



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL APPEAL CASE No. 63 OF 2016**

*(Being an appeal arising from Kitale Chief Magistrate's Court*

*Criminal Case No. 1569 of 2015 delivered by M.I.G.*

*Moranga Principal Magistrate on 9/6/2016)*

**MOSES GITAU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. **Moses Gitau** the “appellant” herein was charged with the offence of **robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars being that the appellant on the **8<sup>th</sup> day of February 2015** at **Miti Moja Junction in Trans- Nzoia County** , jointly with another not before court robbed **Joseph Kagera Wangugu** of cash **Kshs 2000/-** and food stuff shopping all valued at **Kshs 2,200/-** and at the time of such robbery stabbed the said **Joseph Kagera Wambugu**.

2. He denied the charges and the case proceeded to full hearing, with the prosecution calling three (3) witnesses.

The appellant gave an unsworn statement and called no witnesses. He was convicted and sentenced to death.

He has appealed against the judgment raising the following grounds of appeal:

- i) That the trial magistrate erred in law and fact by convicting the appellant relying on hearsay evidence.**
- ii) That the trial magistrate erred in law and fact by convicting the appellant without taking note that the appellant was arrested after a duration of two weeks from the day of the alleged incident.**
- iii) That the investigating officer did not conduct an identification parade in order for the real culprit to be identified.**

**iv) That the complainant alleged that the crime was committed at 5.00 pm and yet no eye witness was summoned to give evidence before court.**

**v) That the alleged exhibits were not found in the appellant's possession not were they brought before court.**

**vi) That the trial magistrate erred in law and fact by convicting the appellant without taking note that there was an existing grudge between the complainant's family and the appellant.**

**vii) That the trial magistrate erred in law and fact by rejecting the defence of appellant without any cogent reason hence shifting the burden of proof to the appellant.**

3. During the hearing of the appeal the appellant relied on his written submissions . He submitted that PW1 gave contradictory evidence on how this whole issue started.

Secondly the shirt he was allegedly wearing was not produced as an exhibit. His alleged boss Mr Mwaura did not testify inspite of being indulged by the court.

4. He argued that if indeed PW1 screamed then people should have come to his rescue. None of such witnesses testified and there was no eye witness who testified. He doubted PW1's claim that he was robbed of shop goods and cash.

5. He further submitted that an Identification parade ought to have been conducted to enable PW1 identify him . He claims that they fought and the robbery issue was an after thought to cover up the fight.

6. Mr Kakoi for the State opposed the appeal submitting that PW1 was attacked by the appellant and other. He knew the appellant well and identified him as it was day time. He was stabbed severally on the body. That this had been confirmed by medical evidence.

7. He dismissed the appellant's defence as it did not displace the prosecution case.

8. A summary of the evidence on record is that PW1 left Kapkoi Centre on 8<sup>th</sup> February 2015 at 5 pm. He had gone to the Centre to make some purchases worth Shs 150/-. He walked alone but there was a youngman walking behind him. At Miti Moja he came across three men seated, and he only knew one of them who is the appellant. He knew him as a neighbour son of Macharia. They used to call him “ Tao” for Gitau.

9. The appellant and one of the three came to him and the appellant told him

“ Mzee hebu simama.” He snatched his paper bag containing the purchases he had made and gave his colleague. He held PW1 and pushed him to a side road. The rest attacked him, sat on him as they ransacked his pockets. The appellant took away his Shs 2000/- which was in denominations of Shs 1000/- from his back trouser pockets.

10. One **James Kibera** screamed loudly. The appellant took a knife and stabbed him on the chest through the shirt. He held onto the appellant. In the process the appellant stabbed him on the left forearm and the back side. A crowd had gathered and he sent James kibera to call his employer, mr Mwaura who came and took him to hospital as he was heavily bleeding. Members of the public chased away his attackers.

11. PW1 was discharged from hospital after a day and a P3 form (Exhibit 1) was later filled. The appellant was later arrested for stealing a hen and thats when he was called to go and identify him.

He further indicated that the appellan's accomplices are at large but even if he saw them he can't identify them because the incident occurred at 6 pm.

He brought to the court the clothes that he was wearing that day i.e black trouser with blood stains

(exhibit 3) and a short with a hole in it (exhibit 2).

He denied having any grudges with the appellant. In cross-examination he said no one came to his rescue during the attack, though people responded to his screams. He denied fighting the appellant after he poured his beer.

12. **PW2 Peter maseke** the clinical officer who examined PW1 found him to have the following injuries:

- Stab wound on the back neck and front neck
- Cut wound on right chest.- Cut wound on left upper arm
- Ring and small left hand fingers were injured
- Cut wound on palm.

He classified the injuries as actual bodily harm and produced the P3 form (Exhibit 1)

13. **PW3 Corporal Amos Limo** received PW1 On 8<sup>th</sup> February 2015 at 5.45 pm. He reported having been injured by Moses Gitau who cut him with a slasher for no reason. He recorded his statement and he went to hospital. The suspect went missing for a while later until when a village elder reported that the suspect had stolen his mother's chicken . After investigations it was realised that PW1 had been robbed of goods worth Kshs 2000/-. They then charged him with robbery with violence.

