



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**APPELLATE SIDE**

**CRIMINAL APPEAL 12 OF 2003**

(From Original Conviction and Sentence in Criminal Case No. 2605 of 2000 of the  
Principal Magistrate's Court at Eldoret: by L. W. GITARI (Mrs.) P.M.,  
on 11/11/2002

DAVID DAMULELE EKENO .....APPELLANT

**V E R S U S**

REPUBLIC .....RESPONDENT

**JUDGMENT**

David Ekeno was originally charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that, on the 11th day of June 2000 at Caltex Petrol Station Uganda Road in Uasin Gishu District of the Rift Valley Province, while armed with stones robbed Wycliffe Ochieng' of one wall clock valued at Kshs. 250/= and at or immediately before or immediately after the time of such robbery used actual violence on the said Wycliffe Ochieng'.

He was convicted after a full trial and sentenced to suffer death, but being aggrieved by the said conviction and sentence, he has now preferred this appeal which is based on the grounds that, there was no sufficient evidence to warrant the conviction.

Mr. Omutelema the learned State counsel did not support the conviction. Indeed it was his submission, that charge sheet indicated that the appellant was alone, and further, that there were no aggravating circumstances to warrant the conviction. It was however his submission that there was sufficient evidence to found a conviction for simple robbery.

We have also taken into account, the submissions of the learned State Counsel Mr. Omutelema, the grounds that were advanced by the appellant in this appeal, as well as his submissions.

The issues that would then arise in this appeal, is whether the evidence on record was sufficient to warrant the conviction for the offence of robbery with violence.

After a careful re-evaluation of the evidence on record with a view to establishing whether or not, this appeal is meritorious, we form the opinion that the ingredients of the offence of robbery with violence were never proven beyond reasonable doubt, and would on that account alone allow this appeal. Having found as we do, the next issue for our determination would be whether it would be appropriate to

substitute the conviction as Mr. Omutelema urges us to do.

Based on the evidence, we do however find that the appellant used an act of violence when he struck the complainant with a stone, a fact which he did not dispute at all, as he preferred to remain quiet when asked upon to defend himself, and coupled with the fact that the complainant was able to recover his clock within a few minutes of the attack, we would set aside the conviction for the charge of robbery with violence, and thereby quash the resultant sentence, but substitute it with a conviction for the offence of attempted robbery contrary to section 297 (1) of the Penal Code, for which the appellant shall serve 4 years imprisonment. The term already served shall be taken into account.

It is so ordered.

Dated and delivered at Eldoret this 18th day of January 2005.

JEANNE GACHECHE

JUDGE

GEORGE DULU

JUDGE

Delivered in the presence of:  
Mr. Omutelema for the State.  
Appellant in person.