



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**HCRA No. 64 Of 2016**

**ABDALLA ALI NZIVO.....APPELLANT**

**-VERSUS**

**REPUBLIC.....RESPONDENT**

*(An Appeal from the original conviction and sentence in CR. CASE No. 186 of 2015 by Hon. N.S LUTTA (SPM) at Mariakani Law Courts on 16/06/2016)*

**JUDGMENT**

1. The Appellant was sentenced to death for the offence of robbery with violence contrary to section 296 (2) of the penal code.
2. The particulars of the charge were that on 7/04/2015 at about 22.30 hours at Mazeras town in Rabai Sub County, Kaloleni District, Kilifi County, the Appellant jointly with others not before court while armed with crude weapons namely rungas robbed **LAMECK OCHIENG** Ksh. 2,000/= a mobile phone make Samsung model DE1006, a wallet containing two ATM bank cards and a National identity card all valued at Ksh. 4,500/= and immediately after the time of such robbery used actual violence to the said **LAMECK OCHIENG**.
3. The complainant said on 7/04/2015 at around 10 p.m. he was at Rock Villa Club at Mazeras. The complainant who is a matatu driver said his motor vehicle Reg. No. KAU 601H was being washed. He decided to go for his vehicle; he got a boda boda (motor cycle) rider. The rider started talking on phone. When the complainant told him to proceed, he got annoyed. The complainant decided to alight from that motor cycle and he boarded another one. The first boda boda rider followed him and told him he would teach him a lesson. He was joined by seven other people and they attacked the complainant.  
  
The complainant managed to escape into a sewerage alley and he went back to the club, naked and having lost his Samsung mobile, ATM cards, National ID card and Ksh. 3,000.  
  
The complainant said there was security light and he was able to identify the Appellant because he came to a place there was a security light and the complainant talked to him for some time.
4. PW2, the complainant's wife and PW3, a worker at the club said the complainant left with the Appellant and returned to the club after a short time assaulted, naked and being pursued by seven people.
5. The Appellant said in his defence that he carried the complainant his boda boda but the Appellant received a call from his mother, he stopped to talk to his mother but the complainant told him to stop at a junction and wrestled him down and other both boda riders who taunted the complainant wanted to rob him of the motor cycle attacked him and pursued him to the Rock Villa Club.
6. The trial court found the Appellant guilty and sentenced him to death. The Appellant has appealed against the conviction and sentence on the following grounds:-

**(i) THAT the learned trial magistrate erred in law and fact by sentencing the Appellant to suffer death without a proper finding that the case of robbery contrary to section 296(2) of the penal code was not proved beyond reasonable doubt.**

**(ii) THAT the learned trial magistrate erred in law and fact by failing to see that the identification by the victims of the attack was not free from the possibilities of error hence unsafe to sustain a safe conviction.**

**(iii) THAT the learned trial magistrate erred in law and fact by failing to give consideration to the Appellant's defence.**

7. The Appellant filed written submission which were as follows:-

(i) That the appellant filed 3 grounds of appeal which form part of the record. The 1st ground of appeal was that the case of robbery contrary to Section 296 (2) of the Penal Code was not proved. It is Trite Law that the onus is always on the prosecution to prove their case beyond any shade of doubt.

(ii) That it is the appellant's humble submission that the case was not proved for the simple reason that the prosecution did not prove any intention or merit to rob the complainant on the part of the appellant.

(iii) Further, that the offence of robbery was not proved for the following reasons:-

- In the complainant's own words at page 4 line 15-16

**"During the incident, I lost a Samsung e.t.c".**

**"I was assaulted on the left hand, ribs and hip"**

The complainant was categorical that there was a commotion during which he lost some items. He does not say he was robbed. No. intention to rob the complainant was proved on the parts of the appellant and his alleged co-perpetrators.

-The prosecution is under a strict duty to prove the charge and every element of it. P.W.4 the Police Officer states at page 11 line 5-6

**"The complaint identified the accused as the person who had (Assaulted) him".** Not robbed. We humbly submit that no robbery was proved. What was proved was a commotion.

-The weapons alleged in the charge sheet - i.e. ruzus were not produced, nor does the complainant state anywhere that his assailants were armed with any weapon.

