



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 186 OF 2011**  
**ANTONY MAIGUA GITUCHU.....APPELLANT**  
**VERSUS**  
**REPUBLIC .....RESPONDENT**

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 8440 of 2003 delivered by Hon. Mwangi, SPM on 4<sup>th</sup> March 2005).

**JUDGMENT**

**Background**

Antony Maigua Githuchu, the Appellant herein was charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the charge were that on 1<sup>st</sup> February, 2002 at Bulbul in Kajiado District within Rift Valley province, robbed one Mary Wambui Maigua of a wrist watch and cash Kshs. 2,000/- and at or immediately before or immediately after the time of such robbery beat the said Mary Wambui Maigua.

The Appellant was convicted accordingly and sentenced to death. He was dissatisfied by both the conviction and sentence and he preferred the instant appeal. In the amended grounds of appeal dated 8<sup>th</sup> May, 2017 he faulted the charge sheet as defective as it did not disclose an offence known to law. He also faulted the trial court for shifting the burden of proof to him and finally that the trial magistrate erred when she found him guilty.

**Submissions**

The appellant relied on written submissions filed on 8<sup>th</sup> May, 2017. He submitted that the charge sheet was defective because he was charged with an offence which was not known in law. In that regard, he was of the view that the evidence adduced did not support the charge. His further submission is that the evidence adduced by the prosecution did not support the charge of robbery with violence. In particular, he took issue with the fact that the prosecution failed to demonstrate that he was armed at the time of the incident. Accordingly, if the court were to find him guilty, he ought to have been convicted for the offence of simple robbery. He emphasized that although a kitchen knife was recovered, the same was not dusted for finger prints to confirm that he had used it. He could not therefore be linked to the robbery. The appellant further took issue with the learned trial magistrate's misdirection that there did not exist a grudge between himself and the complainant. He submitted that he had demonstrated that there was a land dispute between them which motivated the complainant to implicate him. Finally, it was his

submission that the prosecution did not prove the case beyond a reasonable doubt.

Learned State Counsel M/s Sigei opposed the appeal. She submitted that the prosecution had demonstrated that the appellant attacked PW1 with a knife as she walked to her house. He then strangled her leaving her for the dead before he fled after hearing some movements near the scene. PW2 confirmed seeing the appellant at the scene which evidence corroborated that of PW1. According to PW2, himself and one Margaret were workers of PW1. They had been waiting for PW1 who had been visited by the appellant. After PW1 arrived, they left her with the appellant. The appellant was PW1 husband brother's son. He informed PW1 that he wanted to talk to her husband. She informed him that he was at the shop where he could see him. The appellant then informed PW1 that he wanted to pick up his clothes. As they walked into the house, the appellant viciously attacked her. According to Miss Sigei, the failure of the appellant to offer a defence demonstrated that he agreed with the prosecution's case. On whether the charge sheet was defective, Miss Sigei submitted that **Section 296(2) of the Penal Code** provided for the elements of the offence that required to be proved. She submitted that although the provisions did not describe the offence itself, it was not prejudicial to the appellant. She was of the view that the offence had been proved beyond a reasonable doubt and urged that the appeal be dismissed.

### **Evidence**

In total, the prosecution called four witnesses. **PW1 Mary Wambui Maigua** was the complainant. Her testimony was that on 1<sup>st</sup> December, 2002, at about 5.45 p.m., as she approached her gate, she saw two of her workers, John Onyango and Margaret standing by the farm in the company of the appellant. She had an appointment to see the three of them. She released Margaret and John Onyango and was left with the appellant. The appellant was PW1 husband's son. He informed PW1 that he wanted to stay in her home overnight so that he could speak to his father (PW1's husband). She informed him that her husband was at the shopping centre where he could meet him. The appellant then informed PW1 that he required to pick up his clothes before leaving to see his father. Together with PW1, they started walking towards the house. As they entered the house, the appellant held PW1 by the neck and threatened to kill her. A struggle ensued as PW1 tried to flee herself. The appellant tried to strangle her and she started screaming for help. He removed a knife with which he tried to stab her. PW1 was able to get hold of the knife and throw it away. She continued to scream for help as the appellant demanded for money. She told him to pick some Kshs. 2000 from her handbag. Some people came to the compound and that is when the appellant fled. PW1 sustained injuries to the neck, knees, eye and ear. She sought treatment and reported the matter to the police. As the appellant fled, he dropped his hat, knife and a rug. PW1 identified the knife in court. The other exhibits were also produced.

**PW2 John Onyango Awai**, corroborated the evidence of PW1 to the extent that on the material date and time preceding the incident he left PW1 with the appellant. He later learnt that the appellant had assaulted PW1. He witnessed her with a swollen face. His further testimony was that PW1 informed him that the appellant had stolen Kshs. 2000/ from her handbag.

