



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**HCCRA NO. 115 OF 2017**

**(FORMERLY NAKURU HCCRA NO. 210 OF 2015)**

**SAMUEL KARIUKI WANJIKU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate's Court**

**at Eldama Ravine Cr. Case no. 69 of 2014 delivered on the 14<sup>th</sup> day of September, 2015**

**by Hon. R. Yator, Ag. SRM]**

**JUDGMENT**

1. The appellant was convicted and sentenced to life imprisonment for the offence of robbery with violence contrary to section 296 (2) of the Penal Code, the particulars whereof were that he “on the 26<sup>th</sup> day of January 2014 at Timber trading centre in Koibatek District within Baringo County jointly with two others not before the Court, being armed with dangerous weapons namely runigus, robbed Jackson Kiptum Busienei of his mobile phone – Nokia 1280 valued at Ksh. 2500/= and cash 5000/= and at the time of such robbery used actual violence to the said Jackson Kiptum Busienei.”

**Judgment of the trial Court**

2. In convicting and sentencing the appellant, the trial held as follows:

*“I have considered both the Prosecution and defence evidence and the exhibits herein produced. From evidence herein it is not denied and in particular by the accused that he was arrested by the complainant and a crowd and that there was enough light from the Catholic Church to enable identification. As such I do find that the identification of the accused is not dispute.*

*On whether the accused did steal from the complainant, it is the complainant's evidence that at the time of being robbed the accused was with two other and that it was accused who removed the phone and Ksh.5,000/= from his pockets and that he had held him. That accused then threw the phone and money to the other two suspects who then ran away.*

*On whether the offence herein meets the ingredients for robbery with violence, it is the evidence of Pw1 that he was attacked by three people the accused being included and that two of them had runigus which they used to hit him while the one who tried to struggle him had a piece of wood under his jacket. The kind of weapons i.e runigus was definitely dangerous/offensive.*

*The complainant also said the accused did bite his right hand and which fact accused did not deny saying it was because the complainant also did bite him. The doctor produced a P3 form while relying on a treatment chit confirming that indeed the complainant did sustain soft tissue injuries.*

*The complainant did state how he kept on holding to the accused until the crowd arrived and found the accused still being held and they escorted him to the station. I find the Prosecution evidence to be quite overwhelming that in fact the accused was found at the scene of offence and his defence I do dismiss as mere denials and pure lies trying to allege he was being attacked by complainant and others.*

As such I find that the Prosecution has proved its case beyond the required standards of proof and as such I do hereby convict the accused under section 215 CPC.”

### **Sentence**

“**Court:** The accused’s mitigation is noted however, the penalty of robbery with violence is clearly spelt out in the Penal Code and he is hereby sentenced to life imprisonment with a Right of Appeal.”

### **The appeal**

3. By Counsel, Mr. Andrew N. Geke Advocate, the appellant filed a Petition of Appeal dated 28/9/2015 on the following grounds:

1. The learned Magistrate failed to attach any weight to the evidence of the appellant.
2. The Prosecution’s case was not proved beyond reasonable doubt.
3. The learned Magistrate failed to take into account that no evidence of phone ownership was availed to the Court by the complainant.
4. The learned Magistrate failed to take cognizance that at the time of the alleged offence the complainant was drunk.
5. The learned Magistrate failed to take into account the evidence of the doctor in respect of the time gaps in the complainant going to hospital, taking the p3 form from the police and the time it took for it to be filled.
6. The learned Magistrate failed to appreciate that in as much as there was sufficient light at the scene of the alleged robbery no other person was able to see the other two persons who it was alleged ran away.
7. The learned Magistrate failed to appreciate that Prosecution witness number 3 being the Investigating Officer had no evidence to offer the Court since no investigation took place.
8. The learned Magistrate failed to appreciate that the evidence of the Prosecution was contradictory and the same could not sustain the alleged offence of robbery with violence.

*Had the learned Magistrate taken the above into account the appellant was to be acquitted. Therefore the appellant prays for setting aside of the learned Magistrates judgment of conviction and sentence against the appellant and the appellant set free.*

### **Issues for Determination**

4. At hearing the parties relied on written submissions filed, respectively, by appellant’s Counsel on 3<sup>rd</sup> December 2018 and by the DPP on 10<sup>th</sup> January 2019. The submissions canvassed the respective positions taken by the appellant and the DPP on questions before the Court, namely:-

- a) Whether the ingredients of the offence of robbery with violence were proved on the evidence before the Court; and
- b) Whether the appellant was properly identified as one of the perpetrators of the offence, if proved.

