



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 7 OF 2019**

**DENNIS TIROP MUGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(From original Conviction and Sentence in Nanyuki CM Criminal Case No 1184 of 2018 – Njeri Thuku, PM)***

**J U D G M E N T**

1. The Appellant in this appeal was convicted after trial of **robbery with violence** contrary to **section 295** as read with **section 296(2)** of the **Penal Code**. It was alleged that on 07/08/2018 at Rongai Village in Naromoru Township in Kiini East Sub-County within Nyeri County, jointly with others not before court, he robbed one ELIUD MATUGUTA GITHUI of cash KShs 500/00 and a **Nokia** mobile phone valued at KShs 4,500/00, and that at the time of the robbery threatened to use personal violence upon the said complainant. On 08/03/2019 the Appellant was sentenced to 15 years imprisonment. He has appealed against both conviction and sentence.
2. The conviction is challenged upon the following main grounds –
  - (i) That the charge was not proved beyond reasonable doubt.
  - (ii) That the Appellant's defence was rejected without proper reasons.
3. Learned prosecution counsel for the Respondent supported the conviction. He argued that it was founded on good and sound evidence.
4. Twice before this court the Appellant stated that he wished to proceed only with his appeal against sentence; however, given the gravity of the offence that he stood convicted of, and his very young adult age, the court decided to examine the evidence to see if he was properly convicted. In doing so I have borne in mind that I neither saw nor heard the witnesses, and I have given due allowance for that fact.
5. The case laid before the trial court by the prosecution was this: On 07/08/2018 at about 7:30 p.m. PW1 (Eliud Matuguta Githui) and PW4 (Regina Nyangari Matuguta), who were an elderly couple, were in their kitchen where PW4 was preparing supper. They were there accosted by a young man who was armed with a big stick and who apparently had a companion outside. The young man's head was covered by some clothing or head gear, except for the eyes, and neither PW1 nor PW4 could identify him.
6. The young man robbed PW1 of KShs 500/00 and his **Nokia** phone while using threats of violence. He also forced PW1 to open the phone using his password and to disclose his M-Pesa PIN.
7. The robber then scrolled through PW1's phone and then with it called PW2 (Joseph Mwangi Macharia), a neighbour of PW1. He told PW2 that he was taking PW1 to hospital and asked him to send KShs 5,000/00. PW2 sent the money to PW1's number by M-pesa. After about 20 minutes the young man called PW2 again and said they had arrived at hospital and asked for a further KShs 5,000/00, which PW2 again promptly sent.
8. The young robber also called PW5 (Bernard Muthui Matuguta), a son of PW1 who was in Nairobi, again using PW1's phone. He told PW5 to send KShs 5,000/00 immediately or he would shoot his father. PW5 did not send any money; he called PW3 (Wilson Nyamu) who was a neighbour of PW1 and PW4 and asked him to go to his parent's home and check on them. PW3 did so and found other neighbours already there. PW1 and PW4 were unharmed, though shaken. He told PW5 so.
9. The following day PW3 accompanied PW1 to **Naromoru Police Station** where they reported the robbery, and later to a **Safaricom** customer care centre in Nanyuki where PW1 obtained a new mobile line and an M-Pesa statement.
10. PW6 (Sgt Feisal Juma) was a CID officer attached to Safaricom headquarters in Nairobi. His duties included extraction of mobile

phone records and M-Pesa statements. His testimony was that on the date and at the time of the robbery PW1's M-Pesa account on his mobile phone received KShs 10,000/00 from PW2's M-Pesa account in two batches of KShs 5,000/00 each. PW1's M-Pesa account also received KShs 2,000/00 from the M-Pesa account of one Stephen Matuguta (who never testified).

11. PW6 further testified that the total sum of KShs 12,000/00 was sent from PW1's M-Pesa account to the M-Pesa account of one TERESIAH KIPKOECH (phone number 0797-874442). This Teresiah Kipkoech happened to be the Appellant's mother. The Appellant owned up that he was the one using this phone of his mother after the same was traced to him with the assistance of the service provider. It was upon the basis of that phone which received the total sum of KShs 12,000/00 from PW1's phone, which money had been extracted from PW2 and another person using PW1's phone which had just been robbed from PW1, that the Appellant was arrested and charged.

12. That was indeed overwhelming circumstantial evidence. I am satisfied that the Appellant was convicted upon good and sound evidence. His conviction is safe.

13. Regarding sentence, I note that the Appellant had been previously in conflict with the law while a juvenile. As an adult however, he was a first offender. The victim of the robbery (PW1) and his wife (PW4) were not physically injured at all, though obviously shaken. The Appellant told the court he was born on 06/02/2000; he is therefore not yet 21 years old, a very young man. He deserved another chance in life.

14. I am satisfied that the sentence meted out to him of 15 years imprisonment is in the circumstances of this case manifestly harsh and excessive. He has been in prison now from 08/03/2019, a period of over 2 years. That has been sufficient punishment for him.

15. I will in the circumstances partially allow the Appellant's appeal against sentence by setting aside the 15 years imprisonment meted out to him and substituting therefor the time already served. That means that he shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 5<sup>TH</sup> DAY OF MAY 2021**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 13<sup>TH</sup> DAY OF MAY 2021**