



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 79 OF 2013**

**JOSEPH MACHARIA .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(An Appeal from the Judgment of the Ag. Senior Principal Magistrate Honourable T. Nzyoki in Eldoret Criminal Case No. 2438 of 2012, dated 19<sup>th</sup> April, 2013)***

**JUDGMENT**

1. The appellant *Joseph Macharia* was tried and convicted of the offence of robbery with violence contrary to *Section 296 (2)* of the *Penal Code*. He was sentenced to life imprisonment.
2. It was alleged that on the night of 2<sup>nd</sup> June, 2012 at Eldoret Township in Uasin Gishu District within the Rift valley province, jointly with others not before the court, the appellant robbed *Ibrahim Simiyu* one pair of shoes, sweater and cash of Kshs. 800 all valued at Kshs. 2,800 and at or immediately before or after the time of the robbery threatened to use actual violence to the said *Ibrahim Simiyu*.
3. The appellant was aggrieved by his conviction. He filed a petition of appeal in person on 24<sup>th</sup> April, 2013. He subsequently engaged the services of legal counsel and on 30<sup>th</sup> July, 2015, following an application made by his learned counsel *Mr. Kiboi*, the appellant was granted leave under *Section 350* of the *Criminal Procedure Code* to amend his petition of appeal.
4. In his amended petition filed on 27<sup>th</sup> October, 2015, the appellant raised eight grounds in which he in a nutshell complained that the learned trial magistrate erred in law and fact in convicting him on evidence that did not prove his guilt beyond reasonable doubt. In finding that he positively identified as one of the perpetrators of the offence and in shifting the burden of proof to the appellant.
5. At the hearing, the appellant was represented by learned counsel *Mr. Kiboi* while learned prosecuting counsel *Ms. Mutheu* appeared for the state.

In his submissions, *Mr. Kiboi* contended that there was no evidence that the appellant participated in the commission of the offence; that he was not sufficiently and positively identified by the complainant and that is why he was arrested together with other persons. In a synopsis, the appellant's case was that he was wrongly convicted on insufficient evidence and that the appeal ought to be allowed.

6. The appeal is contested by the state. *Ms Mutheu* while opposing the appeal submitted that the prosecution proved every element of the offence beyond any reasonable doubt; that the appellant was positively identified as one of the robbers since this was a case of recognition not identification of a

stranger; and, that the learned trial magistrate did not shift the burden of proof to the appellant.

7. This is a first appeal to the High Court. I am well aware of the duty of a first appellate court which is to revisit and re-evaluate all the evidence adduced before the trial court to arrive at my own independent conclusion giving due allowance to the fact that I did not see or hear the witnesses.

See: *Okeno V Republic 1972 EA 32; Kinyanjui V Republic (2004) 2 KLR 364.*

8. I have carefully considered the evidence adduced before the trial court; the grounds of appeal and the submissions made on behalf of the state and the appellant. As correctly pointed out by the trial court, for the offence of robbery with violence to be established, the prosecution must prove beyond any reasonable doubt that the offender stole the property in question in any of the following circumstances;

(i) That the offender was armed with any dangerous or offensive weapon;

(ii) That he was in the company of one or more person or persons; or that;

(iii) At or immediately before or after the time of the robbery, the offender wounds, beats, strikes or uses any other personal violence to any person.

9. In this case, the only witness who gave material and direct evidence in support of the prosecution case was the complainant. The other witnesses were police officers and PW3, the owner of the motor cycle which the complainant had allegedly hired from the appellant to transport him to Langas Estate. According to the complainant who testified as PW1, the appellant in the course of their journey switched off the motor cycle and its light and at that point he was accosted by two unidentified men who robbed him of his shoes, sweater and Kshs.800. The two men thereafter rode together with the appellant in the motor cycle. He reported the matter to the police and the appellant was arrested the same night. However, none of the stolen items were recovered from him.

10. The appellant in his defence gave a sworn statement in which he denied having committed the offence as alleged. He even denied having conveyed the complainant as a pillion passenger in PW3's motor cycle.

11. Given the above evidence, I find that the evidence on record amounted to the word of the complainant against that of the appellant. Such evidence in my view was not sufficient to sustain a safe conviction especially given that none of the stolen items were recovered from the appellant although he was arrested a few hours after the alleged robbery. Besides the word of the complainant, there is no evidence to prove that any theft was committed against the complainant as alleged.

12. In his judgment, the learned trial magistrate believed the evidence of the complainant but did not give any reason why he disbelieved the accused's statement on oath in which he had denied having committed the offence.

13. On my own reappraisal of the evidence, I am satisfied that the evidence in this case did not prove the charge preferred against the appellant beyond any reasonable doubt. It is my finding that the learned trial magistrate did not properly interrogate the evidence on record having in mind the standard of proof required in criminal cases. The trial court as a result arrived at the erroneous conclusion that the appellant's guilt had been proved beyond reasonable doubt. I consequently find that the appellant's conviction was not safe and it cannot be allowed to stand.

14. In the result, I find merit in the appeal and it is hereby allowed. The appellant's conviction is hereby quashed and the sentence of life imprisonment set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 30<sup>th</sup> day of March, 2017**

In the presence of:

The appellant

Ms Oduor for the state

Mr. Kiboi for the accused absent

Mr. Lobolia court clerk