



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MAKUENI

HCCRA NO. 39 OF 2020

(CONSOLIDATED WITH E014/2020 & 40/2020)

ALFRED MUTUA WAMBUA.....1<sup>ST</sup> APPELLANT

ABEDNEGO MUOKA MUTIE.....2<sup>ND</sup> APPELLANT

PATRICK MUSAU WAMBUA.....3<sup>RD</sup> APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. E.M. Muiiru (S.R.M)

in Kilungu Principal Magistrate's Court PMCR Case No. 977 of 2019

issued on 29<sup>th</sup> January, 2020).

**JUDGMENT**

1. The three appellants Alfred Mutua Wambua, Abednego Muoka Mutie and Patrick Musau Wambua were charged in the magistrates' court jointly with robbery with violence contrary to section 296(2) of the Penal Code. The particulars of offence were that on 15/11/2019 at [Particulars Withheld] town in Mukaa Sub-county of Makueni County jointly robbed JM and FM of their clothes, shoes and phone (*Itel*) all valued at Kshs.110,000/= and before, during and immediately after the said robbery used violence against them.

2. They all denied the charge. After a full trial, they were convicted of the offence, and sentenced to serve 5 years imprisonment each.

3. Dissatisfied with the decision of the trial court they have come to this court on appeal, and their appeals were consolidated and heard together. Their grounds of appeal in summary are as follows –

- 1. That the prosecution evidence was full of inconsistencies and contradictions which should have invited acquittals.**
- 2. That the trial court failed to scrutinize the entire evidence on record to base its conviction and sentence.**
- 3. That had the trial court scrutinized the evidence in its totality, it would not warrant or sustain a conviction and that the appellants would qualify for an acquittal.**
- 4. That the magistrate acted in bad faith by assuming prosecution roles and failing to give weight to the defences.**

4. The appeals proceeded through filing written submissions. I have perused and considered the submissions of each of the three appellants and the State.

5. This being a first appeal, I am required to evaluate the evidence on record afresh and come to my own independent conclusions and inferences – see **Okeno –vs- Republic [1972] E.A 32**, and **Pandya –vs- R [1957] E.A 336**.

6. In criminal cases also the burden is always on the prosecution to prove their case against the accused person beyond any reasonable doubt.

An accused person has no burden to prove his innocence – see **Woolmington –vs- DPP (1935) A.C.**

7. In proving their case, the prosecution called 5 witnesses; and each of the three appellants tendered sworn defence testimony and was not cross examined. The complainants JM and FM testified as Pw1 and Pw3 respectively. It was their evidence that on the night of 15/11/2019 at 11 pm as they waited for transport at [Particulars Withheld], some people emerged and pretended to assist them against their will. The said people took their bags of clothes and shoes without their consent and when they followed them they led them to a house where they robbed them of a phone and money and one of them attempted to sexually assault M.

8. They thus reported to the police, and next morning, the police led by Pw4 PC Stephen Mwangangi of Malili Police Station were led by the complainants to the scene where some of the items were recovered and the appellants arrested.

9. In their defences, the appellants admitted meeting the complainants that night but stated that they merely assisted them as good Samaritans only for the complainants to turn around and make a robbery report to the police.

10. I note that the appellants were convicted of robbery with violence contrary to section 296(2) of the Penal Code, which provides as follows –

**296(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, or if at or immediately before or immediately after the time of such robbery, he wounds, beats, strikes or uses any other personal violence to any person he shall be sentenced to death.**

11. The appellants were three (3) in number. However, they were neither armed, nor did they use any force to take the bags of clothes and shoes of the complainants. They just took away the items without the consent of the owners, while the owners were protesting. The violence used on M appears to have been in the nature of an attempted sexual assault, which in my view was not proof of robbery.

12. Though the appellants claim that there were major inconsistencies and contradictions in the prosecution evidence I find none. Though they say that the trial court turned itself to a prosecutor, I find no evidence of such. Though they say that their defences were not considered, in my view the trial court considered the sworn defences of the appellants and disbelieved the same. I find that these grounds of appeal have no basis and I dismiss the same.

13. Having said so as above, in my view only a lesser offence of theft was proved by the prosecution against the appellants, from the evidence on record. Such theft is as defined under section 275 of the Penal Code which states as follows –

**275 – Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.**

14. In my view, from the evidence on record the trial court should have convicted the appellants for theft contrary to section 275 of the Penal Code not for robbery with violence. I will thus substitute the conviction herein with a conviction for theft.

15. With regard to sentence, the appellants were sentenced to serve five (5) years imprisonment each. They were sentenced on 3<sup>rd</sup> February 2020. The maximum sentence for theft is three years imprisonment. I will reduce the sentence to two (2) years imprisonment for each of them from the date on which they were sentenced by the trial court.

16. To conclude, I quash the conviction of each of the appellant for robbery with violence, and instead substitute a conviction for stealing contrary to section 275 of the Penal Code for each of the three (3) appellants herein. I also set aside the sentence imposed and instead order that each of the three appellants will serve two (2) years imprisonment from the date each was sentenced by the trial court. It is so ordered.

**DELIVERED, SIGNED & DATED THIS 14<sup>TH</sup> DAY OF JULY, 2021, IN OPEN COURT AT MAKUENI**

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**GEORGE DULU**

**JUDGE**