**PW3, PC Issac Kinoti** of Ngong Police Station investigated the matter. He visited the scene and collected the knife which he produced as an exhibit. On 11<sup>th</sup> February, 2002, he received information that the appellant had been arrested and was being held at Kikuyu Police Station on suspicion of having committed murder. He went and took necessary action and charged him. According to PW2 and 3, the appellant was a son to PW1's husband. PW3 testified that the appellant stole some personal effects including money from PW1.

**PW4, Dr. Zephania Kamau** of Police Surgery examined PW1 on 5<sup>th</sup> February, 2002, following an assault incident. He observed blood in the left eye which had formed a haematoma. She also had scratch marks on the right side of the neck and bruises on both legs. He formed an opinion that the injuries were inflicted by a blunt object and scratches. He assessed the degree of injuries as harm. He adduced the P3 Form as exhibit.

After the close of the prosecution case, the trial court ruled that the prosecution had established a prima facie case and accordingly put the appellant on defence. The appellant opted to keep quiet and await the

court's verdict.

### **Determination.**

After considering that evidence on record, it is now the duty of the court to determine whether the charge sheet was defective and whether the case was proved beyond a reasonable doubt. On whether the charge sheet was defective, the appellant submitted that he was charged with an offence not known in law because Section 296 of the Penal Code does not define the offence of robbery with violence. I concur with the appellant to the extent that a charge sheet is said to be defective if it does not provide for an offence known in law. It can also be defective if it is drafted in such an unambiguous manner as to render the accused not to understand the offence facing him. In that regard, an accused would not be in a position to mount a defence against the prosecution case.

In the present case, the appellant was charged with robbery with violence contrary to **Section 296(2) of the Penal Code**. The provision itself spells out the elements of the offence of robbery with violence. The offence of robbery itself is defined under **Section 295 of the Penal Code**. In this case however, the appellant was not charged with the offence of simple robbery but with robbery with violence. The prosecution was therefore enjoined to draft the charge under **Section 296(2)** as opposed to **Section 295 of the Penal Code**. It behooved the prosecution to prove the elements of the offence charged. **Section 295** would only apply if the evidence adduced does not establish the offence charged but of simple robbery. In such a case, this court would exercise its powers under **Section 179(2) of the Criminal Procedure Code** to substitute the offence of robbery with violence with the offence that the evidence discloses. Accordingly, I find and hold that the charge sheet was not defective.

I now delve into whether the charge of robbery with violence was proved. The elements of the offence are defined under **Section 296(2) of the Penal Code** as:

**“If the offender is armed with any dangerous or offensive weapon or instrument , or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.**

The case for the prosecution was that PW1 and the appellant were walking into the house when the appellant grabbed PW1's neck and started strangling her before attempting to stab her with a kitchen knife. Although PW1 testified that the appellant demanded for money, that evidence was contradicted by other evidence on record. Back to the charge sheet, it was alleged that the appellant robbed her of a wrist watch and cash Kshs 2000/=. In her own evidence, she testified that she told the appellant to pick Kshs. 2000/= from her handbag. She did not mention that the appellant stole the money or the watch or both. The evidence of theft was only disclosed by PW2 and 2. In my view, this was a material contradiction because the complainant herself was best placed to confirm whether or not she was robbed of any property by the appellant. To this extent, I find that the appellant's sole intention was to attack and injure PW1 as opposed to committing the offence of robbery. This is vindicated by PW1's statement in close-examination about an issue related to land. The appellant introduced the issue on land to demonstrate that there existed a grudge between himself and PW1. PW1 on the other hand was sketchy on the issue which she said she did not wish to discuss. This, to me appears to have been an underlying issue which may have instigated the assault.

Although there was no eye witness, there is no doubt that the appellant was left in the company of PW1 before the incident occurred. Her own testimony was corroborated by PW4, Dr. Kamau who examined her and confirmed she had suffered harm. He also produced the P3 Form in this regard. Although the appellant did not adduce any defence, it is trite that the burden of prove in criminal law always lies with the prosecution to prove their case beyond a reasonable doubt. For the afore stated reasons, I find that the prosecution discharged this burden and proved a case of assault causing actual bodily harm contrary to **Section 251 of the Penal Code**.

In the result, pursuant to **Section 179(2) of the Criminal Procedure Code**, I find the appellant guilty of

the offence of assault occasioning actual bodily harm contrary to **Section 251 of the Penal Code** and convict him accordingly. The appellant was convicted and sentenced on 17<sup>th</sup> March, 2005 and as at date he has exceeded the maximum sentence provided under **Section 251 of the Penal Code**. Accordingly, I order that he be forthwith set free unless otherwise lawfully held.

**Dated and Delivered at Nairobi this 14<sup>th</sup> day of June, 2017.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of;**

1. Appellant present in person.
2. Miss Kimiri for the Respondent.