



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL APPEAL NO15 OF 2015**

**RICHARD MOSE KEYA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal from the conviction and the sentence of the PMs Court**

**at Ogembo of Hon. N Wairimu dated the 16<sup>th</sup> of February 2015).**

**JUDGMENT**

**1. Richard Moses Keya** hereinafter referred to as the appellant is aggrieved and dissatisfied with the conviction and death sentence which was imposed on him on 16/02/2015 by the court at Ogembo. His appeal is against the conviction and sentence.

**2. His grounds of appeal are that;**

i. The Trial Magistrate erred in both law and facts by not considering my defense.

ii. The Trial Magistrate erred in law and facts by convicting him without the first report of the complainant which was supposed to be indicated on the OB at Ogembo Police Station OB No.23 dated 22/07/2013.

**3.** In criminal cases the prosecution's responsibility is to prove their case beyond reasonable doubt. This onus does not shift to the accused person. The trial court found that the prosecution had discharged its onus. The duty of this court is to re-evaluate, re-assess and re-analyze the evidence afresh in order to reach its own conclusion. This court notes that the trial court had the opportunity and the advantage of observing the demeanor of the witnesses (*see Okeno v R. [1972] E.A. 32 and Pandya v R. [1957] E.A. 336*).

**4.** The appellant was charged before the PM,s Court at Ogembo with the offence of Robbery with Violence contrary Section 296 (2) of the Penal Code. The particular of the offence are that: "On the 1<sup>st</sup> day of July 2012, at Turwa sub location in Nyamache district within Kisii county jointly with others not before court robbed Suzfine Kemunto Richard ,two T.V set make Panasonic, a solar panel, sonny radio cassette , three amplifier and 2 mobile phones make Forme all valued at Kshs. 41,500/- and during such time of such robbery used actual violence to the said Suzfine Kemunto Richard. The appellant pleaded not guilty and the case was heard. The prosecution called 6witnesses. Pw1 was Josephine Kemunto the complainant, Pw2 was NM ( minor, 14 years) , Pw3 was VM ( minor 11 years), Pw4 was Tom Nyatete a chief at Bassi Masige East Location Nyamache District, Pw5 was Doctor Okinyi David, Pw6 No.55129 P.C Musimi Munyao the investigating officer . The appellant gave a sworn statement in his defense.

**5.** The evidence as adduced by the prosecution was as follows; On the night of 1<sup>st</sup> July 2012 Pw1 the complainant and her children aged 13,11,9, 7 and 4 were in her house at Turwa sub location. They heard people breaking their front door of their house. The children began to cry. They were ordered to keep quiet by the robbers. The robbers took 2 television sets, 3 amplifiers, 2 solar systems, 2 phones and a radio cassette. During the robbery they were removed from their beds and kept in the sitting room. Pw1 was asked for money and upon telling the robbers that she did not have money she was cut on the head with a panga. Pw2 screamed and she was also cut on the head. According to Pw1, Pw2 and Pw3, the appellant who was amongst the thieves. He is a person they know. That before leaving their house the appellant threatened them that he would be back if they reported the matter and if they screamed they would return. The next morning Pw1 went to report the robbery to the assistant chief who promised to have the appellant arrested. Pw1 and Pw2 went to hospital and they were treated and the P3 forms of Pw1 and Pw2 was filled on the 29<sup>th</sup> of July 2013. Sometime in 2013 Pw1 heard that the appellant had been arrested on another charge. Pw1 reported the robbery to the police and the appellant was charged.

**6.** The appellant in his defense testified that in August 2011 he had a scuffle with his 2 brothers after he heard them discuss their land. He

