



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 104 OF 2014**

**VINCENT ISIAHO .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(An Appeal from the Judgment of the Principal Magistrate Honourable B. Mosiria in Kapsabet Criminal Case No. 2032 of 2012, dated 24<sup>th</sup> June, 2014)*

**JUDGMENT**

1. The appellant *Vincent Isiaho* was charged in the lower court in two counts with two different offences.
2. In the first count, he was charged with the offence of robbery with violence contrary to *Section 295* as read with *Section 296(2)* of the *Penal Code*. It was alleged that on the 16<sup>th</sup> day of August, 2012 at around 8.30 p.m at Surunga village in Nandi County, jointly with others not before the court, he robbed *James Akeng'o Mufumbwa* of Kshs. 3,000 while armed with rungun.
3. In the second count, he was charged with the offence of assault causing actual bodily harm contrary to *Section 251* of the *Penal Code* the particulars being that on the same day, time and place, he assaulted *Hardson Imbwenya Ochieng* on his right leg using a stick occasioning him actual bodily harm.
4. After a full trial, the learned trial magistrate found the appellant guilty of the offence charged in count 1 and convicted him accordingly. He was sentenced to death. No finding was made in respect of the charge of assault causing actual bodily harm. It was left in abeyance owing to the conviction and sentence in count 1.
5. The appellant was aggrieved by his conviction and sentence. He appealed to this court vide a petition of appeal filed on 4<sup>th</sup> July, 2014. He thereafter filed amended grounds of appeal on 4<sup>th</sup> July, 2016 without leave of the court but on 3<sup>rd</sup> November, 2016, the appellant successfully applied that the amended grounds be admitted on record and be deemed to have been filed with leave of the court. Consequently, the amended grounds shall form the basis of the appellant's appeal.
6. In the amended grounds of appeal, the appellant set out four grounds which are that; the learned trial magistrate erred in law and in fact by convicting him on contradictory and uncorroborated evidence; in convicting him without considering the discrepancies between the evidence of the clinical officer and the P3 form he filled; in convicting him without considering the variance between the particulars of the charge and the evidence adduced by the prosecution witnesses and lastly, that the trial magistrate erred in convicting him on identification evidence which was marred by errors.

7. During the hearing, the appellant who was not represented by counsel chose to rely entirely on hand written submissions which he presented to the court. In his submissions, he claimed that the evidence on the basis of which he was convicted was insufficient to prove the offence of robbery with violence beyond any reasonable doubt. He contended that the evidence was contradictory and that in his view, PW1 and PW2 were not credible witnesses. He also challenged the validity of the charge sheet claiming that it was defective; that the evidence tendered by the prosecution was at variance with the particulars supporting the offence.

He also averred that he was not positively identified as the incident took place at night. He relied on the case of *Kiarie V Republic (1984) 739* where the Court of Appeal held that where the evidence relied upon to implicate an accused person is entirely that of identification, the evidence must be watertight to justify a conviction.

8. In her response, learned prosecuting counsel *Ms Oduor* opposed the appeal arguing that the prosecution adduced sufficient evidence to prove every element of the offence beyond any reasonable doubt; that the appellant was correctly identified by PW1 and PW2 as one of the persons who participated in the robbery; that the appellant was found in possession of a mobile phone and a jacket belonging to PW1 which had been stolen during the robbery. She also disputed the claim that the charge sheet was defective. She urged the court to dismiss the appeal for lack of merit.

9. This being the first appellate court, I am obligated to re-evaluate and reconsider all the evidence tendered before the trial court to arrive at my own independent conclusions. In doing so, I should be careful to remember that unlike the trial court, I did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage.

See – *Pandya V Republic (1957) EA 336; Njoroge V Republic (1987) KLR 19.*

10. I have carefully analysed all the evidence presented to the trial court, the grounds of appeal, the judgment of the learned trial magistrate and the submissions made by both parties.

