



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CRIMINAL APPEAL NO. 21 OF 2016**

**LAZARUS OMOTO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in criminal case No.1604 of 2014 of the*

*Chief Magistrate's Court at Busia by Hon. M.A Nanzushi – Senior Resident Magistrate)*

**JUDGMENT**

1. **LAZARUS OMOTO**, the appellant, was convicted of the offence of robbery contrary to section 296(2) of the Penal Code.
2. The particulars of the offences were that on the 25<sup>th</sup> June 2014 at **ELUNGALI** village in **MARACHI NORTH** location of **BUSIA** County, jointly with another not before court robbed **ABDI WANGA MASINDE** of a mobile phone and Kshs.2000/= all valued at Kshs.7500/= the property of the said **ABDI WANGA MASINDE** and at the time of said robbery, used actual violence to the said **ABDI WANGA MASINDE**.
3. The appellant was sentenced to suffer death as prescribed by the law. He has appealed against both conviction and sentence.
4. The appellant was in person. He raised five grounds of appeal which I have summarized as follows:
  - a) That the learned trial magistrate erred in law and in fact by failing to appreciate that his constitutional rights were breached.
  - b) That the learned trial magistrate erred in law and in fact by relying on evidence that did not establish the ingredients of the offence.
  - c) That the learned trial magistrate erred in law and in fact by relying on insufficient prosecution evidence.
  - d) That the learned trial magistrate erred in law and in fact by disregarding the entire defence.
5. The state opposed the appeal through Ms. Ngari, the learned counsel.
6. The facts of the prosecution case were briefly as follows:

The complainant was walking home from a mosque. A motor cycle approached from behind. This was on a narrow road. He stood aside to allow the motor cycle to pass. The pillion passenger jumped off the motor cycle and butted him on the head with his head. He fell down and he was robbed of his mobile phone and a jacket that contained his Kshs.2000/=. The two robbers rode off and he managed to pursue them while raising an alarm. Members of public responded and the appellant was arrested while his accomplice managed to escape. His jacket was recovered but the money and the mobile phone were not.

7. The appellant denied involvement in the offence and contended that while he was ferrying a passenger on a motor cycle, he found some three people on the road holding sticks. When he saw them he sped off but since it had rained, he fell down and they arrested him on allegations that he had caused a scene. After about five minutes of his arrest, the complainant joined his arresters and accused him of robbing him.

8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

9. The appellant contended that Article 50(2) (k) of the Constitution was breached. This therefore denied him his right to fair trial. This Article provides as follows:

*Every accused person has the right to a fair trial, which includes the right—*

*(k) to adduce and challenge evidence.*

His argument is that he was denied the right to challenge the evidence of the investigating officer who was not called to testify. This argument is misplaced for the failure to call this witness can only affect the weight of the evidence against him. The evidence of a witness who is not called to testify cannot be acted upon by court unless it falls in the category of exceptions recognized by the law. This ground of appeal lacks merit.

10. The ingredients of the offence of robbery contrary to section 296 (2) of the Penal Code were stated with clarity by the Court of Appeal in **JOHANA NDUNGU vs. REPUBLIC [1996] eKLR** where it stated:

*In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:*

*1. If the offender is armed with any dangerous or offensive weapon or instrument, or*

*2. If he is in company with one or more other person or persons, or*

*3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.*

While analyzing the evidence on record, I will bear in mind the ingredients of the offence stated hereinabove.

11. What evidence was at the disposal of the learned trial magistrate? According to **Abdi Masinde Wanga (PW1)**, he was robbed by two people who pounced on him from a motor cycle. The pillion passenger used his head to butt him on the head. This person took his phone which had fallen down and forcefully removed his jacket. When his attackers rode away, he followed them while shouting for help. Since it had rained, members of public managed to arrest the two but one of them escaped. At the time of arrest, his jacket was recovered.

12. **Joshua Oduol Wanzala (PW2)** testified that when he was going home with **Moses Opondo (PW3)** they heard screams of a person crying that he had been robbed by people who were running away on a motor cycle. They stopped near a junction to a feeder road. A motor cycle with two people approached. They managed to push the motor cycle to the ground for it had slowed down. The appellant was the rider. The pillion passenger managed to escape. He said there was a jacket on the motor cycle's handle bars that had mud all over and it was torn. The evidence of **Moses Opondo (PW3)** was to the same effect. Both said that the complainant reached at the scene where the appellant was arrested and identified the jacket as his.

13. In his defence the appellant contended that while he was ferrying a passenger, he found some three people on the road holding sticks. He sped off on seeing them but he fell down and he was arrested. They gave him a jacket and soon the complainant joined them.

14. The learned trial magistrate was justified in dismissing the appellant's defence. When he cross examined PW2 and PW3 who arrested him, he never challenged them with the facts that they were the ones who gave him the jacket. It was an outright afterthought.

15. The complainant was robbed by two people who also inflicted injuries on him. I make a finding that the prosecution proved its case beyond any reasonable doubt against the appellant. His appeal lacks merit and the same is accordingly dismissed.

**DELIVERED and SIGNED at BUSIA this 29<sup>th</sup> day of May, 2018**

**KIARIE WAWERU KIARIE**

**JUDGE**