



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO. 96 OF 2015
JOHN KABIRO KIMONJO.....APPELLANT
VERSUS
REPUBLICRESPONDENT

(From the original conviction and sentence in criminal case No.1222 of 2010 of the Senior Principal Magistrate's Court at Murang'a by Hon. E.J Osoro – Senior Resident Magistrate)

JUDGMENT

The appellant, **JOHN KABIRO KIMONJO**, was convicted in three counts.

In count one he was charged with the offence of attempted robbery with violence contrary to section 297 (2) of the Penal Code.

In count two the charge was assault causing actual bodily harm contrary to section 251 of the Penal code and in count three the charge was being in possession of cannabis contrary to section 3(1) (2) (sic) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.

The particulars of the offence were that on 9th May 2010 at Ngerene Thobotho village, Murang'a District of Central Province, jointly with others, while armed with a club, an axe and a machete attempted to rob **ANTHONY MACHARIA KARIUKI** of money and at or immediately after the time of such attempt used actual violence to the said **ANTHONY MACHARIA KARIUKI**. Later after he was searched, he was found in possession of a roll of cannabis.

He was sentenced to death in count one, to serve two years imprisonment in count 2 and in count 3 to serve two months imprisonment. The sentences in counts two and three were ordered to be held in abeyance.

He now appeals against both conviction and sentence.

The appellant was in person. He raised three grounds of appeal in his amended grounds of appeal which can be summarized as follows:

1. That the learned magistrate erred in law and in fact by relying on doubtful evidence.
2. That the learned magistrate erred in law and in fact by convicting him on charges that were not adequately proved.

The state opposed the appeal through M/s. Joyce Gacheru, the learned counsel.

Briefly the facts of the prosecution case are as follows:

At about 3 am some robbers struck at the home of the complainant. The thugs demanded money from outside.

The complainant and his family raised an alarm in spite of the orders by the thugs to keep quiet. In the mean time his brother in the same compound apprehended one of the robbers and shouted for help. The complainant rushed there and after some considerable struggle overpowered the arrested robber and disarmed him. The person who was arrested is the appellant. In the course of the struggle, the complainant was injured. Later when the appellant was rearrested by the police and searched, he was found in possession of some cannabis.

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.**

The appellant is connected to the offences in count one and two by the evidence of **Anthony Macharia Kariuki (PW1)**. He testified that when he realized some robbers were outside his house and that they demanded some money, together with his family raised an alarm. While still in his house, he heard his calling and who said he had arrested one of the thugs. He rushed where the two were struggling and helped his brother to overcome the arrested thug who turned out to be the appellant.

Simon Mwangi Kariuki (PW2) on his part said that at about 3 am when he heard commotion at his brother's house he went out. He then saw a man running away from his brother's (PW1's) house. When this man was near him, he ordered him to stop. This man had an axe which he raised up. He hit the man with a hoe handle he had and the axe and the spotlight he had fell down. He got hold of him and a struggle ensued. meanwhile he raised an alarm and informed his brother that he had arrested one. The other thugs ran into some bananas. His brother joined him and they managed to subdue the appellant. Both brothers sustained some injuries.

Though the appellant contended that he was not pointed out to PW2 who arrested him, that was not necessary for two reasons; one, the complainant had not seen any of the would be robbers and two, he was arrested while fleeing from the complainant's house. This was at 3am and there cannot be any logical explanation as to what he was doing there other than that he was part of the gang of robbers. The evidence against him was water tight. In the case of **ALI RAMADHAN V REPUBLIC, CRIMINAL APPEAL NO. 79 OF 1985 (UR)**, the court of appeal held:-

“.....The identification of a person who took part in the alleged offence was chased from the scene of crime to the place where he was arrested is of course strong evidence of identification and if all the links in the chain are sound, it may be safely relied upon.....”

In the instant case the appellant was arrested within the homestead where robbery was to take place. This, in the circumstances of the case, is the best evidence.

After the appellant was rearrested from members of public, he led **PC Muthee (PW5)** and other officers to his house where they recovered the cannabis the subject of count three. I have no reason to doubt the evidence of this witness.

The upshot of the foregoing analysis of the evidence on record, is that the conviction of the appellant was based on sound evidence. The learned trial magistrate cannot be faulted in any way. The appeal is therefore dismissed.

DATED at MURANG'A this 19th day of August 2016

KIARIE WAWERU KIARIE

JUDGE