



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 49 OF 2018

JOB AYIENDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the sentence of the subordinate court dated 23rd March 2018 in Criminal Case No. 88 of 2017 at Kilgoris Law Courts before Hon. Matutu(SRM)).

JUDGMENT

1. The appellant, **JOB AYIENDA**, was charged with the offence of robbery with violence contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code**. It was alleged that on 6th January, 2017 at Sikawa area in Transmara West District of the Narok County jointly with another not before court being armed with dangerous weapons namely rungu and panga, he robbed Shadrack Otieno a motorcycle registration KMDT 230W make Bajaj-Boxer and immediately before or immediately after the time of such robbery used actual violence to the said Shadrack Otieno.
2. 5 witnesses testified in support of the prosecution's case. The complainant, Pw1 Shadrack Otieno, narrated how on the material day at about 1:00 p.m., in the normal course of his business as a bodaboda operator, he had been stopped by the appellant and another person who asked him to take them to Sigawa area. They persuaded him to use another route and on the way they had attacked him with a nut and stole the motorcycle which belonged to PW2 Joshua Sikuku Waswa. He told the court that he knew the appellant prior to the incident as he had been working in the area for about 2 years. Pw2 testified that he gave the motor cycle to Pw1 on the 6/1/17 at 1.00pm he later learnt that Pw1 had been robbed of the motor cycle. They found Pw1 at the hospital and on regaining consciousness Pw1 told that Job Ayienda was one of the people who robbed him.
3. PW3 Zablon Auka Alisi testified that he does boda boda business from the same stage as the complainant. On the material day, he had met the appellant and in the company of another person when ferrying his passenger. He later met the complainant on his way and shortly after received a call informing him that the complainant had been injured and the motorcycle he had been riding stolen. PW4 No. 88095 PC Willis Ochieng conducted the investigations and took the witnesses' statements. Pw5 Seth Midenyo the clinical officer on the 6/1/17 the complainant had been brought into the health care centre in an unconscious state. He noted that the complainant had suffered cuts on the head, on the back and side. He was stitched up and referred to Migori county hospital. On the 21/1/17 the complainant regained consciousness. He filled the P3 form on the 23/1/17.
4. The appellant in his defence testified that on the 19/1/2017 at 2.00pm he was at his home when the police arrested him and took him to Etago and thereafter to Kilgoris police. There was no complainant he was told that someone had reported that he had his money. The investigating officer demanded Kshs. 10,000/- from him. He told him he had no money. He did not commit the offence. There was no evidence linking him to the offence. That no eye witness testified. The complainant said it's Jacob who attacked him at Sigawa. There was contradiction of where the offence occurred. The injuries were not consistent. He is not Jacob.
5. The foregoing facts were presented to the trial court which found that the prosecution had sufficiently established the charge against the appellant. The court convicted and sentenced the appellant to serve 20 years' imprisonment.
6. The appellant now seeks a reduction of his sentence to a non-custodial one on the grounds that he has since realized the gravity of his actions. He says that he has changed and he wants another chance to test his freedom and help his poor family.
7. Counsel for the prosecution has opposed this appeal for the reason that the sentence issued was commensurate to the offence. He submitted that the offence was serious one as the complainant had lost consciousness for 3 days.
8. In imposing the sentence of 20 years imprisonment, the trial court had in mind the Supreme Court's decision in the case of **Francis Karioko Muruatetu & Anor v Republic Petition No. 15 of 2015 Consolidated with Petition 16 of 2015 [2017]eKLR**, the Supreme Court declared the mandatory death sentence unconstitutional for the offence of murder.

9. The principles in *Muruatetu & Anor v Republic* were found to apply to mutatis mutandis to the offence of robbery with violence by the Court of Appeal in **William Okungu Kittiny v Republic Criminal Appeal No. 56 of 2013 [2018]eKLR**.

10. When faced with this issue Majanja J. in the case of **Michael Kathewa Laichena & Anor v Republic Petition No. 19 of 2017 [2018]Eklr** found as follows;

“18. Section 296 of the Penal Code provides for both the offences of robbery and aggravated robbery and their respective penalties under sub-sections (1) and (2) as follows:

296 (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company 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. [Emphasis mine]

19. What is clear from these provisions is that robbery with violence is an aggravated form of robbery with additional ingredients set out in section 296(2) of the Penal Code.

I would therefore take 14 years’ imprisonment as the starting point for considering the sentence for robbery with violence. I should not be seen as stating or implying that 14 years’ imprisonment as a mandatory minimum sentence for robbery with violence. The court is entitled to consider all the circumstances and prescribe an appropriate sentence whether below or above 14 years’ imprisonment.”

11. In the **Muruatetu case (supra)**, the Supreme Court suggested the following guidelines as applicable in re-hearing a sentence for the conviction of a murder charge:

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

12. The appellant has urged this court to give him a non- custodial sentence. As rightly pointed out by counsel for the respondent, the offence committed by the appellant was severe. The complainant sustained cut wounds to the head on the back and side. The appellant and his accomplice beat him up, left him for the dead and stole the motorcycle which had not been recovered as at the time of the trial. For these reasons, I find a custodial sentence befitting of the crime.

13. **Section 333 of the Criminal Procedure Code** requires the court to consider time spent in custody when imposing a sentence. I note that the appellant has been in custody throughout the trial to date. The trial court also treated him as a first offender. Having weighed the evidence against the mitigating factors and having also considered by the above authorities. I am convinced that the appeal against sentence is merited. I hereby substitute the sentence of 20 years’ imprisonment with a sentence of 14 years’ imprisonment with effect from 23rd March, 2018.

Dated and delivered at Kisii on this 8th day of January 2019.

R.E.OUGO

JUDGE

In the presence of;

Appellant In Person

Mr. Otieno Senior Prosecution Counsel

Rael Court Clerk