

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 108 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

DAVID MUTHOMI KAIRITHIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.G. Sogomo, SRM dated 21st September 2017 at Principal Magistrate's Court at Tigania in Criminal Case No. 1156 of 2016)

JUDGMENT

1. The appellant, **DAVID MUTHOMI KAIRITHIA**, was charged with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. It was alleged that on 23rd April, 2016 at Ikoone centre, Akaiga sub location, Akaiga Location in Tigania East District within Meru County, jointly with another not before court, robbed **MUTEGI STEPHEN** of his cash Kshs. 700/= and immediately before or immediately after the time of such robbery while armed with a crude weapon namely panga, used actual violence on the said **MUTEGI STEPHEN** by cutting him on one left side of the head. The appellant was convicted and sentenced to death.

2. The evidence before the trial court was that Mutegi Stephen (PW 1) was headed from Gikoone village on 23rd April 2016 at 9.30pm when he met his friends Zakary M'Iruri (PW 2) and Robert Mbaabu (PW 3). They spoke for a while then parted. After about 10 metres, PW 1 was attacked by two assailants. He fell down and recognized the appellant as one of them. The assailants started to beat him but he fought back. He grabbed the appellant's hand as he tried to cut him with a panga. At this point he realized it was the appellant as there was sufficient moonlight and he also raised alarm which caused PW 2 and PW 3 to come to his rescue.

3. PW 2 recalled that he saw the appellant fighting with PW 1 and together with PW 3 they went and separated them although PW 1 had his head cut. PW 2 told the court he knew the appellant. PW 3 also confirmed that after leaving PW 1, he saw him wrestling with the appellant who now had a cut on his head. He recalled that together with PW 2 they disarmed the appellant who had a machete. He also knew the appellant from the village. Thereafter they took the appellant to hospital.

A Clinical Officer, Martin Njeri (PW 4), who examined PW 1 confirmed that he had suffered a deep cut on the parietal area of the head caused by a sharp object. She noted that the degree of injury was grievous. The matter was reported at Mikinduri Police Station on 24th April 2016 by PW 1 as confirmed by the investigating officer PC Stanley Kipchumba (PW 5).

5. In his sworn evidence, the appellant denied the offence and stated that on 23rd April 2016, he was at home. He claimed that PW 1 had tried to frame him following a quarrel with his wife.

6. This is a case where the testimony of PW 1, PW 2 and PW 3 corroborated each other. The appellant assaulted PW 1 and in the struggle, he was caught by PW 2 and PW 3 in the act. The case of mistaken identity is therefore excluded. What is in doubt is whether there was intent to steal from PW 1. Although PW 1 lost Kshs. 700/=, it is not clear that it was stolen. The evidence also displaces his alibi defence.

7. I therefore set aside the conviction for robbery with violence and substitute it with causing grievous harm contrary to **section 234** of the **Penal Code**. I sentence the appellant to **four (4) years** imprisonment from the date of conviction and sentence.

DATED and DELIVERED at MERU this 29th day of May 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Namiti, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.