14. In his defence the appellant gave an unsworn statement.

He stated that on 8th February 2015 5 pm him and others were at Moi Farm. PW1 was also there , and he poured the appellant's spirits and created disturbance. The club owner chased them away and closed the place as people had become unruly. He added that PW1 , appellant and another disagreed when pw1 poured his drink, and they parted ways. On 6th April 2015 9.00 pm he was arrested by police officers from Simatwet patrol base for this offence which he denied.

15. This being a first appeal this court has the duty to re-evaluate the evidence and come to its own conclusion, while bearing in mind that it never saw or heard the witnesses.

**See Okeno V Republic 1972 EA 32, Mwangi V Republic [2004] 2 KLR 28.**

16. I have considered the evidence on record, grounds of appeal and the submissions by both parties.

The two issues falling for determination are ;

- (i) Whether a robbery with violence was committed against the complainant.
- (ii) If the answer to issue (I) is in the affirmative, whether the appellant was the perpetrator.

**Issue No. (i) Whether a robbery with violence was committed against the complainant**

17. The offence of robbery is defined under Section 296(2) of the Penal Code. The said offence is said to be proved when a theft is accompanied by either one being armed with any dangerous weapon or instrument OR one is in company with one or more other person or persons

OR if immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any violent to any person.

18. PW1 has explained how he was robbed of purchases worth Kshs 150/- plus Kshs 2000/- which he had in his trouser pockets.

He had specifically gone to Kapkoi to make purchases. He stated that he was a casual worker at a shamba and his salary had delayed. This was to explain how he had Kshs 2,150/- on himself at that time.

This evidence is very important as “Stealing” is one of the key elements of a case of robbery with violence. The appellant has in his defence stated that there was a disagreement and quarrel between him and PW1 and not a robbery.

Was anything stolen from PW1 as he alleged?

19. The investigating officer (PW3) told the court that he is the one who received PW1 at the Simatwet patrol base report office on 8<sup>th</sup> February 2015 at 5.45 pm. The report he made is found at page 29 lines 15-19 of the record of appeal. It states :

**“ On 8/2/2015 I was at the report office. I received Joseph Wambugu. He said he had been injured on the hand by someone known to him as Moses Gitau. He said he was cut by a slasher. He said he was on his way from the shamba. He (accused) attacked him for no reason and inflicted cut wounds.”**

That is the full report. He did not mention anything about money or purchases.

20. Later in his testimony the same investigating officer (PW3) states at page 30 lines 7-12 of the record of appeal as follows:

***“ That is when we conducted a search and later charged him with an assault. Myself and other officers prepared the charge sheet . It is after we investigated that we realized the complainant was robbed of goods worth 2000. That is why we chose to charge him with Robbery with violence. He is seated in court (identified accused).”***

It is not clear when and how this realization came about for them to prefer the present charge. Was it after the receipt of the chicken theft report? Indeed if the investigating officer had wanted to confirm if PW1 had any such money and goods on himself he could have interrogated the shopkeeper who allegedly sold him the goods at Kapkoi Centre as well as his employer Mr Mwaura.

I find this element of proof of the existence of the Shs 2000/- and the goods worth 150/- or 200/- missing.

21. There is however evidence that PW1 was assaulted. The medical evidence by PW2 and even PW3 who received his report have confirmed that.

I have found the lesser offence of assault proved.

22. Since robbery with Violence must have the Stealing and Violence and in this case the stealing is missing my finding is that robbery with Violence contrary to section 296(2) of Penal Code was not proved.

What was proved is the lesser offence of assault.

**Issue No. (ii) If the answer to issue (i) is in the affirmative, whether the appellant was the perpetrator.**

- The time of the occurrence of this incident was 5 pm – 6 pm. The appellant admits having been with pw1 but under different circumstances.

- The Conditions for identification were favourable and PW1 knew the appellant well by name and as a neighbour's son. He even gave his names to the police. I find that the appellant was properly identified.

23. Section 179 (1) of Criminal procedure Code provides:

*“ When a person is charged with an offence consisting of several particulars, a combination of some of which constitutes a complete minor offence, and the contamination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.”*

Having found that a lesser offence than what was charged was proved I will reduce the robbery with Violence charge to assault causing actual bodily harm.

24. I therefore allow the appeal and set aside both conviction and sentence. In passing sentence i have considered the seriousness of the several injuries inflicted on pw1 .

I hereby convict the appellant for the offence of causing actual harm contrary to Section 215 of the Penal Code and sentence him to serve four (4) years imprisonment from the date of conviction.

Orders accordingly.

Delivered, signed and dated on 29<sup>th</sup> day of August 2017 at Kitale.

---

**H. ONG'UDI**

**JUDGE**

**In the presence of;**

**M/s Kagai for Mr. Kakoi for State**

**Appellant present**

**Kirong Court Assistant**

**Court: Judgment delivered in open court.**

**Right of Appeal explained.**

---

**H. ONG'UDI**

**JUDGE**

**29/8/2017**