IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 39 OF 2013

JULIUS KIOKO PIUS …….…… APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the conviction and sentence of the Senior Principal Magistrate J. Karanja delivered on 28/03/2013 in Makueni Principal Magistrate Criminal Case No. 300 of 2012)

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(Before Beatrice Thuranira Jaden J and L.N. Gacheru J)

J U D G M E N T

1. The Appellant, **Julius Kioko Pius** was 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 13th day of August 2012 at **Mwaani village**, **Wote Location**, **Makueni District** within **Makueni County** jointly with others not before court robbed **Geoffrey Muendo Ndavi** of cash Kshs.37,000/= and at the time of such robbery beat the said **Geoffrey Muendo**.

2. When The Appellant was arraigned before the trial court, he pleaded not guilty. After a full trial, the Appellant was convicted and sentenced to death.
3. The prosecution evidence was that on the material day at about 11.30 p.m, the complainant, PW1 **Geoffrey Muendo Ndavi** was at **Dallas bar** in **Wote town**. He then telephoned the Appellant who was a neighbour and a *'boda boda'* operator to ferry him home. They agreed at the fare then the Appellant stepped aside and made a telephone call. The complainant then boarded the motor cycle and they started the journey. On the way the Appellant stopped and another person who the Appellant said was also a customer boarded the motor cycle and sat behind the complainant. On the way this other customer grabbed the complainant from behind and the motor cycle fell down. The other customer then grabbed the complainant by the jacket from behind and made away with Kshs.37,000/= which was in the trouser jacket. The complainant held the Appellant and started screaming for help. Neighbours rushed to the scene. The Appellant was arrested and escorted to the police station. The complainant who had sustained a cut on the heel during the attack was issued with a P3 form and referred to hospital for treatment. After investigations the Appellant was charged with the offence herein.
4. In his defence the Appellant gave sworn evidence. No witnesses were called. The Appellant stated that on the material day he went on with his '*boda boda'* operations as usual. He then got a customer who wanted to go to **Mavindini area**. On the way back he came across the complainant

who was lying down on the ground. The Appellant slowed down and hooted. The complainant then got up and started screaming. When people came to the scene the complainant then alleged that the Appellant had robbed him. The Appellant was then escorted to the police station and was subsequently charged with an offence that he knew nothing about.

5. The Appellant was aggrieved with the conviction and sentence and appealed to the court on the following grounds:-

v. **"The learned trial magistrate erred in law and facts when he convicted the Appellant on the strength of insufficient evidence that could not sustain the charge facing the Appellant and as such occasioned a miscarriage of justice.**
v. **The learned trial magistrate erred in law and facts when he convicted the Appellant on the basis of uncorroborated and contradictory evidence.**
v. **The learned trial magistrate erred in law and facts when he overlooked the first report made to the witnesses concerning any loss of valuables or lack thereof and as such reached a wrong conclusion that money had indeed been stolen occasioning a serious miscarriage of justice.**
v. **The learned trial magistrate erred in law and facts when he dismissed the Appellant's defence as simply unbelievable without considering the sequence of events and that there also existed a love triangle between the Appellant, the complainant and a named lady and thus ill motive on the part of the complainant occasioning a serious miscarriage of justice."**

6. During the hearing of the appeal, the Appellant's counsel relied on written submissions. The said submissions essentially reiterate the grounds of appeal. The State conceded to the appeal.
7. This being a first appeal court, we have an obligation to re-evaluate all the evidence given during the trial and come to our own independent conclusions. *See* **Okeno –vs- Republic (1972) EA 32**.
8. The offence of robbery with violence is successfully proved if one of the following ingredients are proved:-
    a. **The offender is armed with any offensive weapon or instrument; or**
    b. **The offender is in the company of one or more other persons; or**
    c. **At or immediately before and or immediately after the robbery, the offender beat, struck or used any other form of personal violence against the victims of the robbery. (*See*, for example,** Ganzi & 2 Others versus Republic [2005] 1 KLR 52.)

9. On whether there was sufficient evidence adduced in support of the charge, we observe that the evidence that links the Appellant to the actual commission of the offence is that of the complainant only. The other witness from the scene, **IP Julius Nduva Muli,** testified that he heard the screams and rushed to the scene where he found a crowd of people and the Appellant and the motor cycle on the ground. That the complainant was at the scene and he complained about having been robbed by the Appellant.
10. Although the complainant's evidence is that he was robbed of Kshs.37,000/=, there are no other details given on the said amount of money. It does not come out from the complainant's evidence nor from the evidence of the investigations carried out whether the complainant normally carries that kind of money with him or whether he had it for some specific purpose.
11. The person mentioned by the complainant as having seen the complainant on the Appellant's motor cycle was not called to testify. This was a crucial witness who could have shed more light on the matter especially taking into account the defence by the accused that this case was a frame up on him by the complainant due to rivalry over a woman. Although the trial magistrate observed that the defence case was not plausible, a conviction is based on the strength of the prosecution case and not the weakness of the defence case. The prosecution case was rather weak as the case boils down to the word of the complainant and the Appellant against each other.
12. The totality of the evidence has left lingering doubts in our minds. We find the conviction unsafe. Consequently, we quash the conviction and set aside the sentence. The Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN **L.N. GACHERU**

JUDGE **JUDGE**

Dated and **delivered** at **Machakos** this **17th** day of **July 2014**.

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B. THURANIRA JADEN

JUDGE