### **Determination**

#### *The Law*

5. Section 296 (2) of the Penal Code provides for the offence robbery with violence as follows:

#### **296. (2) Punishment of robbery**

*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.*

6. In elaborating the ingredients of the offence of robbery with violence the Court of Appeal in **Johanne Ndungu v. R**, Mombasa Criminal Appeal No. 116 of 1995 as cited in Patrick & Anor v. R (2005) 2 KLR 162, 167 held as follows:

“**What acts constitute an offence under section 292 (2) of the Penal Code?** This Court considered that question in **Johana Ndungu v Republic** – Criminal Appeal No 116 of 1995 (unreported) where it stated:

“In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in

conjunction with section 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

**1. If the offender is armed with any dangerous or offensive weapon or instrument, or**

**2. If he is in company with one or more other person or persons, or**

**3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.**

Analyzing the first set of circumstances the essential ingredient apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the Court to so convict him.

In the same manner in the second set of circumstances if it is shown and accepted by Court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The Court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The Court is not required to look for the presence of either of these two ingredients. If the Court finds that or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly.”

See also ***Odhiambo & Anor. v. R*** [2005] 2 KLR 176 on the test of dangerous or offensive weapon is being the use to which the person possessing it intends to put it.

### **The Evidence before the Court**

7. The evidence before the trial Court was as follows:

**“PW1**

*I come from Matharu scheme in Timboroa. I work with Kenya Pipeline as a night guard.*

*On 26.1.014 at 11.00 pm I do recall I was at Timboroa centre on my way going home. I was from bar (Wanjiku club) and on that day I had received my salary. I did not arrive home safely and I decided to use a foot path rather than the main road (tarmac) and I used the Nyakio footpath and on nearing the catholic church I heard people talking behind me before passing past the church they neared me from behind and they were three people and one of them put his hand on my neck and another slapped me on the face and ears and one was behind me and they were men and they held my throat trying to strangle me. I held the hand of the man who was struggling me and he had a piece of wood hidden under his jacket at the right hand and I had felt it was a piece of wood. One of them started to search my trouser pocket. The other two had runkus as they were hitting me. The person who removed my money I held his hand and he strangled and fell down. He had also removed my Nokia make 1280 and I was screaming and they kept hitting me threatening to kill me and he had left my throat hence I screamed loudly. They dragged me down while assaulting me. People came and they saw torches and two ran away and I held one of them who is the one who had removed my money Ksh.5,000/= and the phone and I held on him and people arrived who were many villagers and I was still holding one suspect. People identified the person I had held.*

*At that time I had not identified the person. People wanted to burn him and one Mayaka who guards Timboroa Health Centre pleaded with public not to lynch or burn him so he helps identify his accomplices. I held him on the waist by the belt and escorted him to Timboroa Police station.*

*When he had seen people coming he had thrown the phone and money to his other two suspects and the same was never recovered. The suspect I had held did bit me on right hand (two healed scars seen). I was lying down with the one suspect when he threw away the items. On the way there were security lights from the Catholic Church gate hence I could see. I did not recognize the other suspects. At Timboroa police station I was able to see accused clearly and I had never seen him. Mayaka then took me to Timboroa Health Centre where I was treated and discharged and I gave the police the treatment note in an exercise book form (MFI – 1) dated 26.01.014 Timboroa Health Centre in Pw1 names. I had been injured on the head behind, on top on the right shoulders, bitten right hand, and back pain and all over the body as I was beaten with runkus. I called colleagues who came and took me home and the following day I went to record my statement. When I arrived at police station there was enough light hence I saw the accused on his face clearly and the following day I identified him as well and could see he was a fat person. I was issued with P3 form which I took to Eldama Ravine District Hospital which was dully filled and I returned to the police station and it is the one in Court.*

P3 form – MFI – 2.

I can positively identify the person who I had taken to the police and it's the accused in Court (points out). I have never recovered my money and phone. The accused has never come to approach me but his mother came to approach me asking for forgiveness and return my money and phone and I have never spoken with accused in Court. None of the other two suspects who approached have come to me and I have never known them.

**Cross examination**

You approached me while you were three and it was not you alone. I did not see Oduor and I did not search you and I did not see any meant in my pocket. I do not know who Oduor is and he was not the first person to arrive there. I did bite you also and you did bite me and I was biting so as you leave. When you saw torches you threw money and the phone to the other suspects.

