



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL CASE NO. 68 OF 2015

[Being an appeal arising from Sentence and conviction of Kitale Chief Magistrate' v.w. wandera delivered 25/5/2015 in criminal case no 648 of 2012)

JOSEPH MUSAMIAAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The appellant and others were charged with the offence of **Robbery with Violence contrary to Section 296(2) of the Penal Code**. The Particulars of the offence were that on the **4th December 2011 at Hututu village in Trans Nzoia County while armed with sticks the accused person jointly robbed Robert Sabuni Sudi of Kshs 30,000/- and during the said robbery used actual violence against him.**
2. The appellant was convicted of assault and sentenced. The rest of the co-accused were set free. The appellant herein filed this appeal which the state conceded.
3. The facts of this matter as set out by the prosecution witnesses shows that the complaint was attacked in his house around 10 pm. He said that Francis Wabwoba and Wafula came to his house at that time and after speaking with him left. However as they left they attacked him as he opened the gate. He stated that the rest of the accused participated in the attack. He called for help and the village elder PW2 came to his rescue.
4. He also said that he had lit a tin lamp and with that and the moonlight he was able to see and recognise his assailants who were his neighbours for over 20 years.
5. **PW2 Godfrey Wamalwa Wafula** the village elder testified that he heard people singing luyha circumcision songs which was very unusual at the home of the complainant. He rushed to the scene and he found the complainant bleeding from the head. He told him that it was the appellant and others who had assaulted him.
6. **PW3 Patrick Opiya Oladi** testified that he had gone to see the complainant over a burial issue when he heard people singing Bukusu circumcision song and shouting “thief thief.” He found the complainant crying at his gate and the 1st appellant beating him. He rushed to inform his brother and when he arrived he found the attackers having left and the complainant in his house bleeding from the head. He did also mentioned the names of the attackers.
7. **PW6 John Koima** the clinical officer produced the P3 form on behalf of the complainant which shows

that he had injuries on his head.

8. After the closing of the prosecution case the appellants offered no defence and the court proceeded to convict and sentence them.

9. I have perused the entire evidence and I am in agreement with the trial court that the charges of robbery were not established by the prosecution against the appellant. There is no evidence that there was actual robbery committed and thus reducing the same to simple assault was proper.

10. In the petition of appeal among the grounds raised by the appellant is that the prosecution failed to call the investigating officer and that the medical evidence produced did not support the charge. That there were glaring contradictions in the prosecution evidence.

Although the learned state counsel conceded to the appeal this court is not bound by such concession and thus it must arrive at its own independent findings.

11. Turning to the first ground of appeal, it is true that the prosecution did not call the investigating officer to shed light on why he decided to charge the appellants. Ordinarily it is common knowledge and it is the investigating officer who is usually expected to tie up the prosecution case. That is always a presumption. Practically however there is nothing to bar the evidence already on record to sustain a charge.

12. In this case I am satisfied that the evidence of the complainant significantly placed the appellant at the scene. They spent sometime inside the complainant's house. As soon as they assaulted the complainant, he raised alarm and PW3 came and in fact witnesses the 1st appellant beating up the complainant. PW2 equally rushed to the scene and the complainant was able to inform him who the assailant were. In fact the light from the tin lamp and the moon aided the complainant in recognising his assailants who were apparently his neighbours.

13. Consequently I do not find any case of mistaken identity.

As regards the injuries, although, the P3 form was filled 53 days later, the medical documents relied on by PW4 were in my view sufficient. The complainant stated that he took time to heal and thus the P3 form was filled later. In any case there is no prescribed time for the filling of the P3 form and thus the 53 days cannot be considered inordinate delay.

14. Was there any glaring contradiction in the evidence as presented by the prosecution? I do not think so. The complainant evidence was clear and straight forward. All that he failed to prove was the theft of Kshs 30,000/- but he managed to establish that he was assaulted.

15. Neither do I find the sentence excessive. The trial court clearly relied on the probation report which was favourable for them to serve non-custodian sentence.

16. The appeal is otherwise dismissed.

Delivered this 9th day of March 2017.

H.K. CHEMITEI

JUDGE

In the presence of;

Chebii for the Appellant

Kakoi for Respondent

Kirong – Court Assistant