



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 143 OF 2013

BENJAMIN KILONZO APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of Hon. M.K.N. Nyakundi Ag. SPM delivered on 24/4/2013 in Kangundo Chief Magistrate's Court Criminal Case No. 19 of 2012

(Before Hon. B. Thurairaja J and L.M. Mutende J)

J U D G M E N T

1. The Appellant, **Benjamin Kilonzo Mutua**, was charged with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**.

The particulars of the offence were that on the 1st day of January 2012 at 8.00 p.m. at **Koma village, Komarock Location in Matungulu District within Machakos County** jointly with another not before court being armed with offensive weapon namely a piece of timber robbed **Peter Wambua Maungo** of Kshs.260/=, 1kg of sugar valued at Kshs.200/= and a piece of *panga* soap valued at Kshs.40/= all valued at Kshs.500/= and before the time of such robbery used actual personal violence and caused the death of **Peter Wambua Maungo**.

2. When the Appellant was arraigned before the trial court, he pleaded not guilty. The case proceeded to a full trial.
3. The prosecution case was that on the material day at about 7.00 p.m, PW1 **Mweu Maitha**, the deceased's employer gave the deceased Kshs.500/= and sent him to the shops to buy some sugar and a piece of bar soap. The deceased did not go back to his employer that night. The following morning at about 6.00 a.m. the deceased who was bleeding from the mouth and nose informed his co-worker, PW2 **Maweu Siano** that he had been beaten by the Appellant. The matter was reported to PW8 **Sgt. Boniface Waita** at the nearby AP Camp. The matter was subsequently reported at the police station and the deceased taken to **Kangundo Hospital** where he was treated and discharged. However, his condition deteriorated and the deceased was taken back to **Kangundo Hospital**. The deceased was referred to **Kenyatta National Hospital**. However, the deceased succumbed to the injuries while on the way. The Appellant was subsequently charged with the offence herein.
4. When placed on his defence, the Appellant gave sworn evidence. The Appellant stated that on 6/1/2012 he was going on with his work as usual when he was arrested by two police officers. He

- was taken to **Kangundo Police Station** but was not explained the reason for his arrest. The Appellant denied having committed the offence.
5. At the conclusion of the case, the trial magistrate found the Appellant guilty. The Appellant was convicted and sentenced to death.
 6. The Appellant was aggrieved by both the conviction and sentence and appealed to this court. The grounds of appeal are essentially that the prosecution case was not proved beyond reasonable doubts and that the defence case was not given adequate consideration. The State conceded to the appeal.
 7. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – *See Okeno –vs- Republic (1972) EA 32.*
 8. PW1 **Mweu Maitha** the deceased’s employer, PW2 **Maweu Siano** who was the deceased’s colleague at work, PW3 **Elizabeth** the wife to the deceased and PW8 **Ap. Sgt Bonface Waita** who received the report from the deceased are the four prosecution witnesses who interacted with the deceased after the deceased was injured. It was the evidence of these four witnesses that the deceased who was bleeding from the mouth and nose told them that he had been beaten by the Appellant. PW8 further testified that the deceased informed him that the attackers also stole from him.
 9. This dying declaration from the deceased is not corroborated by any other material evidence. As stated by the **Court of Appeal** in the case of **Choge v. Republic [1985] KLR 1:-**

“the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person”.

10. The rest of the prosecution witnesses were the arresting officers, PW4 (**PC Kennedy Abongo** and PW7 **PC Albert Nyabando**); the Investigating Officer (**Cpl. Amin Said Mwasoria**) and PW9 **DR Muoki James**. These are formal witnesses whose evidence is of no probative value.
11. In his defence, the Appellant denied the offence and talked about his arrest. However, a conviction is not based on the weakness of the defence case but on the strength of the prosecution case. With the gaps we have pointed out in the prosecution case, we give the Appellant the benefit of doubt.
12. The appeal has merits and is allowed. The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

L. MUTENDE

JUDGE

JUDGE

Dated and delivered at Machakos this 26th day of August, 2015

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B. THURANIRA JADEN

JUDGE