



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 33 OF 2018

(An Appeal arising from conviction and sentence in Kitale Chief Magistrate' Court Criminal Case No. 3322 of 2017 delivered by Hon.P. Biwott- Senior Principal Magistrate on 27 March, 2018)

WILSON WEKESA JUMA.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged with the offence of **Robbery with Violence contrary to Section 296(2) of the Penal Code**. The particulars of the charge was that **on the night between 8th and 9th September 2017 at Mitume area within Trans nzoia county jointly with another not before court robbed PAUL ONYANGO WASIGA of his kshs. 4000 and his mobile phone make Techno valued at kshs. 11,000 and immediately before or after the time of such robbery used actual violence to the said PAUL ONYANGO WASIGA.**
2. The appellant after full trial was convicted and sentence to 20 years imprisonment hence this appeal. The grounds which he has appealed against are general in nature and specifically touches on the veracity of the evidence as presented during trial. The appeal has been vehemently opposed by the learned state counsel on the grounds that the same was not merited as the case was proved beyond any shadow of doubt.
3. Before looking at the merits or otherwise of the same it shall be appropriate to analyse the evidence as presented during trial. The prosecution called a total of three witnesses to establish its case whose evidence can be summarised as hereunder.
4. **PW1 the complainant** told the court that he left EPIC Club at around midnight on 8th and 9th September 2017 and took a boda boda at Oil Libya as he went to his home at Mitume. The said Motor cycle was ridden by the Appellant who was his usual customer. On the way he ferried a second other persons whom he said he knew.
5. On the way near Union primary school the 2nd person said that they should pass through Machinjoni area whereas he was going to Luguna area. He objected but that Appellant did not want to hear that. On the way the person behind held his neck from behind and the Appellant kept going and refused to stop. He struggled hard and the 3rd person took a knife and cut him on the hand. He then forcefully took the items enumerated in the charge sheet.
6. As they struggled the Motorcycle wobbled on the road and he managed to jump off as he screamed. A man from a nearby church came to his rescue. He reported at the AP camp and later went to the hospital where he was treated and a P3 form was filled. He reported the matter with the police and later let them in arresting the Appellant.
7. **PW2 John Koima** a clinical officer from Kitale County hospital examined the complainant and filled the P3 form. He said that he had cut injuries to the left palm which he assessed as harm.
8. **PW 3 PC Sammy Kimanzi** from Kitale police station carried out the investigation after being assigned the file. He issued the complainant the P3 form and recorded statements from the witnesses. He also gave him an arrest order to be effected by the AP officers at Mitume. He said that he charged him with the offence for he corporated with others to rob the Complainant.
9. When placed on his defence the Appellant gave unsworn evidence and did not call any witness. He said that he was actually doing boda boda business on the material night when two people came and asked him to take them to Mitume area which he complied. On the way his Motor cycle began to wobble and he asked the passenger what was wrong and he was told by the other that he had been robbed by his friend.
10. He said that he took him at the AP camp where he reported the incident. They were told to call them if he see the suspect. In the morning he met the Complainant at the stage with his chairman and was looking for the rider and he identified himself. That the Complainant

then implicated him in the incident and that is how he was arrested.

11. The parties were advised to file written submissions which the court has perused. The centrality of the appeal is on the question of identification.

12. The question of being carried by the Appellant that night was admitted by the Appellant during his defence evidence although it was unsworn. He confirmed that he ferried the Complainant and another passenger who apparently robbed the Complainant.

13. I have read his line of defence and the same does not make much sense. At what point did he realise that the attacker had taken off? A motor cycle is not a car that one can jump without the driver noticing. If indeed the Complainant sustained a knife injury how come the Appellant did not notice the commotion?

14. The Appellant defence does not add up. The same has no probative value since it was not sworn. Although the real culprit was not arrested I do not think that he was not known to the Appellant. The Appellant according to the evidence of the Complainant acquiesced as the Complainant was being robbed. He did not do much and worse still he did not stop or take the Appellant to his destination.

15. There was no evidence that the Appellant being a good citizen and a businessman reported the incident anywhere that night to the relevant administrative authorities. It was only the Complainant who did so and he was lucky that he knew the Appellant being his regular customer.

16. The ingredients of Robbery with violence as clearly submitted by the state were proved. The assailant was armed with a dangerous weapon and in the company of more than one person. At the time of such robbery violence was used against the Complainant. The items enumerated in the charge sheet were stolen from him.

17. The only difference in the case at hand was that the Appellant was an accomplice. He was a conduit so to speak. He was involved in the whole robbery indirectly. He did not do anything to mitigate the same. He allowed his passenger to hurt the complainant using the knife and stole from him. In short and contrary to his submission the matter was well proven by the single identifying witness.

18. In respect to the sentencing I find the 20 years imprisonment imposed against the Appellant on the higher side considering the circumstances. Although the main culprit was not found the Appellant was an accomplice and it would have been appropriate had he assisted the police in apprehending him. Nonetheless he was guilty of the offence.

19. In the premises I shall reduce the 20 years sentence to **10 years** imprisonment from the date herein. The appeal is otherwise dismissed.

Delivered, signed and dated at Kitale this 6th day of June 2019.

H. K. CHEMITEI

JUDGE

6/ 6/ 2019

In the presence of:

Appellant present

Mr Omoria for Respondent

Court Assistant – Emily

Judgment read in open court