> June, 2015 and discharged on 4<sup>th</sup> July, 2015. He was admitted for emergency surgery. He had a depressed compound skull fracture. The diagnosis was confirmed by CT scan done at Mediheal hospital on 26<sup>th</sup> June, 2015. He had depressed fracture of frontal bone (PMFI 1).

I did the surgery on 27<sup>th</sup> June, 2015 and on 4<sup>th</sup> July, 2015 he was stable and he was discharged to follow on outpatient basis.

I filled the P3 form for the said John Kitilit on 4<sup>th</sup> July, 2015.

I produce it as an exhibit – exb 3. The details are same as the injuries on the discharge summary.

Degree of injury was grievous harm. I produce the CT Scan report as exhibit – exb 1.

I produce the discharge summary and patient file as exhibit – exb 2.

Cross examination by accused person

On 26<sup>th</sup> June, 2015 is when he came to the hospital. I can't recall the time.

He had injuries on the face and head.

Probable weapon was blunt.

I filled the P3 form. I wasn't concerned with the identity of the attackers.

He was conscious when he was brought to the hospital.

**Court Prosecutor**

No re-examination. I close the prosecution case.

## **DW1**

*I am Brian Sigilai Kitilit. I stay in Mogotio Centre. I am a businessman. I recall on 02.04.2015 I went to Narok with George Kiprono i.e Ololong were rented a room and started operating a shop. For Kshs.70,000 we rented till 01.05.2015 when I went back to Mogotio to get Mary my wife. I went back to Narok with her. We continued working till 01.07.2015 when my wife and George came back to Mogotio to run my shop in Majani Mingi. I remained in Narok on 05.07.2015 being a Sunday I was in my shop. At 4:00 some people came and bought soda. They said they are AP officers from Mogotio. They told me to close the shop and I did.*

*They took me to Ololunga Police Station then to Mogotio Police Station at 3:00 am. The following day I was finger printed and charged with this offence. This is a lie. Previously the complainant who is my brother had employed me in his Petrol Station. He was to pay me Kshs.10,000 per month for six months. I worked from June 2014 so he was to pay me in December, 2014. When I asked for my money he said I had stolen from him and he won't pay me. I informed my father who tried talking to John but they didn't agree. I told him to go with us to the Station but he refused. He said he would go to Mombasa and do witchcraft and I will die. I decided to quit his employment. In January, 2015 Police came to my house at night but I declined to open for them so they went.*

### **Cross-examination by Mburu**

*I went to Narok on 02.04.2015 by Matatu with George. I haven't produced any receipts in Court.*

*I was trading a general shop in Narok with starting capital of Kshs.70,000 our landlord was Abdi Kadir and rent was Kshs.7,000 per month. We worked till 01.05.2015 when I came to Mogotio for one day then back to Narok till 01.07.2015. I don't have receipts for rent for that business in Court.*

*I didn't rob John. I was John's pump attendant and I was to be paid after six months. I reported the matter to our dad in January, 2015. The receipts are in the shop.*

*George had travelled to take my pregnant wife home during my arrest.*

## **DW2**

*I am George Kiprono. I stay in Mogotio. I operate a hotel in Kiptoweri Mogotio. On 02.04.2015 I went to Narok with Brian and we opened a shop at Olulunga the following day. We worked till 01.05.2015 when Brian came to Mogotio and the following day he came to Narok with his wife and she told me that Brian has been arrested. The following day on 05.07.2015 I came to Eldama Ravine Law Court to see him from Majani Mingi where we had a shop.*

### **Cross-examination by Mburu**

*Brian is my nephew his mother is my sister. On 02.04.2015 we went to Narok Brian and I. my sister Chebichii was left running our shop in Majani Mingi. We opened the shop on 03.04.2015. I can't recall the name of the land lord. We weren't being given receipts for rent. If Brian says we were being given receipts that's not true. I came to Mogotio on 01.07.2015 to check on the other business I didn't come with the matatu receipt for Narok. We rented a house and I don't have the receipts. Rent in Narok was Kshs.700.*

*I didn't travel to bring Brians wife home but to check on our shop in Majani.*

## **DW3**

*I am Mary Kiprono. I stay in Kabiemit. I operate a shop at Kabiemit. Brian my husband went to Narok on 02.04.2015 and came back on 01.05.2015 and 02.05.2015 I went to Narok with him to operate our shop with George.*

*On 05.07.2015 at 4 pm Brian called me and told me that he has been arrested and he's being brought to Mogotio. On 04.07.2015 he was charged with this offence. I was with Brian on 25<sup>th</sup> and 26<sup>th</sup> June, 2016 in Narok.*

### **Cross examination by Prosecution**

*I joined them on 02.05.2015. We were staying in Olulunga with George Kiprono. In front was a shop and behind the shop was a room where I slept with Brian. George had a separate house not far from us. He used to spent/slept at his friend's house. I was in Narok on the night of 25<sup>th</sup> and 26<sup>th</sup>. Our landlord was a Maasai not a Somali and not Abdi Kadir. George was our employee not business partner. Brian had only one shop in Narok.*

*He had no shop in Majani Mingi.*

## **DW4**

*I am Kitilit Changwor. I stay in Koibos Location. Both complainant and accused are my children. On that day Brian was not near the complainant. I am told he was in Narok working. The complainant likes complaining against people. I wonder where the others suspect is. If Brian robbed John, I don't know. May be John thought its Brian. If he was in Narok how did he get to Mugurin. Brian was employed by John and he quit but I don't know whether he quit in good faith or they had issues. I can't recall for how long he worked there.*

