



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO. 75 OF 2014**

**STEPHEN KIPCHUMBA CHERUIYOT.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An Appeal from the Judgment of the Principal Magistrate Honourable B. Mosiria*

*in Kapsabet Criminal Case No. 245 of 2013 dated 19<sup>th</sup> November, 2013)*

**JUDGMENT**

The appellant herein, one *Stephen Kipchumba Cheruiyot* was charged in the first count with the offence of attempted robbery contrary to *Section 297 (2) of the Penal Code*.

The particulars of this offence are that on the 31<sup>st</sup> day of January, 2013 at Nandi Hills junction within Nandi County, the appellant being armed with a knife attempted to rob *Hillary Mutai* of his shop goods namely 50kgs of sugar, 10 boxes of washing bar soaps, 20 packets of match boxes, 50kgs of tea leaves, 3 cartons of Chipsy cooking fat, 5 bundles of Ndovu wheat flour, 10 bundles of Jogoo maize flour, 10 dozen of Vaseline baby Jelly, three cartons of Omo Satchets and at or immediately before or immediately after the said attempted robbery wounded the said *Hillary Mutai*.

The second count is of assault causing actual bodily harm, contrary to *Section 251 of the Penal Code*.

The particulars hereof are that on the 31<sup>st</sup> day of January 2013 at Nandi Hills junction, within Nandi County, the appellant unlawfully assaulted *Damaris Mutai* by stabbing her on the lower side of the abdomen and left side of the cheek using a knife, thereby occasioning her actual bodily harm.

The prosecution case is that PW-1 and PW-2 who are a husband and a wife, operates a grocery shop at Nandi Hills junction to Kisumu. They live adjacent to the said shop in a well secured plot in which PW-3 was the only other tenant. On 31<sup>st</sup> January, 2013 at about 2.30 a.m PW-1, PW-2 and PW-3 were all asleep. PW-1 was woken up by the shop padlock alarm. He put on the lights and went to the house corridor to find out what was happening. He was shocked when he saw a man inside the house who was wearing a mask on his face. The intruder tried to escape and PW-1 got hold of him. The two grappled. The intruder was armed with a knife of which he used to cut PW-1 on the left wrist. PW-1 raised alarm and attracted his wife, PW-3, PW-4 and other neighbours. PW-2 joined the struggle to assist her husband. The assailant attacked her with the knife. He scratched her with it on the left cheek and stabbed her on the right side of the abdomen. She also raised alarm. PW-3 tried to get out of his house to assist but noted his house door was locked from outside. He opened the window and through it called upon neighbours to open for him. PW-4, a neighbor, was woken up by the raised alarm. He was not immediately able to get to the complainant's compound. He climbed over the aerial pole and jumped into the compound. He found PW-1 and PW-2 struggling with the assailant. He helped to subdue the assailant. PW-1 opened for PW-3 who also joined them. There were many other neighbours who had turned up to assist but were unable to access the plot as the gate was locked. The watchman was with them outside the gate. The assailant was unmasked and was well recognized by PW-1 and PW-2 as their customer who used to charge his phone at their shop and also to play pool nearby. It was noted that he had gained entry into the home using the window which grill he had broken. He had accessed the table room where he got a bunch of keys. He had opened the house outer door using the keys and the shop padlock alarm went off when he tried to open it.

The gate padlock was cut to allow those outside, inside. When they entered they attacked the assailant and led him towards Nandi Hills Police station.

The police at the place had been alerted of the incident. PW-6 and a police driver, *Sergeant Hesbon*, headed to the place. They met a crowd

of people escorting the suspect towards the police station. The victims were with them. They also had the knife the assailant was armed with. The assailant was re-arrested and taken to Nandi Hills police station. The victims were taken to Nandi Hills District Hospital. They were treated and their P-3 forms filled. The degree of injury sustained by each one of them was classified as harm.

PW-6 investigated the case. He visited the scene and guided by foot marks could trail how the assailant accessed the complainant's home compound. He had jumped over the stones wall, gone to the roof of the toilet and into the compound. He saw and collected the window grill which the assailant cut to access the house. From the assailant the bunch of keys he had taken were got in his pocket. The hood he had was recovered and kept as exhibit. The shop padlock which is alarmed was also got as well as the cut gate padlock. The assailant had also worn a jumper which he had removed to fit into the window opening. It was kept as exhibit. The assailant was eventually charged with the indicated offences. The listed items were produced in court as exhibits.

The appellant gave sworn testimony in his defence and called no witness. In it he denied the offences and stated he used to charge his phone in the shop of PW-1 and PW-2. On the material day he took it for charging at 7.00 p.m and was given a receipt. When he went for it later it was not found. PW-1 denied that the phone was left there and when he was shown the receipt denied it was from them. PW2 kept the receipt. The appellant left and when he went back PW-1 claimed that the appellant had issues with him. PW-1 slapped the appellant. The two fought. PW-2 screamed. Neighbours turned up and PW-2 alleged the appellant wanted to steal from the shop. The appellant was attacked and the watchman pleaded with them not to kill him but to take him to the police. The guard rung the police. He was then taken to the police station.

The trial magistrate evaluated the evidence, found the appellant guilty on both counts, convicted him and sentenced him to serve on the first count 20 years in jail and on the 2<sup>nd</sup> one, one year imprisonment. Sentences to run concurrently.

The appellant dissatisfied with the said conviction and sentences appealed to this court on the grounds that:-

- (1) The prosecution evidence was contradictory
- (2) The investigations were shoddy and poor.
- (3) The language used during plea was unknown.
- (4) The charge sheet was defective.
- (5) The case against him was not proved beyond reasonable doubt.
- (6) The produced exhibits do not support the charge

I've re-evaluated the entire evidence in the case, the judgment passed, sentences passed, grounds of appeal and submissions by both sides.

When the appellant was charged on 1<sup>st</sup> February, 2013 the court indicated interpretation in English/Kiswahili/Nandi. Above Swahili there is a tick which is clear indication to me that the language used was Swahili. The same style is used to indicate the presence of the appellant on that date where Absent/present, have present ticked above. This buttresses the position. It is therefore not correct when the appellant claims unknown language was used during the plea taking.

The appellant herein was charged under *Section 297(2)* which reads:-

***297(1) – Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to it being stolen, is guilty of a felony and is liable to imprisonment for seven years.***

***(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.***

The evidence adduced by the prosecution witnesses shows this is an "open and shut" case. The appellant herein was arrested "red handed" right at the scene, while in the process of committing the offence. He was armed with a knife of which he used to wound PW-1 and PW-2. The evidence of these two witnesses, who are a husband and a wife, is buttressed by the evidence of two independent witnesses, PW-3 and PW-4 who are their neighbours.

The witnesses were firm and their evidence is consistent. It was not shaken by the appellant during cross examination. The trial court had no cause to doubt it, and neither do I have. They were all witnesses of truth.

The appellant's defence was an afterthought. It was not covered during cross-examination of the prosecution witnesses. It is a poorly crafted defence which reveals want in facets of truth. It does not at all cast a doubt on the truth of the prosecution case that the appellant committed the offences convicted of.

The first count carries a maximum of death sentence. He was sentenced to serve 20 years imprisonment. The trial court was lenient and the appellant should count himself lucky.

The second count carries a maximum sentence of 5 years imprisonment. One year was equally lenient enough.

This court find no cause to interfere with either the convictions or the sentences imposed. The appeal lacks merit and is hereby dismissed.

**S. M GITHINJI**

**JUDGE**

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

In the presence of:-

1. The appellant
2. Ms Kagali for State
3. Mr. Mwelem Court clerk