11. The appellant has complained that he was convicted on a defective charge sheet. I have perused the charge sheet. On the face of it, the charge sheet is not defective. It contains the statement of the offences charged in each count and sufficient particulars supporting the offences charged.

But with specific reference to count 1, I agree with the appellant that to some extent, the evidence adduced by the prosecution witnesses did not support the offence charged as far as the weapon the assailants were allegedly armed with during the robbery is concerned. In their evidence, PW1 and PW2 claimed that the four men who assaulted and allegedly robbed PW2 were armed with sticks or pieces of wood and not *rungus* as stated in the charge sheet.

12. The above is however not a serious anomaly considering that the offence of robbery with violence can still be proved irrespective of whether the offender was armed with any weapon if there was proof that theft actually occurred and that the offender was in the company of one or more other person at the material time or if at or immediately before or immediately after the time of the robbery, violence was inflicted on the victim or any other person. See: *Johana Ndungu V Republic Criminal Appeal No. 116 of 1995; Hillary Kemboi Seurei V Republic Criminal Appeal No. 20 of 2015 (Eldoret) 2016 eKLR.*

13. Having said that, on my re-appraisal of the evidence on record, I find that the evidence of PW1 and PW2 who were the key prosecution witnesses was insufficient to prove beyond doubt that PW2 was indeed robbed of Ksh. 3,000 during the incident. Their evidence was not only contradictory on this aspect but also confusing. PW2 claimed that he had Kshs. 3,000 in his jacket. The money was stolen minus the jacket. PW1 who was in his company and who ideally should have seen what was transpiring between PW2 and the robbers considering PW2's claim that he had a torch which he shone on them did not say that he witnessed PW2 being robbed. He only claimed that the accused was later found in possession of a jacket and a phone a day after the robbery which PW2 identified as items stolen from him during the robbery. PW2 did not however claim in his evidence that a jacket and a mobile phone had been stolen

from him during the robbery. He only complained about the loss of cash in the sum of Kshs 3,000. With this kind of evidence, it is doubtful whether PW2 was actually robbed of the money as alleged.

14. In my view, learned trial magistrate did not subject the evidence placed before her to thorough scrutiny as she was required to do. She laid a lot of emphasis on the claim that on the following day, the appellant offered to take PW2 to hospital and sought his forgiveness. But this by itself does not amount to prove that the appellant actually committed the offence charged in count 1. There was no evidence to indicate why the appellant allegedly sought forgiveness from PW2. There is therefore a possibility that he may have sought forgiveness for other reasons other than that he was guilty of having committed the offence as charged.

15. In view of the foregoing, I find that the appellant's conviction in count 1 is unsafe and cannot be allowed to stand. Consequently, the conviction is hereby quashed and the sentence of death set aside.

16. That said, I have noted that the trial magistrate did not make any finding in respect of count 2. This was an error. She ought to have pronounced her decision in that count as well and it is only if her decision resulted into a conviction and sentence that she would have held the sentence in abeyance in view of the death sentence imposed in count 1.

17. On my part, given the evidence on record, I am satisfied that both PW1 and PW2 were attacked by four men on the material date and that the appellant herein was positively identified through torch light as one of the assailants. Both witnesses knew him previously as a motor bike rider. The appellant confirmed this description in his statement in defence. It was therefore a case of recognition which is always more satisfactory and reliable than the identification of a stranger. See – Anjononi & others V Republic (1980) KLR 59. There is undisputed evidence that as a result of the attack, PW1 sustained injuries which were classified as harm in the P3 form produced as Pexhibit 4 by PW4.

18. In the premises, I am convinced that the offence of assault causing actual bodily harm as charged in count 2 was proved against the appellant beyond any reasonable doubt. I thus enter a conviction against the appellant in count 2 and noting that he was a first offender, I sentence him to 2 ½ years imprisonment from the date of conviction. The period already served to be computed within the period of that sentence.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 15<sup>th</sup> day of February 2017**

In the presence of:

The appellant

Mr. Mwaura for the State

Mr. Lobolia Court Clerk