



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO.97 OF 2014

SIMON MUGAMBI MWAMBI APPELLANT

VERSUS

REPUBLIC RESPONDENT

*(From the original conviction and sentence in criminal case No. 1151 of 2012 of the
Chief Magistrate's Court at Maua by Hon. C. Maundu – Senior Principal Magistrate)*

JUDGMENT

The appellant, **SIMON MUGAMBI MWAMBI**, was convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

The particulars of the offence were that on 1st April 2012 at Kabuline location in Igembe District of Meru County, while armed with a knife robbed **SABELINA NCOROI** of a handbag containing Kshs. 5000/= and during the time of such robbery used actual violence to the said **SABELINA NCOROI**.

The appellant was sentenced to death. He now appeals against both conviction and sentence.

The appellant was in person. He raised the following grounds of appeal:

1. That the learned trial magistrate erred in law and in fact by relying on the evidence of relatives to convict him.
2. That the learned trial magistrate erred in law and in fact by failing to appreciate that the evidence disclosed the offence of grievous harm.

The state opposed the appeal through Mr. Namiti, the learned counsel.

The facts of the prosecution case briefly were as follows:

As the complainant was going home from church, the appellant accosted her and grabbed the handbag she had. A struggle ensued and the appellant stabbed her severally. He managed to run away with the handbag. Members of the public gave chase but did not apprehend him on that day.

In his defence the appellant contended that he was arrested and taken to the police. While in custody the

complainant's husband informed him that he had fabricated a case against him and demanded Kshs. 150,000/= for him to be released. He said they falsely accused him so as to force him to sell them his land.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

There is nothing to stop close relatives from testifying in a case where one of them is the complainant. Their evidence does not rank any higher or lower than of any other witnesses. If the witnesses are competent to testify, the evidence is subjected to the test just like any other evidence.

Section 125 (1) of the Evidence Act provides as follows:

All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.

In the instant case the allegation by the appellant that P.W.1, P.W.2 and P.W.3 were relatives is clearly an afterthought. He never raised this issue with them during cross examination even after **Dorcas Kanario** (PW2) testified that she did not know the complainant's home. This ground of appeal is dismissed.

Though the appellant had contended that P.W.1, P.W.2 and P.W.3 had given contradictory evidence, my perusal of the record does not reveal any contradictions.

Saberina Ncoroi (P.W1) testified that when she met with the appellant, the latter grabbed her handbag and a struggle ensued. She released the bag after the appellant stabbed her on the arm and in the abdomen. This was the gist of the evidence of **Dorcas Kanario** (P.W2) and that of **Stanley Kiriangi Meeme** (P.W3), the two eye witnesses. There was no evidence of a fight between the complainant and the appellant.

The ingredients of the offence of robbery contrary to section 296 (2) were spelled out in the case of **JOHANA NDUNGU vs. REPUBLIC [1996] eKLR** as follows:

Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

- 1. If the offender is armed with any dangerous or offensive weapon or instrument, or***
- 2. If he is in company with one or more other person or persons, or***
- 3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.***

In the instant case the offence of robbery with violence contrary to section 296(2) was proved against the appellant beyond any reasonable doubts. This therefore means that the appeal cannot stand. The same is dismissed.

DATED at MERU this 26th day of **April, 2017**

KIARIE WAWERU KIARIE

JUDGE