objected suggesting that the land be subdivided. That on the 26<sup>th</sup> of January 2012 whilst on his way to his home from his sister's place he met the area chief and some elders and after he had walked a short distance he heard someone shout "mwizi" which promoted the elders and some young men to attack him leaving him for dead. He was put in a vehicle belonging to Nyangusu Police Station with injuries to his head he was admitted for one week. On being discharged he was taken to Nyangusu police station where he was charged with the offence of being in possession of bhang in CR. No. 164/12 and was released on a cash bail of Kshs.3000/-. That on the 8/1/2013 whilst riding on a motor cycle heading for Igare the area chief was in the DO's vehicle when the AP officers who were in the same vehicle started shooting at him and the rider. He managed to get away and he reported the incident at Ogembo Police Station on the advice of his uncle. He was asked to seek medical attention first and when he returned his complaint had not been reported in the OB and he was asked to return after 3 days. That on the 19/1/2013 at 8pm he was in his home with his wife and child when the chief went there with other people and they tied his hands. When he declined to accompany them before alerting his brother the chief and one Nyaikenya said, "Simumaliza twende" promoting the other people to start cutting him with pagans and he sustained a cut on the back his head left elbow, right and both legs. He called his wife to raise alarm this prompted members of public to respond and when they saw his condition they informed the assistant chief who gave him a letter addressed to Kisii level 5 hospital where he was admitted until May. He produced the letter from the assistant chief and a discharge summary from Kisii level 5 hospital. He testified further that on the 22/7/2013 at midnight the same people returned and set his house on fire. He was unable to record his statement the next day as the officer who was investigating his case was not. He recorded his statement on the 24<sup>th</sup>. He produces a letter given to him by the area assistant chief which he used to make the report at Ogembo and a copy of his statement and that of his wife. That at the police station he was advised to go back for a P3 form and on the 23/ 7/ 2013 he went with police officers to his home where photographs were taken and on the 29<sup>th</sup> whilst going to pick his pickup he was arrested by the area chief and on the way they picked a woman from Motanya who alleged that he had robbed her on the 1/7/2012. He was brought to court and charged with threatening to kill Jason Nyachoti Keya in Cr. No.1121 of 12 and later with the offence of robbery which he knows nothing about and did not commit. He argued there was no report in no OB 1<sup>st</sup> report for 1 year yet he was at home throughout and there was no warrant to show why no report was made. He indicated that he had no witnesses as his wife who was his witness had left after their home got burnt and he has not seen her since them.

7. I have considered the appellants submission, the prosecution submission and the evidence adduced. The appellant was charged with robbery with violence. From the evidence adduced there is evidence from the complainant and her 2 children Pw2 and Pw3 that they were robbed on the night of 1<sup>st</sup> July 2012. Pw1 stated was injured after she was cut with a panga, she sustained a cut on her head and Nancy an injury on the head too.

8. The next issue is whether the appellant was one of the robbers. Pw1 testified that she was able to identify the appellant from his voice. He talked to her. He told her, Nimekuja mara ya kwanza hi ni kionjo mkisema tena nitarudi. He even called her by her name Kemunto. Pw1 testified that there was a hurricane lamp in the house which enabled them to see the persons who had entered the house. That she was able to see the appellant for after they finished taking the items out the appellant turned back and told them he would be back. Pw2 identified the appellant as the one who hit her with a panga. She also repeated what the appellant told them "hii ni mara ya kwanza mara ingine nitawanyonga". Pw3 identified the appellant as the one who went back into the house. Pw1, Pw2 and Pw3 testified that they knew the appellant before and that he is their relative. I note that they were consistent in their evidence. They were able to identify the appellant as one of the persons who robbed them on the material night. They explained that the robbery was reported to the assistant chief who promised to inform the chief and that they did not report to the police as they thought the chief would take action. Pw1 also explained that they lived in fear as the appellant had threatened to return and finish them in the event they made a report. On the medical report Pw1 explained that she treated at Nyamache. I am satisfied that the appellant was identified as one of the robbers who robbed Pw1 on the 1/7/2012. Pw4 testified that he attempted to arrest the appellant but he ran away.

9. On the appellant's defense the trial magistrate considered his defense and noted that the appellant's defense that Pw4 had a vendetta with the appellant was not proved as they were unsubstantiated allegations which were insufficient to raise reasonable doubt on the authenticity of the claims by the complainant. I have considered the defense raised and I too find that it casts no doubt on the prosecution case. The link the appellant wants to create between his relationship with the chief is farfetched in light of the evidence adduced. This court went ahead and called for the OB record he sought. The said record was an alleged assault on the 19/1/2013 a date beyond the date of the alleged offence.

10. On the contradiction of Pw1 and Pw7 evidence on the source of light Pw7 was not in the house on the material night. His evidence on lighting does not in any way weaken the prosecution. If there was contradictory evidence from Pw2 and Pw3 on the kind of lightning then that could have dented the prosecution case. There was also no need for the investigating officer to take photographs of the scene as he was receiving the report months after the incident took place.

11. There is however the issue of whether Pw1 and Pw3 were injured on the material night of the robbery. Their P3 forms were filled on the 30/7/2013, the injuries indicated for Pw1 was cut wounds, her injuries were said to be a month old and Nancy's P3 form indicates she was injured a week before the 30/7/2013. The said P3 forms do not support injuries alleged to have been obtained on the 1/7/2012. The evidence adduced however proves an offence of robbery not robbery with violence. I therefore substitute the conviction with one of robbery contrary to section 296 (1). The death sentence meted on the accused is set aside and call upon the appellant to make his mitigation.

Dated signed and delivered at Kisii this 20<sup>th</sup> day of **November 2018**

**R.E. OUGO**

**JUDGE**

**In the presence of;**

**Appellant**

**In person**

**Mr. Otieno**

**Senior State Counsel**

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court/ clerk