



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 116 OF 2017

(Being an appeal arising from conviction and sentence in Eldoret Chief Magistrate's court in criminal case NO. 891 of 2013 delivered by C. Obulutsa Senior Principal Magistrate on 4/12/2017)

MAXWELL MUTETI FEDHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with three offences of Robbery with violence as follows:-

On the first count, the appellant was charged with **Robbery with violence contrary to section 296(2) of the Penal Code**. The particulars of the charge were that **on the 26th day of February 2013 at Maili Nne estate In Eldoret West District within Uasin Gishu County, jointly with others not before court robbed Prudence Chepchirchir a mobile phone make Sony Erickson valued at Kshs 38,000/= and immediately before the time of such robbery wounded the said prudence Chepchirchir.**

2. The appellant was equally charged with the **second count of Robbery with violence contrary to section 296(2) of the Penal code**. The particulars of the charge were that **on the 26th day of February 2013 at Maili Nne estate In Eldoret West District within Uasin Gishu County, jointly with others not before court robbed Hilda Birech Chepkogei a mobile phone make Nokia valued at Kshs 4,500/= and cash Kshs 2000/= and immediately before the time of such robbery wounded the said Hilda Birech Chekoei.**

3. He was also charged with the **third count of Robbery with violence contrary to Section 296(2) of the Penal code**. The particulars of the charge were that on the 26th day of February 2013 at Maili Nne estate In Eldoret West District within Uasin Gishu County, jointly with others not before court robbed Tomas Kipyatich Kiptoo cash KSHS 4,000/- and immediately before the time of such robbery, threatened to use violence to the said Thomas Kipyatich Kiptoo.

4. He was equally charged with the offence of **being in possession of Narcotic drugs contrary to Section 3(2) as read with Section 1(a) and 3(2) of the Narcotic Drugs and Psychotropic substances Control Act Legal Notice No. 4/1992**. The particulars were that **on the 26th day of February 2013 at Maili Nne estate In Eldoret West District within Uasin Gishu County, was found being in possession of Narcotic drug to wit 15 rolls of cannabis sativa (Bhang) which was not in form of medical Preparation.**

5. The appellant was found guilty and sentenced to death. On the count of Narcotic substances he pleaded guilty and was sentenced to 2 years probation.

6. He has filed his appeal citing several grounds. It must be noted that his co-accused absconded and the other was set free.

7. The brief summary of the proceedings at the trial court were that **PW1 Prudence Chepchirchir** was walking home with her 3 friends at Maili Nne at 10.30 pm when they were attacked by about 7 people. They succeeded in taking her phone as they strangled her. The rest left as she continued struggling with the appellant. After a while some people including the police came to her aid and the appellant was arrested. He was also found with 15 rolls of bhang. She went to the hospital where P3 form was filled.

8. **PW2 Hilda Birech** was in the company of PW1 that night. She testified that she recognised the appellant who was an alibino through the security lights around.

9. **PW3 APC Kemoi Denis** was on duty that night when one Tom who was with PW1 and Pw2 reported the incident. They rushed to the scene and managed to arrested the appellant. He was searched and found with 15 rolls of Bhang. The witness on being cross-examined confirmed that he had known the appellant for about 1 years as he uses to sees him at Maili Nne.

10. PW4 Thomas Kipletich Kiptoo as with PW1 and PW2 when they were attacked. He managed to escape and reported at the police Station. He recognised the appellant because of his albinism. He also saw the bhang when it was recovered from him.

11. **PW5 APC Simon Muko Mandila** testified that PW4 came to the office and reported the incident. He went to the scene with his colleague and managed to arrest the appellant who was still struggling with his victims. He was arrested and escorted to Baharini police station. They also arrested the co-accomplices when they came to inquire about the appellant the following day.

12. **PW6 Simon Kiplagat Rono** the clinical officer from Uasin Gishu hospital produced the P3 form in respect to the complainants. The 1st complainant had sustained injuries in which she had swollen forehead, bruises on the neck and elbow. The 2nd complaint had injuries on the neck, wrist joint and knees. He produced two P3 forms.

13. **PW7 Corporal Otieno** from Eldoret Police station took over the investigations from Corporal Mbula who carried out the investigations and preferred charges against the appellant. He also produced the exhibits.

14. When put on his defence he admitted that he was selling bhang and that he was heading home. Thomas the threatened to sent him to Tanzania as he was an albino. He called him a thief and arrested him. He denied the charge.

Analysis and Determination

15. The court has carefully perused the proceedings herein. The ingredients for the offence of robbery with violence are now clear namely, the assailant must be armed and dangerous with an offensive weapon, in company of others and must use threat, force or violence.

16. From the record, the attackers were more than one. The appellant was apparently recognised by the assistance of the security lights and was arrested at the scene. His skin pigmentation (albino) aided in the process. More importantly he was arrested at the scene a fact which he does not deny.

17. He was arrested and found in possession of 15 rolls of bhang which he admitted and was sentenced to serve 2 years in probation.

18. The complainants sustained injuries which was evidenced by the production of the P3 form.

19. In short I find the appeal herein unmeritorious. The same is dismissed. The prosecution case was proved beyond a shadow of doubt. The admission of being found with the bhang and the evidence of being arrested while struggling with the victim was sufficient.

20. However pursuant to the decision in *Francis Muruatetu & Others Vs Republic Supreme Court Petition No 15/2015* I am inclined to permit the appellant another opportunity to mitigate on the sentence and thereafter an appropriate fresh sentence can be considered.

21. The appeal is otherwise dismissed.

Delivered, signed and dated at Eldoret on this 19th day of October, 2018.

H.K. CHEMITEI

JUDGE

19/10/18

In the presence of:

R. Karanja for the Respondent

Appellant - present

Court Assistant – Christine

Judgment read in open court.