



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO. 52 OF 2017**

**JACKTON SHAMBA.....APELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An Appeal from the Judgment of the Principal Magistrate Honourable H.O. Barasa***

***in Eldoret Criminal Case No. 2092 of 2013 dated 21<sup>st</sup> April, 2017)***

**JUDGMENT**

*JACTON SHAMBA*, the appellant herein, was charged with the offence of robbery, contrary to *Section 296(1)* of the *Penal Code*.

The particulars of this offence are that on the 7<sup>th</sup> day of June 2013 at Majengo village, in Lugari District, within Kakamega County, the appellant robbed *B F* of one Radio valued at Kshs. 1,000/- and at the time of such robbery threatened to use actual violence to the said *B F*.

The prosecution case is that in April 2014 *B F*, the complainant in this case, was aged 10 years and was a pupil in class 6 at Green Embers

Academy. The mother, the *PW-2* in the case, asked him the position he was in, in class and said position 3. His uncle namely *P O*, impressed by the said performance bought him a small rechargeable Radio for 1,000 Kshs. On 7<sup>th</sup> January 2013, when the complainant got out of the school at about 5.30 p.m, *PW-2* sent him to go to *Mama Tom* and recharge the said Radio. They had been advised against using it before it was fully charged. The complainant went in company of another boy who was being assisted by *PW-2*, known as *P O*.

When these two boys were on the way, they saw *Shamba*, the appellant herein approaching from behind. He seemed drunk.

*PW-1* told *P O* to give him way. *PW-1* went to one side of the road and *P O* to the other. When the appellant got near them he went to the side *PW-1* was. He forcefully took the radio. He held *PW-1* by the neck, strangled him and then pushed him into a ditch before he ran away. *P O* screamed and raised *PW-1* up. The appellant ran away saying, “*today you will know I am a monkey’s ass*”. A young man known in the area as officer responded, as well as *Hawad* and *Imu*. By that time the appellant had vanished. They tried to trail the appellant and advised the complainant to report to the police. They reported at Majengo police station. They were

told to go and call their mother. However, the mother heard disgusted members of the public who were near the stage saying, “*We get him, we kill him*”. The police appeared with the two boys and requested *PW-2* to accompany them to the appellant’s place. *PW-2* was surprised to hear what the appellant had allegedly done. She used to assist him whenever he had a problem. He was also their neighbor and there’s a time he was supplying them with firewood. They knew him very well. They led the police to his house. During the attack he was clad in a blue jeans and a whitish shirt. The police called him out and his wife told him to tell the truth. Police asked him if he had changed clothes and he said no. He was asked about the radio and said it was in his mother’s house. He led them there. At the place he said he gave it to *B*, a girl slightly older than the complainant. The appellant called her and instructed her to avail the radio he had given her. She went and availed it. The police, among them the *PW-3* in this case, took the radio as exhibit and arrested the appellant. He was taken to the camp, and the following day to Lumakanda Police station.

The following morning *PW-1*’s neck was swollen. *PW-2* took him to Lumakanda district hospital. His P-3 form was filled on 11<sup>th</sup> July, 2013 by *Julius Mashet*. He noted that on the head, *PW-1* had swollen neck and

superficial bruises. The back was also bruised. He assessed the degree of injury as grievous harm. *PW-4* investigated the case and had the appellant charged. The recovered radio, its purchase receipt and the said P-3 form were produced in court as exhibits.

The appellant gave unsworn testimony in his defence and called no witness. His defence is that the lady he was working for caused his arrest. He had worked for her for long and then decided to go elsewhere. When he met with her she asked him why he had left working for her. Later she took police officer to him. They searched his house and recovered nothing. The police went to his home and had the radio. They said the appellant's niece produced it saying appellant gave it to her on 7<sup>th</sup> June, 2013. He denied commission of the offence. He alleged he is innocent.

The trial magistrate evaluated the evidence, found him guilty of the offence, convicted him and sentenced him to serve 2 years in prison.

Dissatisfied with the said conviction he appealed to this court on the grounds that:-

- (1) The case against him was not proved beyond reasonable doubt.
- (2) The evidence was not properly analyzed and the court arrived at an erroneous decision.
- (3) A crucial witness, P O was not called as a witness.
- (4) The sentence meted was harsh in the circumstances.
- (5) The court relied on uncorroborated and unsworn evidence of a minor.
- (6) The medical evidence relied on was not authentic and their contents were not supported by the evidence of PW-1.
- (7) The ingredients of the offence of Robbery under Section 296 (1) of the Penal Code were not established by the prosecution.
- (8) The charge sheet was defective.
- (9) The appellant's defence was wrongly dismissed as it was consistent and truthful.
- (10) The prosecution case was contradictory and unreliable.

When *Mr. Were*, the counsel for the appellant argued the appeal, he averred that a crucial witness who was with the complainant was not called as a witness. His name is *P*, and the court should hold that if called his evidence would have adverse effects to the prosecution case. The court relied on uncorroborated and unsworn evidence of a minor, PW-1. The medical evidence relied on, was of doubtful authenticity. Only the P-3 was produced without any treatment sheets. The P-3 was filled

30 days after the alleged incident and the age of injury was estimated to be 3 weeks. Ingredients of robbery were not established as there was no evidence to show that the complainant owned the Radio. The copy of the receipt availed had no name.

