



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO. 57 OF 2014

FRANCIS KAMANDE NGUGI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in criminal case No.813 of 2013 of the Senior Principal Magistrate's Court at Kigumo by Hon. D.O Orimba – Senior Principal Magistrate)

JUDGMENT

The appellant, **FRANCIS KAMANDE NGUGI**, was charged with the offence of robbery contrary to section 296 (2) of the Penal Code.

The particulars of the offence were that on 7th July 2013 at Kianjiruini village, Murang'a South District of Murang'a County, jointly with another not before court, robbed **JOSEPH NGUGI KIMANI** of items valued at Kshs 8,200 and at the time of the said robbery assaulted the said **JOSEPH NGUGI KIMANI**.

He was sentenced to suffer death.

He now appeals against both conviction and sentence.

The appellant was in person. He raised seven grounds of appeal which can be summarized in one ground as follows:

1. That the learned magistrate erred in law and in fact in convicting the appellant without sufficient evidence to support the charge.

The state conceded to the appeal through Mr. Njeru, the learned counsel.

Briefly the facts of the prosecution case are as follows:

At about 2 pm the complainant was going home from church. Near his gate he found the appellant who was in company of another. The appellant grabbed him and demanded the money he had received after selling his land. The two proceeded to rob him. He raised an alarm and the duo ran away.

In his defence the appellant denied any involvement in the offence.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced

before the lower court and 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**.

My perusal of the record confirms that the learned state counsel was right in conceding the appeal. There are glaring contradictions that possibly point to a case of assault, that the complainant exaggerated for whatever reason. In the file there is a chit attached to the p3 form which was addressed to the M.O.H Maragua from the office of the O.C.S Maragua. The chit is to the effect that the complainant was assaulted by people not known to him well. The evidence on record is to the effect that these two were neighbours. Why did he then tell the police that his assailants were not well known to him?

Joseph Ngugi Kimani (PW1) testified that he was attacked and robbed by the appellant and another person. This is not what he reported to **Moses Muchoki (PW2)**. Muchoki testified that the complainant told him that he was robbed by the appellant. **Lucy Wambugu (PW3)** on her part said after she was attracted to the scene by screams, she saw the appellant beating the complainant. She did not testify to have seen anybody else at the scene.

The evidence by the complainant and the key witnesses raise an issue of credibility. The court of appeal in the case of **NDUNGU KIMANYI Vs. REPUBLIC [1979] KLR 283, MADAN, MILLER and POTTER JJA** held:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

This description by the court of appeal fits well in the portrait the complainant painted of himself. It was unsafe for the learned trial magistrate to rely on his evidence. There was no sufficient evidence to convict the appellant. I therefore quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DATED at MURANG'A this 20th day of July 2016

KIARIE WAWERU KIARIE

JUDGE