### Cross examination by Prosecutor

*They are step children. John's mother is my second wife and Brian's mum third wife.*

*Brian was in Narok but that is what I was told. Before going to Narok Brian was staying at Musa's place. I don't know when Brian went to Narok but the month is June when he went to Narok. I don't know how long Brian worked for John or how much he was earning. Brian told me that John had his money but he didn't tell me how much it was. There is no time Brian sent me or I went to John to ask him to pay Brian's money. I know John said Brian had stolen from him. This is the 1<sup>st</sup> time John has made allegations about Brian. He employed Brian to assist him in his job. I don't know who robbed John. Brian told me he was in Narok then.*

### DW5

*I am Musa Kitilit. I stay in Kabiyet. I cleared form four last year 2017. In June, 2015 I was in School. I was told by the teacher that I am needed home. I went home on 26<sup>th</sup> June, 2015 and learnt that John told me he doesn't know who attacked him but his money Kshs.100,000 had been taken. That's all.*

### Cross examination by Prosecution

*I was in Mugurin Secondary School boarding form two and released to go home. John's wife told me that they don't know who attacked them. I found her at Mugurin Centre on 26.06.2015 on 27.06.2015 went to see him in hospital. I don't know who informed the teacher. John is my step-mother and Brian is my brother. I stayed home for four days then went back to school. On the night John was attacked I was in school.*

*I found John's wife at the shopping Centre on the morning they were attacked."*

[6] When weighed as a whole as required (see *Nguku v. R* (1985) KLR 412 and *Ouma v. R* () KLR 619), the evidence of the Prosecution and the Defence in this case supports the existence of a grudge over alleged loss of money Ksh.700,000/- at the complainant's petrol station where his step brother appellant worked as an attendant and alleged failure of the complainant to pay the appellant (DW1) his wages of ksh.10,000/- per month for a period of 6 months, which the appellant demanded from the complainant (PW1) but was rebuffed with the allegation of loss of the petrol station funds. Indeed, in cross-examination, the appellant raised the possibility of an assault without theft or theft by the complainant's wife or persons who came to help the complainant, all reasonable probabilities that the appellant may have assaulted the complainant in his demand for his alleged owed salary a fight ensuing and loss or theft of money by any other person. These doubts must be given to the benefit of the accused/appellant.

[7] As regards the issue of identification of the appellant, I would have to agree with the prosecution that circumstances favouring positive identification on the evidence were poor in view of the timing at 10.30pm in a night when there was a power blackout and the two identifying witness allegedly using torches to identify the appellant. The purported identification by use of a scarf alleged to belong to the appellant was not useful because there was no antecedent evidence indicating or proving the said scarf to belong to the appellant. PW2 evidence of the theft of the torch places the torch in the bedroom inside the house, from where it was subsequently discovered missing after the incident, while she was outside and cannot, therefore, have used the said torch, as she alleged, to shine on the assailants and identify the appellant.

[8] Although, the complainant said he had recognised (which is stronger identification evidence than mere physical identification, see *Anjononi v. R* (1980) KLR 59) and talked to the appellant, and may be taken to have recognised his step brother, his single identifying witness evidence requires corroboration which was not forthcoming, as the evidence of his wife PW2 as regards identification is shaky. Owing to the difficult circumstances, the alleged identification is not safe. See *Karani v. R* (1985) KLR 290 following *Roria v. R* (1961) EA 583 of "the need to test with greatest care the evidence of a single witness in respect of identification especially when it is known that conditions favouring a correct identification were difficult [and] in such cases there is need for other evidence."

[9] There were clear contradictions and inconsistencies as regards the existence of money allegedly stolen, where it was stored and stolen from, and the fact of its theft. PW1 the complainant said he put the money Ksh.175,000/- in a metal box in his bedroom while his wife PW2 said the money was at the sitting room; and while PW1 said his 175,000/- was stolen along with PW2's 35,000/-, PW2 herself said that she saw the money which they had not counted after the attack, creating a doubt whether any money was stolen at all.

[10] As regards the involvement of the appellant, there is inconsistency that while theft was allegedly perpetrated inside the house of the complainant and the assault outside, there was no evidence by either eye-witness that the appellant or the person they identified as the appellant had entered the house so as to be able to access the allegedly stolen money.

[11] That, as testified by PW3, the accused was sighted with a passenger on his motor bike on the evening of the alleged attack is of no consequence.

[12] PW4's evidence that he was called by the complainant's wife who told him that "**John had been beaten up**" made no mention of any theft of money.

[13] While the appellant with another *may* have "**beaten up**" the complainant (PW1), in the words of PW4, occasioning the injuries observed and classified as grievous harm by the Doctor (PW6), that is only evidence of assault and not of robbery. The offence of causing grievous harm would still not be proved if, as here, there is no positive identification of the assailant. In any event, it is not for the court to surmise but the prosecution to prove the charge beyond reasonable doubt.

[14] There being no proof of theft there cannot be robbery – simple or aggravated – and the appellant who in any event was not positively identified as one of the assailants will be acquitted.

**Orders**

[15] The appeal will, therefore, be allowed, the conviction for robbery with violence contrary section 296 (2) of the Penal Code quashed and the sentence of imprisonment for 15 years set aside.

[16] The appellant shall, therefore, be released from custody, unless he is otherwise lawfully held.

*Order accordingly.*

**DATED AND DELIVERED THIS 18<sup>TH</sup> DAY OF DECEMBER 2019.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.