

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 37 OF 2018

ZAPHANIA OBANDE NYABUGA.....APPELLANT

VERSUS

THE STATE.....RESPONDENT

[Being an Appeal from the Conviction and Sentence of Hon. J. Were (SRM) Keroka Law Courts dated 10th November 2011 in Keroka Principal Magistrate's Court Criminal Case No. 281 of 2005]

JUDGEMENT

This appeal was transferred to this court by the Kisii High Court. In the lower court the appellant jointly with another not before this court were tried and convicted on a charge of Robbery with violence contrary to Section 296 (2) of the Penal Code. It was alleged that **on the nights of 22nd and 23rd July 2005 at Nyansiongo Gesima Location in Nyamira District within Nyanza Province, jointly with others not before court, being armed with dangerous weapon namely an axe, robbed Rebecca Nyandemo Okindo of her mobile, Erickson valued at Kshs. 6000/= and at or immediately before or immediately after the time of such robbery murdered her husband Simeon Nyandemo Okindo and her baby Annah Kerubo Nyandemo.** After hearing and considering the evidence the trial magistrate sentenced them to ten (10) years imprisonment each.

The appellant did not file a petition of appeal but a "mitigation of appeal" in which he listed the following grounds: -

- "1. THAT AM a layman who don't know the procedure of the law. Your honour as I was on with the sentence I was added the other sentence which I expected was to continue from the day I was convicted for 10yrs.**
- 2. That I REQUEST the honourable court to look on the learned sentence of 10yrs. From the day of sentence which was on 1/11/2011 to start from the day of sentence up to now which make me to be confused with the sentence.**
- 3. That I REQUEST to look on the sentence and help me on the sentence of 10yrs ended on 1/11/2014.**
- 4. THAT I wish to be presented during the hearing of this appeal and that more grounds will we adduced in support of it thereof."**

The appeal was canvassed by way of written submissions those of both sides going beyond the issue of the sentence and the respondent conceding the appeal. I am satisfied that the appeal is properly conceded. To begin with the complainant in the charge of robbery was not called to testify and clearly therefore the charge was not proved. Those who initially gave evidence were Mary Moraa Musati (Pw1) who although she was in the house at the time of the robbery stated that she did not see the robbers and Nathan L. Shiundu (Pw2) a Resident Magistrate then stationed at Keroka Law Courts who was called to produce statements he took from the appellant and his co-accused but which were never produced because the appellant and his co-accused repudiated them and the envisaged trial within trial was not held. Soon thereafter the case was transferred to Kisii Chief Magistrate's Court at the behest of the accused persons and when that court sent it back to Keroka Senior Resident Magistrate's Court another Magistrate started it denovo. This time those who testified were Nicholas Omwenga Ondieki (Pw1), Enest Mogaka Okindo (Pw2), Inspector Joseph Kiboi (Pw3), Jackson Murauni (Pw4), Evalyne Misati (Pw5), Superintendent Alex Nganga (Pw6) and Samuel Mbata (Pw7). The two witnesses who had testified earlier were not recalled. Neither was the complainant. None of the witnesses called by the prosecution claimed to have witnessed the robbery and the case against the appellant rested on circumstantial evidence that a bond to keep peace which he had executed in Criminal Case No. 12 of 2005 was found in a bush near the scene of the robbery together with some household items stolen during the robbery but which the robbers abandoned as they fled. That circumstantial evidence in the absence of testimony from the complainant was in my view not sufficient to prove a charge against the accused beyond reasonable doubt. In **HCCRA (Nyamira) No. 5 of 2017 Jeremiah Anyona Nyabuga Vs. Republic** where I upheld the appeal of this appellant's co-accused I stated:-

"Having perused the record of the lower court I did however notice that the complainant in the charge of Robbery with violence (Count I) was not called to testify and even the witness, Mary Moraa (Pw1) who gave evidence concerning that count was not recalled even though the court had granted the appellant's wishes for her recall. The charge of robbery with violence was therefore not proved. Learned Prosecution Counsel did not address himself to this issue in his submissions. I do therefore agree with the appellant that the trial magistrate erred in convicting him on a charge for which no evidence was adduced."

I agree with the Prosecution Counsel that this appeal is merited. Accordingly, conviction is quashed and the sentence is set aside and unless the appellant is otherwise lawfully held he shall be set at liberty forthwith.

Signed, dated and delivered in Nyamira this 14th day of March 2019.

E. N. MAINA

JUDGE