REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 135 OF 2019

PHILLIP KAIRITHIA MUGWIKA .....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

J U D G M E N T

1. **PHILLIP KAIRITHIA MUGWIKA ("the appellant")** was initially charged with the offence of assault causing actual bodily harm contrary to ***section 251 of the Penal Code***. The charges were thereafter substituted on 27/11/2017 and the accused freshly charged with the offence of robbery with violence contrary to ***section 295 as read with Section 296 (2) of the Penal Code*.**

2. It was alleged that on 14th February, 2016 at Kimari Village in Tigania West Sub-County within Meru County, the appellant robbed **Peninah Kanja** of her jacket and cash Kshs. 170/= and during the robbery did assault the said **Peninah Kanja** by punching and slapping her.

3. After trial, the trial court found that the offence committed by the accused person was not of such profound nature as to have charged him with a capital offence. By dint of ***section 179 (b) of the Criminal Procedure Code,*** the trial Court reduced the charge and convicted the appellant with the offence of simple robbery under ***section 295 as read with section 296 (1) of the Penal Code*** and sentenced him to pay a fine of Kshs. 200,000/= in default to serve three years imprisonment.

4. The appellant was aggrieved by the said decision and appealed to this Court setting out five (5) grounds of appeal that can be summarised into two; *that the trial Court erred by convicting the appellant despite the fact that the prosecution had not proved its case to the required standard and that the trial Court erred in failing to consider mitigating factors thereby meting out at a sentence that is harsh and excessive in the circumstances.*

5. This court as the first appellate Court is enjoined to reconsider and re-evaluate the evidence afresh with a view to coming to its own independent findings and conclusions at all times bearing in mind that it did not have the advantage of seeing the witnesses testify. See **Okeno v R [1972] EA. 32.**

6. The evidence before the trial Court was that on the material day at about 9.00 pm, the complainant (**Peninah Kanja (PW1),**) was a pillion passenger with one **Morris Mwenda** on her husband's (**Kenneth Mutembei (PW2)**) motorcycle. **PW2** was the one ferrying the two from Kagaene Market whereby upon reaching Kathangali Area, they found a woman lying on the ground.

7. **PW2** stopped and the crowd demanded that the woman be taken to hospital. On the passangers disembarking, the appellant emerged from behind and slapped the complainant on the mouth and bit her index finger. The appellant then run away with the complainant's jacket, which **PW1 and PW2** admitted at the trial to be a sweater, which allegedly contained Kshs. 170/=.

8. The matter was reported at Kilunge police station and a P3 Form was issued. Neither the cash nor jacket was recovered. In cross-examination, both man and wife told the Court that they had known the appellant for a long time.

9. **PW3 Marimba Tharamba,** a Nursing Officer at Mbeu sub-county hospital produced the P3 Form which disclosed that the complainant was attended to at the facility on 14/2/2017 with some injuries that were classified as harm. The injuries were caused by a blunt and a sharp object. They were 2 weeks old.

10. **PW4 P.C. Victor Odhiambo** testified on behalf of the substantive investigating officer one **Noah Kipkemboi,** who had been transferred from the station. He told the Court that a report was made at around 2233 hrs on 15th February 2016. That in the course of their investigations, they visited the scenes at Kagaene and Kathagari areas. That at Kagaene area witnesses complained that **PW1** had created

disturbance. He stated that he was not the one who prepared the initial charge sheet.

11. In his defence, the appellant gave sworn testimony and called three witnesses. He testified that on the material day, he was at a local bar where he and his colleagues were taking sodas when the complainant entered. She asked him why he was buying people only sodas. He did not answer her but decided to leave and go home. He was later arrested allegedly for assaulting the complainant. He produced the **Investigation diary as Dexh1** which showed that in the initial report, there was no robbery that was reported but assault.

12. **Stanley Kamenchu and Joseph Kaume** testified as **DW2 and DW3,** respectively. They confirmed being with the appellant at the local bar on the material day and time. They told the Court that **PW1** came to the bar and asked the appellant to buy her beer. The appellant refused and **PW1** taunted him. They advised the appellant to leave the bar and they all left and left the appellant at his home gate.

