



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CORAM: D.S. MAJANJA J.**

**CRIMINAL APPEAL NO. 10 OF 2017**

**BETWEEN**

**GEOFFREY OMBONGI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence of Hon. J. Mwaniki – PM*

*dated 18<sup>th</sup> April 2016 at the Principal Magistrate’s Court at Keroka*

*in Criminal Case No. 1011 of 2013)*

**JUDGMENT**

1. The appellant, **GEOFFREY OMBONGI**, was charged and convicted on two counts of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)* as follows;

**Count 1:** *On the 26<sup>th</sup> day of September, 2013 at Engomba Village in Borabu District within Nyamira County while armed with an imitation of a pistol jointly with another not before court robbed BS of mobile phone make Samsung, a pair of shoes and wallet all valued at Kshs. 3100/= and at the time of such robbery threatened to use actual violence to the said BS.*

**Count 2:** *On the 26<sup>th</sup> day of September, 2013 at Engomba Village in Borabu District within Nyamira County while armed with an imitation of a pistol jointly with another not before court robbed BN of mobile phone make Techno and a cap all valued at Kshs. 2700/= and at the time of such robbery threatened to use actual violence to the said BN.*

2. Benson Nyabwaro (PW 1) and Benedict Nyanducha (PW 2) were both teachers and neighbours. They testified that they knew the appellant as he lived in the neighbourhood. They recalled that on 26<sup>th</sup> September 2013 they were confronted by two people who pretended to be police officers and who told them to sit down. One of the assailants pretended to be a calling a vehicle to come and pick them while the appellant accused them of smoking cannabis.

3. PW 1 told the court that the appellant had an item which resembled a pistol. The appellant searched him and took his Samsung mobile phone, his shoes and wallet which contained his ID and payslip. PW 2 also recalled that the appellant searched his pockets and took away his Techno mobile phone and cap.

4. As the appellant was still searching them, PW 2 testified that a motorcycle passed by with headlights on and he was able to clearly recognize the appellant who decided to run away. Both PW 1 and PW 2 tried to stop him but to no avail. They also raised alarm causing the neighbours to come.

5. Since they knew where the appellant lives, PW 1 and PW 2 went to the appellant uncle’s home where he resided but he was not there. They were called by the appellant’s uncle on 29<sup>th</sup> September 2013 that he had returned. They proceeded there and searched him. PW 1 testified that the appellant had a piece of wood that resembled a pistol. They also recovered PW 1’s shoes and the Techno phone belonging to PW 2. They took him to Manga Police Station on the same day where he was re-arrested by PC, Fatuma Rashid (PW 3).

6. When put on his defence, the appellant elected to remain silent.

7. The thrust of the appellant's petition of appeal was that the prosecution failed to prove the case beyond reasonable doubt and that the case against him was fabricated.

8. The offence of robbery with violence under **section 296(2)** of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see *Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR*, *Oluoch v Republic [1985] KLR 549* and *Ganzi & 2 Others v Republic [2005] 1 KLR 52*).

9. I have re-appraised the evidence as required by the first appellate court and I am satisfied that a robbery was committed on the date material to this case. Both PW 1 and PW 2 were attacked by more than one assailant and their personal effects stolen as they were threatened with violence.

10. The issue in this case is whether the appellant was identified. The appellant was not a stranger to PW 1 and PW 2 as he was from the neighbourhood staying with his uncle. Although it was a bit dark, PW 1 was able to recognize him clearly when a motorbike passed by with full headlights. PW 2 also recalled that he recognized him. Their evidence is augmented by the fact that thereafter they went to the appellant's home and recovered their items from him.

11. The testimony of PW 1 and PW 2 withstood cross examination, it was credible and there was no hint of a grudge. Apart from identification, the prosecution case was supported by the discovery of the wooden item that the appellant had when he accosted the witnesses and PW 2's Techno phone. The appellant did not give any explanation or account for the possession of those items nor lay claim to PW 2's Techno phone.

112. I therefore find that the offence was proved to the required standard. I affirm the conviction.

13. Following the decisions of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR* and the Court of Appeal in *William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR* declaring the mandatory death sentence unconstitutional, set aside the sentence and call upon the appellant to make his mitigation.

**DATED and DELIVERED at KISII this 1<sup>st</sup> day of NOVEMBER 2018.**

**D.S MAJANJA**

**JUDGE**

Appellant in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.