**PW2**

I come from Timboroa and a watchman at Timboroa Health Centre and I am a village elder at Timboroa Area.

On 26.1.014 at 11.00 pm I do recall I was on duty at the dispensary when I heard screams at 50 meters away from hospital calling for help "thief, thief" and I went outside gate and I saw people running towards there while having torches and I also went to where the screams were and on arriving I found someone had been arrested and people wanted to lynch him and burn him as they demanded for petrol and I was able to identify the suspect as he came from Timboroa a place called Shauri. I pleaded with people not to kill him but we escort him to the police. The complainant alleged his phone and money Nokia and Ksh.5,000/= had been stolen from him. The complainant said they were three suspects and others had fled away and when I arrived I found Pw1 was still holding onto the suspect he had managed to arrest. He said he had also been beaten by the suspects. The suspect was being beaten all over and could not talk. The public agreed to take police so as to identify others and we escorted him to Timboroa police station and complainant still had him all the way to the police station and left accused behind with police and I went the following day to record statement. The complainant was treated in hospital that same night and I returned to my work place. I have never heard if the money or phone were ever recovered. I can identify the accused as I used to see him physically though I did not know his home and he is in Court (points out). I had never disagreed with him.

**Cross examination:** - Nil.

**Re-examination:** Nil.

**PW3**

Stationed at Timboroa police station and I am the Investigating Officer herein. On 27.1.014 at 8:00 am I do recall I was at anti-crime office when OCS Chief Inspector David Mwangi to investigate robbery case reported that night where accused had been brought by members of public and I went to the cells to interrogate the suspect one Samuel Kariuki (accused pointed out) and he had injuries from being beaten by mob and I took him to Timboroa health centre where he was treated and on return to cells I recorded witness statements and he was given the treatment chit which he had in Court at time of plea.

He said he was assaulted by a mob and I gave complainant P3 form and he was seriously injured as he had teeth bites on right hand and had complained of facial pains dues to slaps and being beaten with a piece of wood. He had been treated at Timboroa health centre and had a treatment note (book form) MFI 1 later I gave him P3 form which he took to Eldama Ravine district hospital which was duly filled and returned.

MFI – 2 identified.

Later I charged the accused with robbery with violence. Two suspects fled away with phone and Ksh.5,000/= of complainant plus the piece of wood.

The complainant said when he was attacked behind one slapped him while another searching and he decided to hold onto one of the suspects who is the accused despite biting him and the crown came to rescue.

I know the accused who lives next to police station and I have no grudge with him.

In fact I have previously helped him as an officer.

**Cross examination by accused:** Nil.

**PW4**

Stationed at Eldama Ravine District Hospital and I am incharge of the facility. MFI 2 was filled by Dr. Karumba on 4.4.2014 and patient was one Jackson Kiptum allegedly assaulted by three people and sent for examination by OCS Timboroa on 27.1.014 and came to the hospital two months later and general medical history was healthy and general physical examination was okey.

On bodily examination he was normal.

The injuries were more than 24 hours and probable type of weapon was not possible to assess and he availed treatment chit he had

soft tissue injuries and treatment that all and I wish to produce MFI – 2 Pexhibit 2. Treatment note (exercise book) bearing stamp of Timboroa health centre under our jurisdiction and the name of client as Jackson Kiptum dated 26.1.2014 and the same reads allegedly attacked by three men and robbed him and held on and screamed and on examination was sick looking with swelling on hand and neck with bruises and opined he had soft tissue injuries resulting from assault and was duly treated and wish to produce the same as Pexhibit.

### **Cross examination by Bosire**

Pexhibit 2 is dated 27.1.2014 but filled on 4.4.014 and assault alleged occurred on 26.1.2014. Timboroa health centre is a government facility and there is no entry before 26.1.014 not after that day. In normal facility lower facilities can use exercise books as treatment chit if they have no treatment chits available.

**Re-examination:** Nil

### **DW1, The Accused**

I come from Timboroa and I split. I did not steal from complainant and yet I was not brought with any exhibit recovered yet they said they found me at the scene.

On that date I was from buying meat at the butchery and I found someone standing and I left but he continued to follow me and he stopped me while saying his phone had been stolen and was talking to another person and shortly he asked that person that they check my pockets and did not find any phone with me and complainant was not satisfied when he was told I did not have any phone.

