



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL APPEAL NO. 3 OF 2018**

**MARTIN OKELLO OGINGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in Criminal case No.406 of 2015 of the Senior Resident Magistrate's Court at Ndiwa by Hon. Mary A.Ochieng-Senior Resident Magistrate)*

**JUDGMENT**

1. Martin Okello Ogingo, the appellant herein, was convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.
2. The particulars in count one were that on the 10<sup>th</sup> November, 2015 at Kachuth sub location, Ndiwa District of Homa Bay County, jointly with others not before court robbed Martin Okello Awuor Kshs.15, 000/= and 5 County Council receipt books all valued at Kshs.16, 000/= the property of County Government of Homa Bay and at or immediately before or immediately after the time of such robbery injured the said Martin Okello Awuor.
3. The appellant was convicted and sentenced to suffer death as prescribed by the law.
4. The appellant was represented by Odingo & Company Advocates. He raised the following grounds of appeal:
  - a. The learned trial magistrate erred in law and in fact by convicting the appellant without production of exhibits.
  - b. The learned trial magistrate erred in law and in fact by convicting him on the evidence of the complainant's brothers.
  - c. The learned trial magistrate erred in law and in fact by convicting him on insufficient evidence.
  - d. The learned trial magistrate erred in law and in fact by meting a harsh and dehumanizing sentence.
5. The appeal was opposed by the state through Mr. Ochengo, learned counsel who contended that the evidence was overwhelming.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. When the appellant filed his submissions through his advocate, he abandoned the grounds that he had filed and submitted on entirely different issues. This practice is deprecated for it departs from the known practice. The counsel for the appellant ought to have sought the leave of the court and serve the respondent with the new grounds, if need be.
8. There is no law that prohibits a relative from being a witness and certainly failure to produce an exhibit cannot be a basis for an acquittal. Each case will however be determined on own merits taking into consideration the prevailing circumstances.
9. Section 296 (2) of the Penal Code provides:

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

Once the trial magistrate is satisfied that the prosecution has proved its case beyond reasonable doubt, the only legal sentence is death. The sentence in this case cannot be described as harsh and dehumanizing; it was the only legal sentence.

10. Before the appellant was arrested, he reported to the assistant chief Alfred Asani Onditi (PW3) that he had fought with the complainant after they disagreed over some work that had been done for the complainant. This is what he maintained in his defence. The prosecution had this defence at the earliest opportunity but did not deem it necessary to investigate it.

11. The complainant alleged that he was attacked by some three people. However, the evidence of Victor Otieno Okeyo (PW4) is that when he rushed to the scene, he saw some two people running to the opposite direction. This evidence ought to have raised a red flag. He indeed testified that he did not see the appellant on that day.

12. From the foregoing analysis of the evidence on record, I find that the conviction of the appellant was not safe. There was no sufficient evidence of robbery. There was a possibility that a disagreement arose due to non-payment for work done and which degenerated to a fight.

13. I accordingly quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held

**DELIVERED and SIGNED at HOMA BAY this 21<sup>st</sup> Day of July, 2021.**

**KIARIE WAWERU KIARIE**

**JUDGE**