



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO. 20 OF 2018**

**EVANS ORITO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal from conviction, judgment and sentences of the appellant herein by Hon. S.N. Lutta (SPM) on 9<sup>th</sup> day of March 2018 in Kisii Principal Magistrate's Court Criminal Case No. 1740 of 2017)**

**JUDGMENT**

1. The appellant **EVANS ORITO** was charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. It was alleged that on 28<sup>th</sup> December 2015 at Rioma sub-location in Marani district jointly with others not before court robbed Mishael Monari of cash Kshs 5,700/= and mobile phone- make Nokia C2- valued at Kshs 5,000/= (the total value being Kshs 10,700)and immediately before the time of said robbery wounded Mishael Monari.
2. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see **Okeno v Republic [1972] EA 32**).
3. The facts leading to this case were that on 28.12.2015, Mashael Monari Pw1 on his way home was surrounded by people who hit his left ear with a weapon. The assailants took away his mobile phone and wallet. Pw1 struggled with one of the assailants (appellant) and as the appellant ran away Pw1 followed him. Upon arriving at the appellant's home, the appellant's mother and brother came out of the house. Edna Nyanchama Pw2 upon hearing noises from her neighbour went to the home of the Appellant. She found Pw1 asking the Appellant why the Appellant had assaulted Pw1 to which the appellant stated that Pw1 was lucky as the Appellant would have killed him. Daniel Onyiego, Pw3 testified that he found Pw1 bleeding and the Appellant told Pw1 that he was lucky as he would otherwise would have killed him.
4. Alex Ombaya Pw4 a clinical officer at Kegogo health centre testified that examined and filed a P3 form in respect of Pw1. Pw1 had sustained injuries on the left ear, chest and right lower limb, concluding that degree of bodily injury was harm. Justus Onyango Pw5 gave evidence that he recorded Pw1's statement and that of the witnesses in this case. He stated that the suspect had gone missing but was arrested on 28.07.2017.
5. The appellant gave a sworn evidence and stated that the complainant has a grudge against him. The complainant is his neighbour and did not know why he was arrested.
6. The thrust of the appellant's case is that the prosecution did not prove its case beyond reasonable doubt and that the appellant was not positively identified on the basis of the evidence tendered by the prosecution. The first issue for determination is whether the appellant was sufficiently identified as the person who attacked Pw1. In **Wamunga v Republic[1989] KLR 424** the Court of Appeal warned that:  
  
***“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.”***
7. It is essential for a trial court before acting on such evidence, to make inquiries as to the presence and nature of light when the offence was committed. From the prosecution evidence, PW1 gave evidence that the people who assaulted him carried a torch. He did not indicate the time he was attacked. Pw1 testified that he struggled with the appellant on the ground, chased the appellant to his home. PW1 asked the appellant why he had assaulted him, to which the appellant informed PW1 that he was lucky, as the appellant would have killed him. PW1 also gave evidence that the appellant was a person known to him. I find that the evidence by the prosecution was sufficient to establish the requirement for identification.

8. This court also has to consider whether the ingredients of the offence the Appellant had been charged with were proven to the required standard, beyond reasonable doubt. The offence of robbery with violence, as well as its ingredients are provided in section 296 (2) of the Penal Code in the following terms:

*“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.”*

9. In the case of **Simon Materu Munialu vs Republic Criminal Appeal 302 of 2005, [2007] eKLR**, the Court of Appeal defined the ingredients for robbery with violence as: *“...the ingredients that the Appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code”*. The Appellant through counsel have submitted that for the offence of robbery with violence to be established it is tantamount for the prosecution to establish theft as it is the central element of the offence- see *Joshua Munyao Kiilu and Another v Republic(2016)*. It was submitted that neither the mobile phone nor the cash alleged to be stolen was recovered from the appellant.

10. In this case PW1 gave evidence that he was attacked by the Appellant and other unknown assailants who stole his mobile phone and cash of Kshs 5,700/-. There were no witnesses to corroborate PW1's allegations of theft. After the said incident PW1 followed the appellant to his home and only inquired why the Appellant assaulted him. PW2 and PW3 gave evidence that PW1 asked the appellant why he had assaulted him to which the Appellant argued answered that PW1 was lucky as the appellant would have killed him. In the case of **Erick Amwata Onono v Republic Criminal Appeal No. 17 of 2015 (2016) eKLR** in which the Court of Appeal stated that:

*“To prove the offence of robbery with violence, the element of stealing must be proved coupled with one or all of the other elements set out in section 296(2), namely that the offender was armed with a dangerous or offensive weapon or instrument; was in the company of one or more others; or immediately before or immediately after the time of the robbery he wounded, beat, struck or used other personal violence on the victim.”*

11. Having reviewed the evidence I find that the appellant was not found with any of the stolen items Pw1 and the other witnesses talked of assault. I find that the evidence does not prove a charge of robbery with violence contrary to Section 296(2) of the Penal Code, and to that extent the conviction was unsafe. It was the evidence of Pw1 that the appellant kicked him on the chest. The said injuries were confirmed by the clinical officer (Pw4) who produced the P3 form of Pw1. Pw1 sustained injuries she had a cut wound on the left ear, chest, and right lower limb. The evidence in my view discloses an offence of assault causing bodily harm contrary to section 251 of the Penal Code. The conviction of robbery with violence is quashed and death sentence meted is set aside. I find the appellant guilty of assault causing actual bodily harm and is convicted of the assault under section 251 of the Penal Code. The maximum sentence in law for the offence of assault is a term of 5 years imprisonment. The appellant has been in jail for about 8 months. The appellant shall pay a fine of Kshs. 50,000/- (fifty thousand) in default he will serve 12 months in jail from the date of conviction.

Dated, signed and delivered at **Kisii** this **16<sup>th</sup>** day of **November 2018**.

**R. E. OUGO**

**JUDGE**

**In the presence;**

**Appellant in person**

**Mr. Otieno            For the State**

**Rael                    Court clerk**