



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 76 OF 2016

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Criminal Case No. 2145 of 2015 delivered by P.C. Biwott Senior principal magistrate on 26/7/2016).

MOSES MUNAHI MUTSOTSO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **Robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars of the charge are that **on the 28th day of April 2015 at Birunda within Trans Nzoia County robbed Mildred Chepkemoi Cherokon cash of kshs 2,650/- and mobile phone make Tecno valued at kshs 2,500/- and immediately before the time of such robbery used actual violence to the said Mildred Chepkemoi Cherokon.**

2. The appellant was convicted and sentenced to 10 years imprisonment hence this appeal. In the grounds of appeal raised by the appellant's counsel as well as the appellant himself, he has majorly attacked the prosecution case by arguing that the same was full of contradictions which when taken in totality did not meet the threshold of convicting the appellant.

3. The brief facts and evidence as presented during trial were that **PW1 the complainant** had travelled from Nairobi to Kitale via North Rift, I suppose Matatu. She arrived at 4.00 am and took a boda boda heading home. At around Birunda area the boda boda rider stopped and drew a panga from his coat and demanded money from her. She obliged and she gave him kshs 2,650 as well as her phone where upon surrendering her Pin details he transferred Kshs 10,000/- on the spot out of kshs 18,350 that were available. He then left the complainant at the scene.

4. Lucky enough another boda boda arrived and took her home. She thereafter went to Safaricom offices and reported the matter as well as to the police station. Safaricom then traced and found that the money had been withdrawn. She was given a statement which eventually she gave to the police and through the same the area Assistant chief managed to arrest the appellant.

5. **PW2 Charles Kundu Namunyu** the acting chief Bondeni after receiving the details managed to arrest the appellant courtesy of his boda boda friends.

6. **PW3 Job Lamerike** from Kitale police station crime office was tasked by OCS to handle the matter. Through the investigations and with the help from Safaricom service provider they managed to trace the appellant and had him arrested. He also produced the Safaricom statement.

7. When put on his defence the appellant gave sworn evidence denying the offence. He said that on 28/4/2015 he was at Kachibora having taken a tractor mechanic. Later on 23/5/2015 he was told by his colleagues that he was wanted by the Assistant chief Kipsongo. He was arrested and was later identified by the complainant.

Analysis and Determination

8. I have read the proceedings as well as the submissions both by the appellant's counsel, the appellant and the State counsel.

9. This in my view was an open and shut case. It was not disputed that the person who withdrew the money from the complainant's Mpesa account was the appellant. The name and the identity card registration number were his. He did not dispute or offer any contrary evidence.

10. As at the time of his arrest his account with Safaricom was still active. How then could he deny that he was not the suspect.

11. Even on identification the complainant was categorical on the clothing the rider wore that early morning. It appears that even at the time of his arrest he was still wearing the same.

12. The elements of stealing and robbery as provided under section 295 of the Criminal Procedure Code were clearly met. Sub section (ii) thereof states;

(ii) Use of or threat to use actual violence to any person or property immediately before or immediately after stealing intended to obtain or retain the stolen item or prevent or overcome resistance to the stealing.”

13. The assailant (the appellant) was armed with a panga and he used it to threaten the complainant. As a consequence he managed to steal the cash money she had as well as transfer that which was in her Mpesa account.

14. This appeal is consequently dismissed. The period the appellant shall serve shall be a deterrent to the rest of his colleagues in the same trade.

Delivered, signed and dated at Kitale this 26th day of September, 2018.

H.K. CHEMITEI

JUDGE

26/09/18

In the presence of:

Mr Kakoi for the Respondent

Appellant present

Court Assistant – Kirong

Judgment read in open court.