-The particulars of the charge were totally at variance with the evidence adduced in Court. First was that there are no weapons mentioned in the evidence contrary to the particulars of the charge. Secondly there was no agreement as to the time of the incident.

Whereas P.W.3 Claims was at 8.00pm the complainant states that it was at 10.00pm.

(iv) The Appellant submitted that concerning the items lost. P.W.4 the Police Officer states that the complainant lost Ksh.2,500/=. The amount stated in the charge sheet is Ksh.2,000/=. Complainant in his evidence at pages 15-16 says it was Ksh.3,000/=. Further discrepancy was that P.W.3 the security guard at the Court states on pages 9 line 7 of the proceedings that the complainant was naked when ran back to the club. Not even the complainant himself states anywhere that he was stripped naked.

(v) On the **2nd** and **3rd** grounds of appeal, the appellant submitted that there was no proper identification of the appellant and that the purported identification of the appellant by the assailant was unsafe to found a conviction.

(vi) For the above reasons the appellant submitted that the appeal herein ought to be allowed and the conviction quashed and the sentence set aside.

8. The Respondent opposed the Appeal and submitted as follows:-

**(i) That the ingredients of robbery were proved.**

**(ii) That the Appellant was in the company of other people. The complainant was injured during the attack and he lost his property.**

**(iii) That the identification was safe as PW1 was able to see the Appellant using security lights. The evidence of PVV1 was corroborated by that of PW3 who said the Appellant left with the complainant and shortly afterwards the complainant ran back naked and a group of people were pursuing him calling him a motor cycle thief.**

**(iv) On the defence by the Appellant, the Respondent submitted that the same was considered and that the Appellant said he was the one who was attacked by the complainant but there is no evidence that he was injured.**

9. I have re-evaluated the evidence in this case bearing in mind that I did not have the advantage of seeing the witnesses. This being a first appeal, it is incumbent upon this court to re-analyse and re-evaluate the evidence adduced before the trial court and come up with its own conclusion while at the same time bearing in mind that I did not have the advantage of seeing the witnesses testify. This role is in line with well-known and established principles of law which have been cited with approval in numerous cases. For example, in **Kiilu & Another Vs Republic** the court citing **Okeno v. R** held:-

**"An appellant on a first appeal is entitled to expect, the evidence as a whole to be submitted to a fresh and exhaustive**

*examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. "*

10. My findings are as follows:-

(i) There are three grounds of appeal, the main one being that the ingredients of robbery with violence were not proved

*.In the case of Mohamed Ali v Republic 120131 eKLR the court held as follows:-*

**"The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of OLUOCH —VS— REPUBLIC [1985] KLR where it was held:**

**"Robbery with violence is committed in any of the following circumstances:**

**(a) The offender is armed with any dangerous and offensive weapon or instrument; or**

**(b) The offender is in company with one or more person or persons; or**

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

*" [Our own emphasis].*

**The use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code."**

(ii) However, in the current case I find that the Complainant was attacked by the Appellant when the Complainant refused to take the Appellant's boda boda. The Complainant said upon getting on the Appellant's boda boda, the Appellant started talking on phone for too long prompting the Complainant to get off and look for another boda boda.

There is evidence that the people who pursued the Complainant wanted to lynch him and they were calling him a boda boda thief. The Appellant ought to have been charged with assault.

(iii) Again I find that the prosecution did not prove its case to the required standard. The Complainant said he lost Ksh.3,000. The charge sheet states he was robbed of Ksh.2,000 while PW4 said that the Complainant lost Ksh.2,500. It is not clear how much the Complainant lost during the attack. The evidence was at variance with the information on the charge sheet.

(iv) The trial court did not take into account the defence evidence. I find that the Appellant did not deny that he carried the Complainant on his boda boda. His defence was that immediately the Complainant got on his boda boda, his mother called him and he stopped to talk on the phone. The Appellant said that the Complainant became abusive and pushed him to the ground. The other boda boda riders attacked the Complainant as they thought he wanted to rob the Appellant of his motor cycle.

(v) I find that the conviction herein is not secure and I accordingly quash it and set aside the sentence. I further order that the Appellant be set free unless he is lawfully held for any other reason.

**Delivered, Dated and signed at Mombasa this 19th day of June 2017.**

**ASENATH ONGERI**

**JUDGE.**