And another three people came to inquire what the problem was and Pw1 said I had stolen his phone and they asked me to sit down and searched me and they started kicking me and one of them went for a rope and they used to tie me and escort me to the station and while still there a watchman came and pleaded they stop beating and while escorting me to the station complainant did bite me on the right ear and I found his hand and I also bit it and other asked him to stop biting my ear and I was escorted to the station and I was booked in as complainant was asked to come the following morning and I was taken to hospital.

Pw1 insisted I return his phone and I kept telling him I did not have and he can go to Court of law. That is all.

### **Cross-examination by Prosecution**

The incident was at Nyakio near Catholic. I do not reside at Nyakio and I reside in Timboroa Shauri. From scene to my home is around 1 km away. I do not recall date of my arrest and on that date at 9:30 pm I was from butchery in Timboroa in Nyakio and I did not know name of butchery nor owner of the butchery and I am a customer and owner knows me and he sold me the meat and I shall not call him as witness. I was alone when going home. I never used to know complainant herein.

At Catholic Church and where I was arrested there was enough light and you could see someone. I mentioned I was from butchery when Pw1 testified. Its not true I was with other suspects in attacking accused then he laid me. The watchman found me being beaten by eight people and Pw1 was not holding me at that time and I did not deny the same when he testified.

The complainant was drunk at that time and I did not mention his drunkenness when he testified. Pw2 I used to know him as he is a village elder and I had never disagreed with him. The people who sat me down I used to see them in town and I had never disagreed with them.

Pw1 bit my ear and refused to release it at the tip (upper part) and I was taken for medication and my ear treated and the officer has my treatment chit. It was not at 11.00 pm when the offence occurred and I did not know exact time since there was light from Catholic Church its easy for someone to know number of people. We were not three. I did bite complainant on the hand and I do not know if he was injured elsewhere. I heard Pw1 say his phone was stolen.”

### **Issue for determination**

8. There was no disputing that the complainant was bitten by the appellant, and the appellant alleged that he too was bitten by the complainant. The issue arising for determination is whether the assault on the complainant was connected to the alleged robbery in the words of section 296 (2) of the Penal Code as being “at or immediately before or immediately after the time of the robbery.” See *Yaa v. R* (2006) 1 KLR.

9. The matter of withdrawal of the criminal case is for consideration by the DPP in accordance with the Article 157 of the Constitution, and there is no evidence that the DPP had exercised the state prosecutorial powers unreasonably and wrongly in insisting on the prosecution of the appellant despite the indication that the complainant in the case wished to reconcile with the appellant and withdraw the complaint, taking into account the seriousness of the robbery with violence charge facing the appellant.

### **Whether the offence of robbery is proved**

#### ***Proof of theft***

10. Theft is the key aid proving ingredient in robbery cases, whether simple robbery or aggravated robbery with violence. Apart from the

complainant's statement in evidence that the assailants had stolen his salary money Ksh.5000/= - which is not clarified as being part or all of his salary - and his Nokia phone, no other evidence was adduced, as urged by the Counsel for the appellant, that he had on him the said money and mobile phone to support the charge of theft. Was the ksh.5000/- in one pocket, in one denomination or in what denominations was the ksh.5000/- and was it in one bundle or staggered in the different pockets of the complainant and how did the appellant steal it all from which pocket or pockets of the complainant and throw it to the two accomplices who ran off with the money and the mobile phone before the crowd responded to the screams of "*thief, thief*" by the complainant?

11. Until, the Supreme Court decision is *Muruatetu & Anor v. R* (2017) eKLR which elaborated the death sentence is a maximum rather than **mandatory** sentence, the Courts, including the Court of Appeal as shown in *Patrick & Another*, supra, had a general view that the offence of robbery with violence attracted a mandatory sentence. Even with *Muruatetu* and the clarity that the death sentence is a maximum sentence, the offence of robbery with violence remains a very serious offence with severe punishment upon conviction. The trial Courts cannot, therefore, take lightly the requirement of proof of all the ingredients of the offence.

