



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 96 OF 2013

MATHEW SALABABA ACHEKUWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence from the judgment in the Chief Magistrate's Court at Milimani Criminal Case No. 356 of 2011 delivered by Hon.Ochenja,CM on 12th June, 2013.)

JUDGMENT

Mathew Salababa Achekuwa, the Appellant herein was charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of count 1 were that on the 4th day of December, 2008 at B.A.T. Provident Fund compound along Denis Pritt Road in Nairobi within Nairobi Area jointly with others not before court, while armed with dangerous weapons namely AK47 Rifle, robbed one Kenneth Mwige (1) camera make canon (2) one mobile phone make Nokia E61(i) IME No. 1351879011938877(3) one Telecom wireless phone (4) One Standard Chartered card (5) Cash 3,000/= all valued at Ksh.80,000/= and, immediately after the time of such robbery used actual violence to the said Kenneth Mwige.

The particulars of Count II were that on the 4th day of December, 2008, at B.A.T. Provident Fund Compound along Denis Pritt Road, Kilimani in Nairobi within Nairobi Area, with others not before court while armed with dangerous or offensive weapons namely AK47 Rifle robbed Winfred Wangari Karani Mwige of one motor vehicle Reg. No. KAP 001F make Toyota Land Cruiser Cynus, cash Kshs. 5,000/= and two wedding rings all valued at Kshs. 3,555.00/= and at, or immediately before or immediately after the time of such robbery used actual violence to the said Winfred Wangari Karani Mwige.

The learned trial magistrate found the Appellant guilty of a lesser offence of simple robbery contrary to Section 296(1) of the Penal Code in respect of both counts. He was sentenced to serve 7 years imprisonment respectively. Both sentences were to run concurrently. He filed a Petition of Appeal on 26th June, 2013. Attached to it is a Memorandum of Appeal titled "**Mitigation**" which raises grounds of appeal against the sentence only.

The appeal was canvassed before me on 7th December, 2015. The Appellant reiterated that he was only appealing against the sentence. He submitted that the trial took rather too long to be heard and disposed of. He was arrested on 19th January, 2011 and was convicted on 12th June, 2013. Although he was granted bond pending trial, he was unable to afford it. He was remorseful and for the period he was in

prison, he had learnt to be a better person. He had also been trained on life support skills such as conducting first aid and fire fighting. He has also learnt skills on small scale entrepreneurship such as making detergents and disinfectants and has been awarded certificates for that. In addition, he has learnt how to make upholstery for which he qualified in both grades 2 & 3. As such, if released from prison he would start up a small scale business that would be helpful to him. Finally, he submitted that he was a married man with two children. He had received information that the children were no longer going to school for lack of school fees as he was the sole bread winner in the family.

Learned State Counsel M/s. Wario opposed the appeal. While conceding that the trial took long to be disposed of, she submitted that the sentence imposed was lawful. Furthermore, given the circumstances of the case, the sentence was lenient as both sentences were to run concurrently. She submitted that the Appellant was an employee of the complainant as a night guard attached by Lavington Security Company. On the material day, he opened the gate for the robbers who gained access to the complainant's house. The complainant and the family were robbed at gun point and in the process the complainant's wife was injured. After the robbers left the scene, the Appellant also fled. As fate had it, he was tracked two years down the line in his rural village in Kakamega. He was escorted to Nairobi and charged accordingly. In that respect, Ms Wario submitted that the Appellant did not deserve any mercy from the court.

I have considered the respective submissions. I wish to note that the learned magistrate, despite finding that there was sufficient evidence against the Appellant in both counts, convicted him for a lesser offence of simple robbery under Section 296(1) of the Penal Code. He reasoned that although one of the complainants was injured, no medical evidence was availed to the court to prove the injuries. For that reason, he reduced the offence to a lesser one. That was a grave error in judgment because although no medical evidence was adduced in court, there was overwhelming evidence that the complainant were injured during the robbery. Besides, under Section 296(2) of the Penal Code, all that the prosecution was required to prove was the existence of any of the elements comprising the offence of robbery with violence. Therefore, although medical evidence was unavailable to prove the use of force, he had found that the attackers were armed with an offensive weapon and used force or threats while robbing the complainants. It had also been established and demonstrated that the robbers were more than one person. There was thus sufficient evidence to found a conviction for the offence of robbery with violence. However, this being an appeal against the sentence only, I will confine myself to the submissions made before me.

Under Section 296(1) of the Penal Code, any person who commits the offence of robbery is liable to imprisonment for 14 years. The sentence imposed on the Appellant was therefore legal. He was sentenced on 12th June, 2013. As at now, he has served only two years in jail. He took plea on 25th January, 2011. Cumulatively then, together with the served sentence, he has been in prison for almost five years now. However, given the facts of the case and the circumstances under which the offence was committed, it is clear that the Appellant abdicated his noble duty of protecting his employer and turned his enemy. That is the last thing the court would expect a person charged with a trustworthy duty to do. His employer had entrusted him as his protector but instead turned to be his worst enemy. He worked in cohort with armed robbers who save for the grace of God, the complainants would have lost their lives. I am in the circumstances, not inclined that, by the fact that the Appellant has learnt life support skills, this court should be lenient with him. The skills will still be useful to him even after he completes the sentence. It is important that he serves the full term of the sentence as a deterrent measure both to himself and would be like-minded offenders.

In the end, I find the appeal unmerited and the same is hereby dismissed.

DATED and DELIVERED this 22nd Day of DECEMBER, 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant present in person*
2. *M/s Wario for the Respondent.*