



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 565, 566 & 567 of 2002

**(From Original Conviction(s) and Sentence(s) in Criminal case No. 109 of 2001 of the Senior
Principal Magistrate’s court at Kibera (J. Siganga – SRM)**

EVANS KABIRU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 566 OF 2002

**(From Original Conviction(s) and Sentence(s) in Criminal case No. 109 of 2001 of the Senior
Principal Magistrate’s court at Kibera (J. Siganga – SRM)**

DAVID KABUKOAPPELLANT

VERSUS

REPUBLICRESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 567 OF 2002

**(From Original Conviction(s) and Sentence(s) in Criminal case No. 109 of 2001 of the Senior
Principal Magistrate’s court at Kibera (J. Siganga – SRM)**

CHRISTOPHER KINYANJUI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

The Appellants in this appeal **EVANS KABIRU** (1st Appellant), **DAVID ABUKO** (2nd Appellant) and **CHRISTOPHER KINYANJUI** (3rd Appellant) were the 2nd, 3rd and 1st accused respectively in the trial before the lower court. The three had been jointly charged with one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. After a full trial, the trial magistrate found them guilty of the lesser charge of **GRIEVOUS HARM** contrary to **Section 234** of the **Penal Code** and proceeded to sentence the 1st and 3rd Appellant to 15 months imprisonment and the 2nd Appellant, who was below 18 years then, to 2½ years Probation term. All the three were aggrieved by the convictions and sentences and therefore lodged these appeals. I have consolidated all three appeals as appeal No. 565 of 2002 since they arose out of the same trial.

The Appellants filed their appeals through Counsel, Messrs V.M. Kamau & Co. Advocates who also argued the appeals on their behalf. The Respondent despite being served was unrepresented.

Similar grounds of appeal were raised on behalf of each Appellant which are summarized as follows: -

That the evidence of the prosecution was unsafe, uncreditworthy and could not sustain a conviction.

Two that the Appellant's defences were not given due consideration.

Three that learned trial magistrate failed to consider all the circumstances of the case before sentencing the Appellants.

The brief facts of the case were that on 30th December 2000 as the Complainant walked home at midday, he was confronted by the 3rd Appellant who demanded money from him. The 3rd Appellant was holding a knife. That when the Complainant said he had no money, the 3rd Appellant snatched his cap and started beating him. The 1st and 2nd Appellants also joined in. In the process, the Complainant's upper tooth was dislodged. PW2 witnessed the attack by all three Appellants. PW3 a youth winger to whom the Complainant reported, in the company of PW5, arrested all three Appellants on 1st January 2001. PW4 a police officer re-arrested the Appellants from PW3. PW6 the Doctor filled and signed the P3 form after examining the Complainant on 4th January 2001 and assessed the degree of injury as grievous harm.

The defence case comprised the 3 Appellants and five defence witnesses. The 3 Appellants said that they were together as the 3rd Appellant sold water at a family plot, when the Complainant trespassed through their plot. When asked not to trespass by the 3rd Appellant, the Complainant reacted by throwing stones at the 3rd Appellant prompting all the 3 Appellants to retaliate. Eventually, the Appellants said the Complainant walked away only later to cause their arrest. Their first witness was 3rd Appellant's grandmother who confirmed the plot in question was hers and that it was private land. The fourth defence witness DW7, was a sister of the 3rd Appellant and one who was in the house at the plot when she heard a commotion. She went out of the house and witnessed the Appellants and the Complainant throwing stones at each other. She asked them to stop and they did.

Mr. Kamau submitted that the evidence adduced in the case did not prove either the offence charged or the offence for which the Appellants were convicted. Counsel submitted that the court recognized that there was inconsistency in the evidence of PW1 and PW2. Counsel submitted that given the inconsistency the charge of **ROBBERY** contrary to **Section 296(2)** could not be sustained. That the learned trial magistrate erred to substitute the charge to that of **GRIEVOUS HARM** contrary to **Section 234** of the **Penal Code** as the evidence did not support the charge either. Counsel submitted that indeed to substitute the charge in the circumstances was not judicious.

The Complainant's evidence was that he was confronted by the 3rd Appellant who was armed with a knife, robbed of his cap and beaten by all the 3 Appellants before they ran away. PW2 who was present at the time of the alleged attack contradicted the Complainant in three material particulars. One he said he did not notice either of the Appellants having any knife, two he did not notice the theft of the

Complainant's cap and three he categorically denied that any of the Appellants ran away from the scene. These contradictions were material and went to the very substance of the offence of **ROBBERY** charged. The evidence of PW2 did not just create doubt that anything was stolen from the Complainant but even negated any motive of robbing or injuring the Complainant. That means the evidence of PW2 negated the presence of any *mensrea* on the Appellants' part to rob the Complainant of any property or to injure him. In the circumstances, the evidence of PW2 directly put to question the genuineness of the Complainant's complaint. That evidence made it also very clear that the incident had taken place where the 3rd Appellant was selling water which was the 3rd Appellant's home. In the circumstances, I find that the credibility of the Complainant was put to question and that in the circumstances no conviction could have been sustainable for any charge whatsoever.

I also find that the Appellants defence was very strong and that it not only negated the charge or any motive on the Appellants' part to commit any offence but also demonstrated very clearly that the Complainant in the case was the villain not victim. It is a pity that the Appellants served their entire sentence before these appeals could be heard.

Having considered these appeals, I find that the learned trial magistrate did not subject eh evidence adduced before her with the care and caution it deserved. Has she analysed the evidence properly, I have no doubt that she could have acquitted the Appellants. I find merit in them, and consequently I allow them, quash the convictions and set aside the sentences imposed.

Dated at Nairobi this 1st day of November 2006.

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LESIT, J.

JUDGE

Read, signed and delivered in presence of;

Appellant(s) present

Mr. Kamau – advocate for the Appellants

Tabitha – Court clerk

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LESIT, J.

JUDGE