



REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 76 OF 2007

ELIUD IROKA *alias* MACHARIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1.The Appellant, together with one Julius Angome Iroka, had been charged with two Counts of the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. It was alleged in Count I that;

“On the 10th day of April 2006 at Shirere Sub-Location in Kakamega District within Western province, jointly with others not before court, while armed with dangerous weapons namely pangas, robbed Sylvester Majoni of one wrist watch and at or immediately before or immediately after the time of such robbery used actual violence to the said Sylvester Majoni.”

In Count II, it was alleged that;

“On the 18th day of May 2006 at Shitao Village, Shirere Sub-Location in Kakamega District within Western Province, jointly with others not before Court, while armed with dangerous weapons namely pangas, robbed Maurice Amwayi of one sagem mobile phone and cash Kshs.6,000/-all valued at Kshs.12,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Maurice Amwayi.”

2.The evidence tendered by the Prosecution was that on 18th March 2006, PW1, Maurice Amwayi and PW4, Grace Amiani were walking home from Kakamega Town Centre when they were attacked at 8.00 p.m. Two men had initially passed them and then turned back and ordered them to sit down. When PW1 protested, he was cut on the left side of the head with a panga. As he tried to run away, a third person emerged and he turned back where the original two confronted him. One cut him on the left pointer finger, nose and upper lip. They stole his Sagem make phone, Kshs.6,000/- in cash and gumboots before running away.

3. According to PW1, he recognized one of the attackers as a local villager called **“Macharia”** and as to how he did so, he said that there was moonlight and also that when he passed them, a vehicle had also passed by and with its headlights, he clearly recognized him as he had previously seen him in the Village.

4.PW4 on her part also said that she recognized the Appellant using the passing vehicles headlights and added that when PW1 was being cut, he shouted; **“Macharia unaniua!” (Macharia, you are killing me!).**

5. In any event, PW1 was assisted by PW9, Thomas Sore who stated that as he approached the scene, he heard PW1, shouting, **“Macharia unaniua!”** and shortly, he met the said Macharia walking towards him. As he had previously known him, he greeted the said Macharia but the greeting was ignored. He noted that Macharia had a panga in one hand and gumboots in the other. He then found PW1, injured, and he assisted in taking him to Kakamega Provincial General hospital and that when he recorded his statement to the Police, he mentioned Macharia as being at the scene and he added that he had known the said Macharia since his childhood.

6. PW2, Sylvester Majoni on his part stated that on 10th April 2006 at 8.00 a.m. he was heading home when he saw two men who had pangas and they accosted him and cut him on the palm and fingers as well as the right shoulder. He fell down and his watch “Omax” make was taken. He went home after the attack and made a report to the Police where he mentioned the names of his assailants as he knew both of them.

7. Further, that the same night and based on his report, the Appellant’s Co-accused was arrested but the Appellant went underground and was only arrested six months later.

8. We should add that PW2 stated that when he saw the robbers, they were standing with one Maoli who intervened when he was attacked and PW5, Maurice Lwabukha stated in his evidence that on 10th April 2006 at 8.00 a.m. he was sitting outside his kiosk when the Appellant and his Co-accused came carrying pangas. They stood next to him and when PW2 passed by, the Appellant suddenly cut him on the shoulder without uttering a word. PW5 intervened and took the panga away. He assisted PW5 to his bicycle and did not notice if he had lost any property. Later, he retrieved the panga and gave it as an exhibit.

9. PW3, Charles Imbwoka, a Major in the Kenya Army stated that on 3rd June 2006, he assisted in arresting the Appellant who had been suspected of having committed a robbery. At the time of arrest, the suspect had a panga and torch and on his part PW6, PC Hillary Kerich stated that he received a report from PW2, Sylvester Majoni that he had been attacked by two people who were well known to him. He issued a P3 form and when he attempted to arrest the two named persons, he found that they had disappeared and later, he managed to do so when the 1st Appellant was charged with another case while the 2nd Appellant was arrested by PW3. Upon doing his investigations, PW6 then charged the Appellant with the offences elsewhere set out above.

10. PW7, Bernard Ochangi, a Clinical Officer produced a P3 form showing the injuries that PW1 had suffered as a result of the alleged robbery and he assessed the degree of injury as grievous harm.

11. In a Ruling delivered on 27th March 2007, the learned trial Magistrate acquitted the Appellant’s co-accused on the charge in Count I but placed both of them in their respective defences in Count II and the present Appellant in both Counts.

12. In his defence, the Appellant stated that he was apprehended by PW3 for no clear reason on 3rd June 2006, taken to Kakamega Police Station with his panga and torch and later, he was charged in Court. He denied the offence.

13. In a well considered judgment, the learned trial Magistrate found that the offence of robbery with violence under **Section 296(2)** of the **Penal Code** had been proved beyond reasonable doubt and on our part, we have the following to say;

14. In Count I, the evidence of PW2 and PW5 as well as PW8 is that the Appellant in broad daylight attacked the complainant and in the course of the attack, an Omax wristwatch was stolen. The attack was explained by PW2 and corroborated by PW5. **That evidence is unshakable but where is the evidence that there was a theft and that anything was stolen from PW2? Section 295 and Section 296(2) of the Penal Code** provide as follows;

“Section 295 Any person who steals anything, and, at or immediately before or immediately after the

time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”

“Section 296(1) ...

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

15. **With the evidence in mind, can it be said that the offence was proved beyond reasonable doubt?** Where is the evidence that an Omax watch was actually stolen during the incident? From the evidence of PW2 and PW5, once the Appellant had cut PW2, PW5 then disarmed him and there is no evidence whatsoever that at any time, either the Appellant or his confederate took anything from PW2 and we are not satisfied with the evidence as presented that an Omax wristwatch was stolen.

16. **Should we substitute the offence with another?** In our view, since the Appellant was never given an opportunity to defend himself on any other charge, we shall not do so but will instead acquit him of the charge in Count I.

17. With regard to Count II, the evidence on record is indeed that the offence was committed but the question is whether the Appellant was properly identified at the scene. The same occurred at night but reading the evidence of PW1, PW4, and PW9, the Appellant was a well known figure in the neighbourhood and he was nicknamed “**Macharia.**” By his words, “**Macharia unaniua!**”, PW1 clearly recognized his attacker as did PW4 and PW9 the latter being the one who rescued PW1. To our minds, that recognition cannot be faulted and we accept the evidence in that regard.

18. As for the Appellant’s defence, there is nothing in it that should make us conclude that it dislodged the strong evidence against him.

19. In the end, while acquitting the Appellant in Count I, the conviction and sentence in Count II is sustained and the Appeal is dismissed in that Count.

20. Orders accordingly.

D. A. ONYANCHA

I. LENAOLA

JUDGE

JUDGE

**DELIVERED, DATED AND COUNTER-SIGNED BY S. CHITEMBWE, JUDGE AT
KAKAMEGA THIS 23RD DAY OF FEBRUARY, 2012**

**S. CHITEMBWE
JUDGE**