



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 117 OF 2015

PAUL KIMANI IRUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction by A. Mwangi, Senior Resident

Magistrate, Kigumo, in Criminal Case No. 70 of 2013 dated 10th November 2015]

JUDGMENT

1. The appellant was convicted for *robbery with violence* contrary to section 296 (2) of the **Penal Code**. He was sentenced to suffer *death*.
2. The particulars of the charge were-

“On the 21st January 2013 at Ihumbu village within Murang’a County while armed with dangerous or offensive weapons namely a panga robbed Joshua Gakere Macharia cash Kshs 200 and a walking stick and at or immediately after the time of such robbery used actual violence to [sic] the said Joshua Gakere Macharia by occasioning him bodily harm.”
3. The appellant is aggrieved by the conviction and sentence. At the hearing of the appeal, the appellant relied on *amended* grounds of appeal filed with *leave* on 5th February 2019.
4. There are *eight* grounds of appeal: I will condense them into *six*. Firstly, that the learned trial magistrate erred by accepting *written* submissions. Secondly, that the trial court failed to comply with section 151 of the **Criminal Procedure Code**; and, section 19 of the **Oaths and Statutory Declarations Act**. Thirdly, that the prosecution witnesses gave contradictory evidence; fourthly, that the medical evidence was inconclusive; fifthly, that the appellant was not accorded a fair trial; and sixthly, that learned trial magistrate overlooked the appellant’s defence.
5. At the hearing of the appeal, the appellant relied entirely on the written submissions filed on 5th February 2019. The core of the submissions is that the prosecution failed to *prove* the charge beyond reasonable doubt. I was implored to allow the appeal.
6. The Republic contests the appeal. The position of the State is that all the ingredients of the offence were proved.
7. This is a first appeal to the High Court. I have *re-evaluated* all the evidence on record and drawn *independent* conclusions. I remain cognizant that I neither saw nor heard the witnesses. ***Njoroge v Republic*** [1987] KLR 19, ***Okeno v Republic*** [1972] EA 32, ***Kariuki Karanja v Republic*** [1986] KLR 190.
8. On 21st January 2013 at about 4.00 p.m., the complainant (PW1) was accosted by the appellant. They knew each other. The scene was outside Ihumbu Primary School. The appellant enquired of him whether he had sold his ox. He replied in the negative.
9. PW1 said that the appellant grabbed him by the neck and tripped him to the ground. He took Kshs 200 from the complainant’s trousers. The appellant removed a *panga* from his jacket and cut him on the left side of the head. He also hit him on the left ear and toes with the walking stick.
10. PW1 said that the incident was witnessed by school children. He named some as Muchono (PW5) and one Mwangi.
11. The complainant reported the matter at Maragua Police Station. The complaint was recorded by PW4, Police Constable Mutinda. He later issued the complainant with a P3 Form which was filled out by PW3 at Maragua Hospital. The complainant was treated and discharged. The

form and treatment notes were produced by PW3 as exhibits 1 and 2.

12. PW1 returned to the hospital on 28th January 2013 for removal of some stitches. On the latter date, the appellant was escorted to the police station by his (appellant's) brother Kamande and another man called Muriigi. None of the two testified.

13. PW2 was the complainant's daughter in law. On the material date at about 4:00 p.m., the complainant found her outside her house. His shirt had bloodstains. She accompanied him to the police station and the hospital.

14. PW3 was Joseph Kitema. He is a clinical officer at the hospital. He examined the complainant on 21st January 2013 at about 5:00 p.m. There was a cut wound on the left parietal scalp and left ear. He was stitched, given antibiotics and discharged. He classified the injuries as *harm*.

15. PW5 was Martin Muchono. He was aged 15 at the time of the trial. He and his classmates were at the gate of Ihumbu Primary School. It was about 4:00 p.m. He witnessed the attack on the complainant. The students moved closer and asked the appellant what was going on. The appellant walked away into the shops.

16. When PW5 was recalled for further cross-examination, he said he recorded his statement about two weeks later. He said he heard the appellant asking the complainant for money; and, saw the appellant strike PW1 with a *panga* and walking stick on the head.

17. The witness said that he could not intervene because he was in his school uniform but another person, Martin Mwangi, helped PW1. Mwangi was not called a witness. PW5 knew both the complainant and the appellant. He said the appellant is a neighbour.

