



IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL NO. 102 OF 2017

BETWEEN

ANTONY KUNGU CHOGI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence dated 4th July, 2017 in Criminal Case No. 141 of 2015 at Gatundu Senior Principal Magistrates Court before Hon. L.M. Wachira (Mrs) SPM)

JUDGMENT

1. The appellant **ANTONY KUNGU CHOGI** was charged and convicted of the offence of robbery with violence contrary to **section 296(2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the offence were that on 5th January 2015 at Kirai Village in Gatundu North Sub-county within Kiambu County, jointly with others not before the court being armed with crude weapon namely wooden stick robbed John Mburu of one phone make Nokia 1200, one pair of shoes, one wallet, cash, Kshs. 5000/- all valued at Kshs. 10,140/- and at or immediately before or immediately after the time of such robbery used actual violence on the said John Mburu Muigai.
2. The appellant was sentenced to death and he appeals against both conviction and sentence. At the hearing of the appeal, Mr. Nyangau, learned counsel for the appellant, submitted that the appellant's defence that there was a fight following a love triangle was not considered by the trial magistrate. Further, that from the totality of the evidence, the prosecution did not prove the offence beyond reasonable doubt.
3. I have considered all the evidence and it is not in doubt that the complainant John Mburu Muigai (PW 1), was assaulted by the appellant on the night of January 2015. This is confirmed by Michael Mwihi Kangiri (PW 2) and Aloyce Mbachi (PW 3) who saw him after the incident and then took him to Gatundu Hospital. The P3 form was filed by Dr. Eunice Mugweni (PW 2) who noted that he had sustained a fracture on the hand which she classified as maim.
4. One of the essential elements of robbery is that the act of violence must be committed in the course of stealing. In this case, the evidence of the Investigating Officer (PW 5) was that the stolen effects items were given to him by Corporal Mbole who told him that the appellant is the one who delivered them to him at the AP Post. Corporal Mbole was never called to testify on the circumstances under which those items were recovered hence the appellant's defence that he took the items to the police station when he found PW 1 in his house gives credence to the appellant's defence that there was a fight following him finding PW 1 in his house with his girlfriend.
5. I accordingly find that the offence of robbery with violence was not proved. But it is clear that the

appellant assaulted PW 1. PW 4 classified the injury as maim which falls within the definition of grievous harm under **section 2** of the *Penal Code*. Causing grievous harm contrary to **section 234** of the *Penal Code* is a lesser and cognate offence. Therefore, under **section 179** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*, I convict the appellant of unlawfully causing grievous harm to John Mburu Mungai contrary to **section 234** of the *Penal Code*.

6. I allow the appeal. The conviction and sentence is quashed and substituted with a conviction of causing grievous harm contrary to **section 234** of the *Penal Code*.

DATED and DELIVERED at KIAMBU this 21st day of February 2018.

D.S. MAJANJA

JUDGE

RULING ON SENTENCE

The appellant was initially charged with the offence of robbery with violence but after hearing the appeal, I reduced the same to causing grievous harm and convicted him. The circumstances under which the offence was committed involved a love triangle. The appellant states that he acted irrationally and prays for forgiveness. Having considered the mitigation, I sentence the appellant to **five (5) years** imprisonment from the date of sentence in the subordinate court. However, the sentence is suspended for a period of **one (1) year**. If he commits any offence and is convicted, he shall be committed to serve the balance of the sentence. If he is of good behavior for one year from today, he shall stand discharged. He is therefore set free unless otherwise lawfully held.

DATED and DELIVERED at KIAMBU this 21st day of February 2018

D.S. MAJANJA

JUDGE

Mr Nyang'au Masore, Advocate for the appellant.

Ms Maundu, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.