13. The Court directed the parties to file their respective submissions but as at the time of writing this judgment, only the appellant had filed his submissions.

14. The issues for determination are whether the charge against the appellant was proved beyond any reasonable doubt in accordance with the law and if so, whether the sentence was excessive in the circumstances. The appellant submitted that, there was contradiction as to the injuries sustained by the appellant as well as on the alleged stolen item, whether it was a jacket or a sweater. The appellant submitted that the case was a framed up case for malice. He relied on **Kisii Hccr No. 6 of 2016 Micheal Omwenga Mokua v. Republic** and **Nakuru Cra No. 24 of 2001 Evans Kanai Karanja v. Republic in support of his submissions.**

15. **Section 295 of the Penal Code** 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 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. ''**

On the other hand, ***section 296(1) of the penal code*** provides that any person who commits the felony of robbery is liable to imprisonment for fourteen years.

16. In **Oluoch V. Republic [1985] KLR 549,** the Court held: -

> **"The ingredients of the offence of robbery under section 296(1) of the Penal Code are:**
>
> **a. stealing anything and**
>
> **b. at or immediately before or immediately after the time of stealing,**
>
> **c. using or threatening 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."**

17. In the present case, the complainant alleged to have been robbed and assaulted by the appellant. The appellant produced the Investigation Diary as **DExh.1.** The same shows that, in the initial report, **PW1** only reported that she had been assaulted by the appellant. There was no mention at all of any robbery or loss of any item. It is not lost of this Court, that the initial charge that the appellant faced was one of assault and not robbery. The charge was only amended midstream as the case progressed.

18. The other issue is the conflict between the charge and the evidence tendered. According to the charge sheet, the appellant had robbed the complainant her jacket and cash of Kshs.170/-. The complainant admitted in cross-examination that what was allegedly stolen was a sweater and not a jacket. Her husband (**PW2)** stated that it was a sweater and not a jacket.

19. With such contradictory evidence, this Court is at a loss as to the basis of the conviction. A sweater is not the same as a jacket. The prosecution did not seek to amend the particulars of the charge, although it was all happy to amend a simple charge of assault and upgrade it to a grave charge of robbery with violence.

20. In the circumstances of this case, this Court reads not only malice in the charge but the prosecution's attempt to fix the appellant with a more grave charge of robbery with violence. The testimony of **PW1 and PW2** taken together with the initial report wherein there was no report of reobbery or any theft of any item gives credence to the appellant's contention that these were but tramped up charges.

21. The other issue is the holding that the trial Court arrived at that the prosecution witnesses presented credible and consistent evidence. The record bears the opposite. In the face of the contradictions alluded to above, this finding by the trial Court cannot be supported by the record. To the contrary, the evidence of the defence was not only consistent but also firm even under cross-examination.

22. When a Court makes a finding that one set of witnesses is believable than the other, there must be a basis for such holding and it must specify the basis. The Court need to say why it believes those witnesses and not the other. In the present case, the prosecution witnesses cannot be said to have been consistent and cogent in their testimony as opposed to those of the defence.

23. There is a doubt as to whether there was any theft, and if so, what was stolen. This doubt should have been resolved in favour of the appellant. **See Evans Kanai Karanja v. R (Supra).** The ingredients of robbery were never proved.

24. This case seems to have been that of alleged assault. The prosecution having changed the case from that of assault to robbery with violence, it was satisfied with its choice and this Court will hold it fast on it. The inconsistencies in the evidence of the prosecution witnesses does not present a plausible reason to reduce the offence from robbery to that of assault. There was an element of provocation which is a defence in assault offences under ***section 208 of the Penal Code*** an element which was ignored by the trial Court.

25. The upshot is that the appeal is meritorious and the same is allowed. The appellant is to be forthwith set at liberty unless otherwise lawfully held.

DATED and DELIVERED at Meru this 5th day of December, 2019.

A. MABEYA

JUDGE