18. I have then considered the substance of the defence put forth by the appellant. He made an *unsworn statement*. He said he was framed. He said that when he was first arrested, he was charged for assault. He queried why the complainant claimed he was robbed 4 months after the incident. He challenged the evidence of PW2 and PW5 as hearsay.

19. I will dispose of *three* procedural matters first. Firstly, section 19 of the **Oaths and Statutory Declarations Act** details the procedure of taking evidence of a child of *tender years*. PW5 was aged 15 at the time of the incident. He was *not* a child of tender years. The trial court was thus *not* obligated to conduct a *voire dire* examination. Furthermore, his evidence was sufficiently *corroborated* by PW1 and PW3.

20. Secondly, I am not persuaded that the appellant was prejudiced in any manner by relying on *written submissions*. He is the one who elected to do so instead of addressing the court orally.

21. Thirdly, the appellant's trial was conducted in open court; he cross examined all the witnesses; and, led his defence. The only infraction that I find is that he was *not* supplied with the original police report made by the complainant. However, the learned trial magistrate had ordered that he be furnished with the report. Granted all the circumstances, I *cannot* say that he did *not* get a *fair trial*; or, that **Article 50** of the **Constitution** was violated.

22. A number of matters arise from the evidence. I will start with *identification*. The incident took place in *broad daylight* outside a school. PW1 and the appellant were *not* strangers. PW5 also knew both of them. He also witnessed the incident from the school gate.

23. That to me is evidence of *recognition*; stronger evidence than mere identification. **Wamunga v Republic** [1989] KLR 424, **Republic v Turnbull & others** [1976] 3 All ER 549. The appellant was thus *positively* identified by PW1 and PW5.

24. The next key question is whether *all* the ingredients of the offence of *robbery with violence* were established. Section 296 (2) of the Penal Code provides-

“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”.

25. The complainant said that the appellant grabbed him by the neck and wrestled him to the ground. He took Kshs 200 from the complainant's trousers. He then retrieved a *panga* from his jacket and cut him on the head. He also hit him on the left ear with the *walking stick*. He disappeared with the walking stick.

26. The incident was witnessed by PW5. There is then the evidence of PW3, the clinical officer. There was a cut wound on the left parietal scalp and left ear. He classified the injuries as *harm*.

27. I find some *serious* gaps in the evidence. First, the *initial* complaint was for *assault*. The police charged the appellant with *assault causing actual bodily harm* contrary to section 251 of the **Penal Code**. The original charge sheet is dated 29th January 2013.

28. When the trial first opened, the appellant pleaded *guilty* to the charge of *assault*. It is instructive that the facts read out made *no* reference whatsoever to theft of Kshs 200 or the walking stick. Nevertheless, the appellant contested the facts; and, a plea of *not guilty* was entered.

29. It is only after the complainant started his testimony that the prosecution sought to amend the charge. That was several *months* later on 11th April 2013. It is instructive that on 10th June 2014, the appellant requested for a copy of the *original report* to the police. The court ordered that the O.B. report be provided. It was not made available. As I stated earlier, that is one of the reasons the appellant claimed that

the trial was *not* fair.

30. I cannot then say that the appellant's defence was a complete sham. The medical report revealed two cuts: on the left ear caused presumably by the walking stick; and, another on the head by a *panga*. A *panga* can be a lethal weapon. A walking stick is however *not* a dangerous or offensive weapon. The clinical officer did not make a clear distinction between the two cuts.

31. The *value* of the walking stick remains unknown. So much so that the stolen property would be the Kshs 200. As I stated earlier the money was *not* mentioned in the original *facts* read out to the appellant in court at the opening of the trial.

32. Considering the circumstances I have outlined, I am *not* satisfied that the evidence of PW1 established the offence of *robbery with violence* or even a *simple robbery*. The evidence proves the lesser but *cognate* offence of *assault causing actual bodily harm*. The conviction was *unsafe*.

33. I find on the totality of the evidence that the appellant was guilty of the lesser but cognate offence of *assault causing actual bodily harm* contrary to section 251 of the **Penal Code**. I *convict* him accordingly.

34. The offence attracts imprisonment of up to *five years*. I have noted the appellant was a first offender. I have also paid heed to the mitigation tendered in the lower court: that he was ailing; and, that his family looked up to him for support. I have also considered the nature of injuries inflicted on an elderly man.

35. The appellant has been in prison for over three years. I find the period served to be *sufficient* punishment.

36. I *set aside* the original conviction and sentence. The appellant shall be set at *liberty* forthwith *unless* otherwise lawfully held.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 19th day of February 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant.

Ms. Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.