



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D.S MAJANJA J.

CRIMINAL APPEAL NO. 67 OF 2017

BETWEEN

ISAAC MACHOGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J. Mwaniki, PM dated 13th June 2015 at the Principal Magistrate's Court at Keroka in Criminal Case No. 641 of 2015)

JUDGMENT

1. The appellant, **ISAAC MACHOGU**, was charged and convicted for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The charge against him was as follows:

On the 10th day of June 2015 at Matembe Sublocation in Masaba South District within Kisii County jointly with another not before court robbed DKM Kshs. 1850, FORME phone, gumboots all valued at Kshs. 3400/= and immediately before the time of such robbery wounded the said DKM.

2. The appellant now appeals against conviction and sentence on the basis of his petition of appeal on his written submissions. He contended that the prosecution did not prove the case beyond reasonable doubt and that his defence was not considered. The State supported the conviction on the ground that it proved all the elements of the offence of robbery with violence.

3. As this is a first appeal, I am required to re-appraise all the evidence and reach an independent conclusion as to whether I should uphold the conviction bearing in mind that I never heard or saw the witnesses testify.

4. The complainant, David Kebwaro (PW 1) was the appellant's uncle while Jared Mwaibi (PW 2) was the appellant's neighbour. On 10th June 2015, PW 1 was with the appellant and two other people. They met PW 2 at a kiosk, talked for a while and then parted ways. He recalled that appellant followed him and caught up with him. The appellant held him by the neck and strangled him while the other assailant, who he had been with them earlier, slapped him and proceeded to empty his coat pockets. They both threatened to kill him as they took his coat, gumboots, Kshs. 1830, phone and keys. He managed to run away and report the matter to the Police and Assistant Chief.

5. PW 2 confirmed that he met PW 1 while he was with the appellant. They spoke for a while and parted ways. He recalled that PW 1 and the appellant left together. The other person initially left with him but decided to follow PW 1. After a while he heard PW 1 screaming that he had been robbed of his coat, gumboots, keys and phone. He later saw PW 1 who had bruises on his throat.

6. The Clinical Officer, Jacinta Munyao (PW 3) who examined PW 1 on 10th June 2015 confirmed that PW 1 had a swollen neck. He concluded that the injury amounted to harm.

7. In his unsworn statement, the appellant denied the offence. He admitted that he knew PW 1 as his former teacher but denied that he knew PW 2. He told the court he was working on 10th and 11th June 2015 and on 12th June 2015, he reported to the police that PW 1's brother had leased his shamba to someone else. He was arrested and charged while at the police station.

8. The offence of robbery with violence under **section 296(2)** of the **Penal Code** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see **Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, Oluoch v Republic**

[1985] KLR 549 and *Ganzi & 2 Others v Republic* [2005] 1 KLR 52).

9. I have re-appraised the evidence and I am satisfied that on the material night, PW 1 was assaulted by two people in the course of stealing his phone and money. His injury was corroborated by PW 3. I therefore find and hold that the prosecution proved the offence of robbery with violence.

10. This incident took place at night hence it calls for caution in examining the evidence to avoid a case of mistaken identity. What is true however is that both PW 1 and PW 2 knew the appellant. They had met earlier before they parted ways. PW 2 saw the appellant follow PW 1 before he was attacked. This evidence is clear that in fact the appellant was the assailant.

11. The appellant complained that the investigating officer was not called. In my view, his testimony would have added nothing as there was credible eyewitness testimony of PW 1 and PW 2, who knew the appellant, putting him at the scene of the incident. The appellant did not suggest in cross-examination of the witnesses or in his defence that the investigating officer would have said anything that would invite the court to draw an adverse inference.

12. I also reject the appellant's defence in view of the credible testimony of PW 1 and PW 2. The issue of the land dispute or the grudge was put to PW 1 in cross examination but he denied it. It was not put to PW 2 who was a neighbour and who would have known about it.

13. I am therefore satisfied that the prosecution proved the offence of robbery with violence against the accused. The conviction is affirmed.

14. The appellant was sentenced to 15 years imprisonment. The trial magistrate took into account that he was a first offender and given that the appellant attacked a person he knew, I do not see any error in the sentence. I affirm it.

15. The appeal is dismissed.

DATED and DELIVERED at KISII this 18th day of DECEMBER 2018.

D.S MAJANJA

JUDGE

Appellant in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.