



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CRIMINAL APPEAL CASE NO. 62 OF 2014**

*[Arising from judgment of R.B. Ngetich [Chief Magistrate] in Bungoma CMCR' s criminal case No. 681 of 2013 delivered on 11<sup>th</sup> June, 2014]*

SAMSON WEKESA alias WICKY..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

**JUDGMENT**

1. This is an appeal arising from the Judgment of R. B. Ngetich Chief Magistrate in C.M.C Criminal Case No. 687 of 2013 where the accused was faced with two counts.

**1<sup>st</sup> count was robbery with violence;** contrary to Section 296 (2) of the Penal Code and a **2<sup>nd</sup> count was, being in possession of narcotic drug** contrary to Section 2 (a) of the Narcotic Drug and Psychotropic Substance Control Act No. 4 of 1994. The appellant was acquitted on the 2<sup>nd</sup> count but convicted on the 1<sup>st</sup> and sentenced to death.

2. The particulars of the offence in the first count were that on the 16<sup>th</sup> of April 2013 at Mayanja Sub-location Kibabii location within Bungoma County the accused jointly with others before court while armed with a Maasai sword and a screw driver robbed **Bevelyne Kituyi** of Kshs. 8,000/=, one radio, two mobile phones; all valued at kshs. 21,110/= and at the time of such robbery he threatened to use actual violence to the said **Bevelyne Kituyi**.

3. Being dissatisfied with the judgement the appellant preferred this appeal on the following grounds

- *The trial Magistrate erred by considering extraneous matters.*
- *The trial court failed to analyze the evidence on record.*
- *Prosecution evidence was insufficient and contradictory.*
- *No medical evidence to establish any act of violence.*
- *The sentence was harsh and excessive.*

4. This being the first appellate court, it must re-consider the evidence afresh, examine and evaluate the same in order to arrive at an independent conclusion see **Okeno vs. Republic [1973] E.A. 322.**

5. The prosecution's case in brief is that on the 16<sup>th</sup> of April, 2013 while **PW1 and 2** were sleeping **PW1** heard an unusual movement in the sitting room. She lit a solar lamp and went into the sitting room

where she saw a person whom she identified as the appellant one Wicky carrying a torch, a sword and a screw driver. He asked her to switch off the lamp and he then lit his torch. He ordered her to give him money and mobile phones. She gave him kshs. 8,000/= and 2 phones which property was valued at kshs. 21,000/=. He then went to where **PW2** slept assaulted her and asked for money. He asked for money in her M-pesa account and since her phone battery had gone off he used his battery to see how much was in her M-pesa account. The two witnesses later screamed attracting neighbors. The next day **PW1 & 2** saw the appellant drinking at the neighbors and they called the police.

6. The onus of proving a criminal case against an accused solely lies on the prosecution. See **Woolmington vs. Director of Public Prosecutions** [1935] A.C 462 and the issue now before court is whether or not the appellant herein robbed **PW1** as alleged. The evidence of **PW1** and **2** is that **PW1** was robbed of 2 phones and money. **PW2** was assaulted by the appellant who was armed. In her evidence **PW1** stated;

***“I lit the solar lamp as I went to the sitting room. I found a person carrying a Maasai sword, screw driver and a torch. He had not put on the torch. I saw him using a lamp..... When I saw him using the lamp light I identified him as Wicky..... Wicky is the accused in the dock.”***

***PW2 “While changing the battery in PW1’s phone, the accused put on a torch in his armpit and light from the torch enabled me see his face. I identified him as Wicky.***

Elsewhere in their evidence they say they were known to him before as he drunk in the neighborhood.

It has been stated before that recognition is the best form of identification and the two were able by the assistance of a solar lamp and a torch to identify the intruder. Was there a robbery.

In **Johanna Ndungu Vs. R Criminal Appeal no. 116 of 2015** the ingredients of the offence of robbery were set out as follows;

- i. The offender is armed with a dangerous or offensive weapon or instrument or***
- ii. If he is in the company of one or more other person or persons or***
- iii. 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.***

**PW2** says the appellant was armed with a sword, a screw driver and a torch. The sword and screw driver are no doubt dangerous however **PW2** in her evidence goes further to say that the appellant pointed a gun at her. This piece of evidence does not support the charge neither is it corroborated by the evidence of **PW1**. I find the evidence that the accused was armed to be contradictory and unreliable in the circumstances. I also find there was no evidence that the appellant was in the company of any other person. Neither was **PW1** or wounded. **PW2** says she was slapped and a gun pointed at her. **PW1** on the other hand says the appellant had threatened to kill her with the Somali sword; If she screamed. She stated that she saw **PW2** being slapped. However there was no proof of injuries sustained though it is simply the word of **PW1** against the accused person.

I do not find the evidence of **PW2** to be a credit worthy. **PW2** alleged to have seen a gun which is not mentioned by **PW1**. Secondly the prosecution did not make any recoveries of the items stolen, neither the phones nor the money.

It is my view against the above background that base only on the evidence of **PW1** the prosecution did not lay sufficient proof to the required standards to sustain the charge of robbery with violence against the accused person and therefore based on the evidence on record the conviction and sentence was not safe. Both are set aside.

The appeal succeeds. The appellant is set free unless otherwise lawfully held.

**Delivered and Dated at Bungoma this 26<sup>th</sup> day of May, 2016.**

**ALI-ARONI**

**JUDGE.**