



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL APPEAL NO. 46 OF 2015

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 29 of 2014 of the Chief Magistrate's Court at Naivasha – E. Kimilu, Ag. PM)

STEPHEN MAINA KIMANI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant was tried and convicted for the offence of Robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars stated that, on the 23rd day of December 2013, at Kosovo village in Naivasha Municipality, within Nakuru County, being armed with a dangerous weapon namely slasher, he robbed **Samuel Wambugu** Kshs 10,000/= and immediately before the time of such robbery used actual violence to the said **Samuel Wambugu**. He was sentenced to death.

2. Aggrieved with the outcome, he lodged the present appeal, based on three amended grounds of appeal as follows:-

“1. THAT the learned trial magistrate erred both in law and fact when he convicted and sentenced me to death yet failed to find that the first report of the incident does not support robbery with violence, hence a fabricated charge.

2. THAT the pundit trial magistrate erred both in law and fact when he convicted me in the present case yet failed to find that the trial was irregularly conducted as key witnesses did not identify vital exhibits.

3. THAT the learned trial magistrate erred both in law and fact when he dismissed my defence and imposed an unconstitutional sentence of death contrary to Article 26 of the Constitution of Kenya (2010).” (sic)

3. In support of the grounds, the Appellant tendered written submissions. Regarding grounds 1, 2, and 3 he submits that there was no report of robbery made by the complainant in his initial report to police, and neither did his companion **PW4** support the complainant's account that he was robbed.

4. Secondly, that the complainant did not identify the panga/slasher allegedly used in the commission of the crime, and how it was recovered after the offence. He finally complained that his defence was not taken into account by the trial magistrate. In particular his narration of the material incident, which disputed the alleged robbery against the complainant.

5. The appeal was opposed by the Director of Public Prosecutions. Through Miss Waweru the Director of Public Prosecutions submitted that the incident in question occurred during daytime and that **PW1** and **PW4** identified the Appellant. That the weapon in question was identified and produced in court, and further, medical evidence proved the injuries inflicted on the complainant in the attack, during which he lost the sum of Kshs 10,000/=.

6. The duty of the first appellate court was stated in **Pandya -Vs- Republic [1957] EA 336** as follows:

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

7. The court has to consider the evidence at the trial and submissions on both sides of the appeal and draw its own conclusions. The prosecution case was that the Appellant and **Andrew Njuguna (PW4)** were potato farmers at **Eburru** aka **Kosovo** near a place called Ndabibi. On 23/12/2013 **Samuel Wambugu (PW1)** a trader, went to the area seeking to buy potatoes. When he got to the Appellant’s farm, the Appellant was hostile because **PW4** passed through the Appellant’s farm while proceeding to **PW4’s** where he eventually purchased potatoes. The Appellant claimed that the **PW1** and **PW4** had trespassed on his farm. As **PW1** and his team started harvesting potatoes on **PW4’s** farm, the Appellant approached them while armed with a slasher.

8. He uttered angry words before attacking **PW1** on the head with the slasher. A struggle ensued and because an alarm was raised, the Appellant fled the scene, leaving behind his slasher and marvin (woolen cap). A report was made to police after the Appellant was spotted at **Centre One**, at Kosovo. The complainant sustained a deep cut on the forehead and neck for which he was treated and stitched. The doctor assessed the degree of injury as grievous harm.

9. In his defence, the Appellant testified that on the material date the complainant and a group of other persons found him at his farm. He and **PW1** (complainant) held discussions on the possible sale of potatoes and other crops. They did not conclude a sale and they left. On 7/12/2014 while he was going about his business he was arrested. Police took from him Shs 13,000/= which was not returned to him. He denied committing the offence.

10. There is no dispute that the Appellant and the complainant encountered each other on the material date at the Appellant’s farm and discussed the possible purchase of farm products by the complainant. No deal was concluded however and the complainant moved on to **PW4’s** farm. The sole question that was in dispute was whether the Appellant engaged the complainant in a confrontation on the said occasion and robbed him after attacking and injuring him.

11. It is apparent from the judgment of the trial court that the court was alive to the ingredients of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The court further sought guidance from decided authority, in this case **Oluoch -Vs- Republic (1985) KLR 549** where the court observed that:

“It is apparent that for a conviction to stand, prosecution should prove that the robbery victim was not only robbed but also that at the time of the robbery, any of the following circumstances were in existence:

a) The Accused was armed with any weapon or instrument that may be deemed to be dangerous or offensive.

b) The Accused was in company of one or more persons.

c) Immediately before or immediately after the time of robbery, the Accused wounded, beat up, struck or used violence to any person.”

12. The incident occurred during day time and there is overwhelming evidence that using a slasher, the Appellant attacked and injured the complainant. It may well be, as the Appellant argues that there was a mix up as to which slasher was handed over to the police and by who. That however does not detract from the substance of evidence by **PW1** and **PW4**.

13. The Appellant was apparently displeased that the complainant and **PW4** had “trespassed” on his farm while headed for **PW4**’s farm where, **PW4** purchased potatoes. The injuries sustained by the complainant are consistent with the attack by a sharp weapon such as a slasher (see **P3 form** marked **Exhibit 1**). It is not likely that **PW1** and **PW4** falsely implicated the Appellant for the severe injury sustained by the complainant. Neither is it believable as the Appellant’s defence suggested that there was no incident between him and the complainant beyond a cordial business discussion.

14. However, regarding the element of actual stealing that was allegedly accompanied by violence, I have doubts whether the prosecution proved that **PW1** lost Shs 10,000/= in the attack. There was no evidence that he had the money in the first place, and neither did **PW4**, who was close by witness the Appellant remove the money from the complainant’s pocket. What **PW4** confirmed was that after the attack a struggle ensued between the Appellant and the complainant.

15. I agree with the Appellant’s submissions that there was insufficient evidence in proof of the element of stealing accompanying the violence. In the circumstances, I would quash the conviction in respect of robbery with violence contrary to Section 296 (2) of the Penal Code.

16. From the evidence by **PW1** and **PW4**, the Appellant was angered that they had “trespassed” on his farm and possibly that **PW4** made no purchase from his farm. He seemed to have had some earlier animus against **PW1**. Angered, he proceeded to arm himself with a slasher as he confronted the men, slashing **PW1**. His actions evince an intention to get even by doing harm to the persons he viewed as having offended him. In the circumstances, I substitute a conviction for the offence of Doing Grievous Harm Contrary to Section 231 (a) of the Penal Code. The Appellant was said to be a first offender. Even then, he inflicted very severe injuries on the complainant. He took the law in his hands to punish **PW1** for alleged trespass. It is miraculous that **PW1** survived the deep neck cut.

17. In the circumstances while setting aside the death sentence imposed on the Appellant by the trial court, I would sentence the Appellant to an imprisonment term of eight (8) years, from the date of his sentencing (13/3/2015). To that extent only, the appeal has succeeded.

Delivered and signed at Naivasha, this 16th day of **March, 2017**.

In the presence of:-

Mr. Mutinda for the DPP

C/C – Barasa

Appellant – present

C. MEOLI

JUDGE