The charge sheet was alleged to be defective as in its particulars states, "*threatened to use violence*". The reason given for dismissal of defence was not proper. The appellant alleged he was fixed by PW-2. The court found she was not the complainant and there was no evidence that complainant acted on her behest. The appellant argued that PW-2 was the mother of the complainant and said during hearing, "*had you humbled yourself I would have withdrawn the case*", showing there was clear nexus between her and the complainant.

There were contradictions on where the radio was found. Investigating officer said it was at appellant's house while other witnesses said it was at appellant mother's house. It was also not clear as to who was robbed and injured.

Some witnesses said it was PW-1 while PW-3 on cross examination suggested it was PW-1 and *P* (the two boys).

When there was a change of magistrate during the trial, the court only asked the appellant whether he wanted the case start De-Novo, he was not informed of his right to recall witnesses under *Section 200(3)* of the *Criminal Procedure Code*.

The state opposed the appeal. They averred that the evidence by prosecution witnesses was reliable, consistent and well corroborated. Ingredients of robbery were well established. PW-1 after voir dire was conducted gave sworn evidence. The incident happened at about 6.00 p.m during the day and the evidence of PW-1 that it's the appellant who committed the offence is of recognition. Actual violence was used during commission of the offence, whereby PW-1 got injured. The appellant led to recovery of the radio at his mother's house. PW-2 well corroborated this evidence.

Provisions of *Section 200 (3)* of the *Criminal Procedure Code* was explained to the appellant who indicated he wished to proceed from the point reached. The error in the particulars of the charge sheet was typographical of which did not affect its meaning or understanding.

I have re-evaluated the entire evidence, the passed Judgment, grounds of appeal and submission by both parties.

I wish to start by saying that the legal requirement that the prosecution must establish their case beyond reasonable doubt, simply means that the court must be certain. In this case the court had to be certain that an offence of robbery took place and that it's the appellant who committed it.

PW-1 a minor was the only eye witness to the incident who was called as a witness. After the voir dire was conducted, the court observed

that, “I find the offered witness understands the nature of oath and the duty of telling the truth. He’ll give sworn evidence”. However, the typed script does not show that he was sworn before he gave his evidence. I have looked at the handwritten script which is written in short, “PW-1 Jxnms says in Swahili:- Jxnms to me sensibly means J- Juvenile, xn – Christian, M- Male and S- sworn”. It is therefore clear that PW-1 gave sworn evidence of which as a matter of law does not require corroboration. The trial court cautioned itself while relying on his uncorroborated evidence, and still found it safe and reliable. In my own evaluation of PW-1’s evidence, it contains abundance of details, some of which were not even revealed by PW-2 of which shows his independence, like on what the appellant said as he left the scene and on how the radio was recovered,

of which I find most steadily and impressive; making it of high probative value. Such evidence could not have been crafted by PW-1 and his mother just to fix the appellant. The appellant prior to the incident was in good terms with PW-2. He had worked for her and used to supply her with firewood. She even used to bail him out whenever he had a problem. She was surprised when she heard he’s the one who had committed the offence against her son. Accused defence that he was fixed by her as he had stopped working for her cannot be true. This is just a smoke’s screen defence of which was rightly dismissed by the trial court.

I do agree there are minor discrepancies in the evidence as to where the said radio was being taken to be charged and on exactly where the radio was recovered. However, it is certain the radio was there and was going to be charged. It is also certain that the appellant led to its recovery. The said discrepancies do not therefore affect the certainty of facts in relation to the ingredients to the offence. The appellant took the radio violently from PW-1 and thereafter led to its recovery. The indication in particulars of the charge sheet that he threatened to use violence, rather than that he used violence, is an error of which did not prejudice him in any way. There is no conceivable defence which would have been

available to him if the correct words were used, and of which he probably failed to advance out of the said error. This therefore amounts to a mere technicality of which needs not affect the meeting of ends of justice. Medical evidence adduced corroborates the complainant’s evidence and that of PW-2 that he was injured during the incident. When P-3 states the injuries were probably 3 weeks old, while they had lasted 30 days, that’s correct as the word used is “probably”. Expert evidence is opinion evidence and at times what influences the opinion is of the nature which would not lead to certainty.

When the trial court asked the appellant whether he wished to proceed from the point reached or have the case heard de novo, it was sufficient in compliance with provisions of *Section 200 (3) of the Criminal Procedure Code*. If he wished any witness recalled nothing prevented him from saying so. Having elected to proceed from the point reached means he never intended to have any of the witness who had given evidence recalled. The process did not prejudice him in anyway.

The bottom line is that the trial court well evaluated the evidence, had the facts right and the applicable law. The appellant was rightly convicted

for the offence of robbery and sentenced to serve 2 years imprisonment. The appeal lacks merit and is dismissed.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 26<sup>th</sup> day of June, 2018**

In the presence of:-

Appellant

Ms. Oduor for the state

Mr. Mwelem – Court assistant