



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT EMBU**

**Criminal Appeal 26 of 2007**

**JAMES MURAGE MURIUKI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant James Murage Muriuki was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

The Trial Magistrate after a full trial did not find any evidence of robbery with violence. Accordingly he reduced the charge to one under Section 296 (1) which does not carry death sentence. He sentenced the accused to 3 years imprisonment.

The grounds of appeal are set out as:

1. the charge was defective
2. complainant denied giving names to the police station and to PW4 who was the first to arrive at the scene.
3. failure to consider evidence of PW2 and PW3
4. that there was a miscarriage of justice in this case.
5. there was no sufficient light for identification.
6. appellant's arrest was surrounded with doubts.
7. the key witnesses of the case were drunk to a state which could not enable them to identify the assailants.
8. the trial magistrate rejected the sworn defence of appellant.

The prosecution evidence was that the complainant was walking home on 23/10/2006 at about 11.00 p.m. when in company of Anthony saw the accused ahead of them. Accused were with the complainant at Munyanga Bar but had left earlier. The complainant with a torch he saw the appellant on top of a mango tree. As the complainant neared the tree the appellant came down from the tree and killed Anthony on the abdomen. He also turned on complainant knocked him down, searched his pockets and took shs.3,800/=.

The appellant hit complainant with a crude weapon which he could not identify. The complainant started bleeding and then the appellant fled. Later the complainant identified his blood stained clothes and a torch. When he screamed his son and his neighbours responded and found appellant had already fled. Complainant was taken to hospital. The complainant's evidence was supported by PW3 who was walking with him. That the appellant was known to the complainant was not disputed. The complainant knew him as Murage. On the issue of medical evidence the witness said that he examined the complainant on 23/10/2006 and filled the P3 form on 21/11/2005. There is confusion. The charge sheet shows that the date of arrest was 24/10/2005 and the appellant was taken to Kerugoya court on 31/10/2005. The record appears that proceedings commenced on 14/11/2005. The P3 form was dated 21/11/2005. Therefore the incident occurred in the year 2005 not 2006. The charge sheet is dated 2005. There is some contradiction in the evidence of medical witness (PW1) who said there was multiple injuries to the back of complainant. The evidence of PW2 and PW3 was that the injury was on the head. The complainant said he could identify the attacker (he knew) but was not able to identify the crude weapon which he said hit him. Again on the issue of the torch he said he had a torch and the PW3 said he used the torch by flashing it on the person of the appellant. When the neighbours came they did not find the attacker. However it was the PW3 who gave the name of appellant to the police. It is true that the PW2 and PW3 were coming from the bar but there is no evidence to show that they were too drunk to know what was going on to them.

On the issue of clothes, there is no firm evidence as to how or when the clothes of appellant were found at the scene. Again the complainant was showing the court his clothes blood stained but when they were taken out there was no evidence of a struggle to be found on the record. After considering the grounds of appeal and the submissions of the appellant I find the evidence offered by the state was contradictory in material particulars. It appears as if there was another incident involving the parties which was brought in court. The only evidence was of PW2 and PW3. They admitted they were drunk at the material time and although they say they were not very drunk this makes their evidence shaky. I therefore find the evidence presented by the prosecution not satisfactory. I am unable to make a finding that the case was proved beyond reasonable doubt.

I therefore allow the appeal and order the appellant to be set at liberty forthwith.

Dated this 4<sup>th</sup> December, 2007.

**J. N. KHAMINWA**

**JUDGE**

**4/12/2007**

**Khaminwa – Judge**

**Njue- Clerk**

**Mr. Kimathi for State**

**Appellant present**

Read in open court.

**J. N. KHAMINWA**

**JUDGE**