



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 266 OF 2014

MOSES ATIKI OSOROAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.1601 of 2012 of the Chief Magistrate's Court at Nakuru by Hon. F. Kombo– Senior Resident Magistrate)

JUDGMENT

1. **Moses Atiki Osoro**, the appellant herein, was convicted for the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code.
2. I was unable to get the particulars of the charge for the judgment only stated the charge and did not recapitulate the particulars of the offence. There was no record of appeal neither was the lower court file availed.
3. The appellant was sentenced to suffer death. He now appeals against both conviction and sentence.
4. The appellant raised six grounds that can be summarized as follows:
 - a) The learned trial magistrate erred in law and in fact by convicting the appellant on contradictory evidence.
 - b) The learned trial magistrate erred in law and in fact by disregarding the defence evidence.
 - c) The learned trial magistrate erred in law and in fact by meting out excessive sentence.
5. The appeal was opposed by the state through Mr. Chigiti, learned counsel who contended that the prosecution proved their case to the required standards.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
7. The Court of Appeal in the case of **Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR** while addressing the legality of a charge of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code stated:

The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides *that 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 to property in order to steal.* It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge.

The effect of a duplex charge is that it vitiates the trial process.

8. I have perused the entire record and I am of the opinion that the interest of justice will be served, if there is a retrial. It would not be in the interest of justice for me to evaluate the other grounds of appeal.

9. The conviction herein is quashed and the sentence set aside. The appellant to be taken before the Chief Magistrate's Court at Nakuru for retrial by any other magistrate with competent jurisdiction other than Hon. F. Kombo.

DATED and SIGNED at Nakuru this 5th Day of December, 2019

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KIARIE WAWERU KIARIE

JUDGE

DELIVERED at Nakuru this 10th day of December, 2019

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JOEL NGUGI

JUDGE