12. As shown in the definition of the offence of robbery in section 295 of the Penal Code, the offences of robbery or robbery with violence under section 296 must first prove **theft** –

### ***295. Definition of robbery***

*Any person who **steals** anything, and, at or immediately before or immediately after the time of stealing it, **uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***

13. The scene was at 11:00pm in the night and the complainant (PW1) was going home from a bar, and even if it is granted that he had been paid his salary that day, on the 26<sup>th</sup> day of the month, it may be that he had spent it or substantial portion of it on alcohol in the bar "Wanjiku Club". How much of his salary was the Ksh.5000/= that was allegedly stolen? Should not evidence of payment of salary that day and in what amount, served to support the allegation of theft taking into account how much, again subject of relevant evidence, was spent in the bar? No evidence was called from person who could have been at the bar to testify that the complainant had with him a mobile phone and no documents of ownership of such a gadget were produced.

14. Pw2 the only other eye witness called testified **that Pw1 claimed that he had been robbed of money and mobile phone**. The stolen items were never recovered and the complainant did not prove by his evidence or that of any other relevant witnesses or documents that he armed and had in his possession at the time of the alleged attack, the items alleged to have been stolen from him to support theft.

15. The considerations as to the ingredients of robbery with violence, which distinguishes the aggravated robbery from simple robbery do not fall into consideration in the **offence of robbery with violence** until theft or stealing is proved. The alternation ingredients of the offence robbery or robbery with violence go to the **manner of execution** of the offence of the **theft or stealing** component of the offence. They are not of themselves **robbery**. They are only the adjectival element of the offence of theft which for the circumstances in which it is done makes it simple robber in circumstances of section 296(1) of the Penal Code, or robbery with violence if under circumstances set out in sub-section (2) thereof. It was of no consequences, therefore, whether or not the Prosecution proved that the appellant was (a) in the company of two other attackers or (b) whether they were armed with dangerous or offensive weapons or (c) whether he or they wounded, struck or beat any person, because the substratum of the offence, that is **stealing**, is not established.

16. The prosecution was, with respect, casual despite the very serious charge of robbery with violence that the appellant faced. If theft or stealing is not proved, the offence of robbery, whether simple or robbery with violence contrary to section 296 (1) or (2) of the Penal Code, respectively, cannot be proved. I do not find that cogent evidence was produced as to the alleged fact of the complainant having had in his possession of money and mobile phone, which the complainant and his alleged colleagues could have stolen.

### ***Identification of the Appellant***

17. The complainant (PW1) had held on to the appellant as the person who had taken his items – the Nokia 1280 mobile phone and Ksh.5000/= and did not let go until the members of the public came to his rescue upon screams of "*thief thief*". Pw2 confirmed that he found the appellant arrested by a large crowd which sought to lynch him, and he came to his rescue by pleading with the crowd not to burn him. The evidence of the Prosecution places the appellant at the scene but the **nature** of the crime, if any, committed by the appellant is subject to further consideration. The Prosecution presents a case of robbery, and that the appellant was one of the robbers.

18. In his defense, the appellant confirmed his arrest by three persons who had come to establish what the matter was upon an allegation by the complainant that he had stolen his phone. He confirmed that he was tied up with a rope as testified by Pw2 and that Pw2 had pleaded with the people to stop beating him. He, however, alleged that he had bitten the complainant in retaliation of the complainant biting him on the right ear. He also confirmed that it was, at the same place near the Catholic Church as testified to by Pw1 and Pw2 and that he was beaten by 8 people.

19. Medical evidence confirmed that the complainant had injuries "*on hand and neck with bruises*" and assessed the degree of injury as "*harm*".

### ***Determination***

20. On the evidence before the trial Court, it was established that the complainant was assaulted by the appellant by biting on the right hand which became swollen and, this injury, together bruises found on his neck were classified as soft tissue injuries to the degree of "**harm**" by the Doctor who examined the complainant using observations 2 months after the fact and record of treatment in treatment notes taken on the date of attack at Timboroa Health Centre.

21. I would reject the Defence's explanation of an out-of-the-blue confrontation by the complainant who demanded return of his mobile phone by the appellant. Why would a person, finding the appellant at butchery "continued to follow me...saying his phone had been stolen."? I find the version of events related by the complainant Pw1, and supported in material particulars as to the arrest of the appellant to be more plausible and Why would the complainant out of the blues follow the appellant who was minding his own business on his way home from a butchery, and at the Catholic church - the same place the complainant claims to have been robbed – demand that the appellant gives him his mobile phone? I do not find in the story by the appellant any reasonable doubt to the fact of **assault** on the appellant.

