



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL APPEAL NO. 4 OF 2009**  
*Lesiit, Kasango J.J.*

**BERNARD KINYUA MUNGATHIA.....**  
**..... APPELLANT**

**V E R S U S**

**REPUBLIC.....**  
**.....RESPONDENT**

***[Being an appeal against the conviction and sentence of the C.M ‘s Court at MERU Hon Mr. MUTANI Esq. in Cr. Case No. 2325 of 1997 dated and delivered on 27<sup>th</sup> August 1997]***

**JUDGEMENT**

The appellant faced one count of Robbery with Violence contrary to section 296(2) of Penal Code and one count of possession of Firearm and the third count of possession of Ammunition without a Firearm Certificate contrary to section 4(2) of the Firearms Act. The facts of the case were that the appellant and others went to the complainant’s home at 8.30 p.m. on the evening in question. They found his wife cooking and held her hostage and directed her to call her husband the complainant outside their home. When the complainant went out, he found the appellant armed with an M16 gun with a magazine and ammunition. The robbers walked the complainant to his bed room where he produced some money. As the complainant gave the money to the appellant he grabbed the gun from him and he and his son PW3 arrested him. The complainant later handed over the gun and ammunition to the OCS Isiolo Police Station. The appellant’s accomplices escaped from the scene and were never caught.

The appellants had denied the charges in his defence the appellant denied being part of the gang and stated that he was arrested as he was on his way to Isiolo Town.

The appellant was convicted for all three offences and sentenced to death in the first count and to five years imprisonment in each of the second and third counts.

The appellant urged the court to consider the grounds he raised in his filed petition of appeal. We have considered them. The grounds raised in the petition are to the effect that the elements of robbery with violence were not proved. That the appellant’s defence was disregarded; that the sentence meted out by the learned trial magistrate was bad in law and that the circumstances of arrest were not positive.

The state opposed the appellants appeal. In his submissions Mr. Kimathi for the State urged the court to find no merit in the appeal as the appellant was disarmed and apprehended by the complainant on the spot in the cause of the robbery and that the circumstances of the arrest were such that there could not have been any possibility of mistaken identity.

We have analyzed and evaluated afresh the evidence adduced before the trial court as required of a first appellate court. See **OKENO VRS REPUBLIC 1973 EA**.

**“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)”**

Having reevaluated the evidence we have no doubt in our minds that the learned trial magistrate finding that the appellant was apprehended by the complainant in the course of the robbery was correct. We however agree with the appellant that from the evidence presented before the court the appellant and his cohorts had not taken anything from the complainant or those in Complainant’s Company. The complainant’s evidence was that he grabbed the appellants gun as he, the complainant, gave the appellant the money he had collected from his bedroom.

Since there was no taking the offence of robbery with violence was not completed. We are fortified in his finding by the definition of robbery provided under section 295 of the Penal Code as follows:-

**“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.**

It is clear that the offence of robbery is not committed if there is no taking as the taking is what constitutes the ingredient of stealing. In the circumstances we find that the offence committed by the appellant was attempted Robbery with Violence, an offence under s.297(2) of the Penal Code.

We find that the appellant was armed with a machine gun and that he and others proceeded to the 1<sup>st</sup> complainant’s house with an intention to rob him of his property. We find that the evidence adduced against the appellant was overwhelming and that an offence was proved. We dismiss the appellants appeal on conviction as lacking any merit.

We however, set aside the conviction for the offence of robbery with violence contrary to section 296(2) of the Penal Code and substitute it with a conviction for the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code. Having done so we are aware that there is a conflict between section 297(2) and section 389 of the Penal Code. S.297(2) provides for death sentence while s.389 provides:-

**“..... But so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.”**

It follows that in accordance with the terms of section 389 of the Penal Code the appellant is liable to imprisonment for a term not exceeding seven years. The court of Appeal in the case **CRIMINAL APPEAL NO. 277 OF 2007 EVANSON MUIRURI GICHANE -V- REPUBLIC** considered that conflict in the two sections and the court stated:

**“The appellant was convicted of an offence (attempted robbery with violence) punishable by death. In terms of Section 389 of the Penal Code the appellant shall not be liable to imprisonment for a term exceeding seven years. But he was sentenced to death. The apparent conflict in the law may only be resolved by Parliament. But the appellant is entitled to the less punitive of the two sentences”.**

Appellant was sentenced on count two and three to 5 years imprisonment on each count. We uphold that sentence and also sentence appellant to imprisonment for 7 years on count one. We order that all the three sentences run concurrently from the date of the appellants sentence in the lower court. To that extent we set aside the lower court's sentence.

These are our orders.

Dated and delivered at Meru this 28<sup>TH</sup> day of Jan 2011

**LESIIT, J**  
**JUDGE.**

**KASANGO, M**  
**JUDGE.**