22. As held above, I, however, do not find the alleged **theft** of mobile phone and Ksh.5000/= to have been proved, and the charge of robbery with violence contrary to section 296 (2) of the Penal Code is, therefore, not proved. It may be that the complainant was attacked by three men as alleged and his mobile phone and money stolen, but the Prosecution did not prove the ingredient of **theft** beyond reasonable doubt, and offence of robbery, simple or robbery with violence, is not proved.

#### **Attempted robbery with violence**

23. Although actual theft was not proved, there is evidence that constitutes to full offence of attempted robbery with violence. The medical evidence proved injuries on the complainant's neck consistent with his evidence of strangulation during the robbery incident. The complainant's evidence that the appellant was in the company of other persons is corroborated by the injuries on the neck which were in his evidence caused by the strangulation by the timber-wielding thug apart from the appellant who allegedly removed the money and mobile phone from his pocket and threw them to the two other thugs when he raised alarm and a crowd of responded. From this evidence there was at least two attackers, the appellant who ransacked the complainant's pockets and the other assailant who strangled the complainant.

24. Section 297 on attempted robbery is in the following terms:

#### **"297. Attempted robbery**

*(1) Any person who **assaults any person with intent to steal anything**, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven 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 assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.*

*[Act No. 24 of 1967, Sch., Act No. 3 of 1969, First Sch., Act No. 25 of 1971, s. 3, Act No. 1 of 1973, s. 2, Act No. 9 of 1976, s. 2, Act No. 5 of 2003, s. 52.]"*

25. The circumstances of this case, where the appellant was in the company of at least one other person and the appellant did assault the complainant by wounding him on the hand by a bite and the other person by strangling the complainant using a timber concealed under his arm, with intent to steal from the complaint the complete act of which was not proved by evidence, bring the offence herein squarely within the proviso of subsection (2) of section 297 of the Penal Code.

#### **Conclusion**

26. The Court has authority of section 180 of the Criminal Procedure Code to convict for an attempt to commit the charged offence, which although not charged, is proved on the evidence before Court, as follows:

#### **"180. Persons charged with any offence may be convicted of attempt**

*When a person is charged with an offence, **he may be convicted of having attempted to commit that offence although he was not charged with the attempt.**"*

27. On the evidence, I find the offence of **attempted robbery with violence contrary to section 297 (2) of the Penal Code** to be proved beyond reasonable doubt.

#### **Sentence**

28. In **Evans Kipruto Tallam v. R** KBT HCCRA NO. 47 of 2017, this Court passed sentence of imprisonment for 10 years for the offence of robbery with violence contrary to section 296 (2) of the Penal Code, where "taking into account her modest value of the stolen items in a mobile phone, spot-light and cash all valued at Ksh.2760/= and the having been no aggravated violence used on any person."

29. In **Yaa v. R**, supra, the Court of Appeal while quashing the conviction from robbery with violence contrary to section 296 (2) of the Penal Code convicted the appellant for **grievous harm** contrary to section 234 of the Penal Code and sentenced him to 12 years imprisonment.

30. In this case, the assault was not aggravated into **grievous harm** and medical evidence assessed the injury as **harm**. The maximum sentence for the offence of attempted robbery c/s 297 (2) of the Penal Code, with the elaboration by the Supreme Court in **Muruatetu & Anor. v. Republic** (2017) eKLR of the death sentence as a maximum rather than a mandatory sentence, is the death sentence. On the principle of **Arissol v. R** (1957) EA 447, 449 of **no maximum sentence on first offender**, the Court shall sentence the appellant to imprisonment for 10 years, taking into account, pursuant to section 333(2) of the Criminal Procedure Code, that the appellant had before

sentence on 14/9/2015 been in pre-trial detention for custody for 1 year 7 months since arrest on 27/1/2014.

**Orders**

31. As the appellant's appeal against conviction for the offence of robbery with violence contrary to section 296 (2) of the Penal Code has succeeded, the conviction and sentence of imprisonment for life therefor, are quashed and set aside, respectively.

32. The appellant is convicted for the offence of **attempted robbery with violence contrary to section 297 (2) of the Penal Code**, and sentenced to **imprisonment for ten (10) years**.

33. The sentence of imprisonment for ten (10) years shall commence on **14/9/2015**, the date of sentence in the trial Court.

*Order accordingly.*

**DATED AND DELIVERED THIS 10<sup>TH</sup> DAY OF JULY 2019.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Mr. Geke, Advocate for the Appellant.

Ms. Macharia, Ass. DPP for the Respondent.