



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BOMET**

**CRIMINAL APPEAL NO. 32 OF 2017**

**SILAS KIRUI .....APPELLANT**

**-VERSUS-**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Bomet PM's Cr Case No. 1452 of 2016 – Hon P. Achieng– PM)*

**JUDGMENT**

The appellant herein was convicted and sentenced to suffer death for the offence of robbery with violence contrary to S, 296 (1) of the Penal Code.

The particulars are that on the 15<sup>th</sup> day of October 2016 at Kipsotet Village within Nakuru County, being armed with an offensive weapon, a knife, robbed Bernard Bett of his motor cycle registration No. KMDW 583W Boxer by make 100cc valued at Kshs.99,500/=.

This is the first appellate court. It has the duty of re-evaluating and considering a fresh the evidence on record so as to arrive at its own conclusions.

**Okeno –vs- R 1972 EALR**

The prosecution in this case called 4 witnesses to buttress their case. The defence called one.

**Brief Facts**

The complainant testified that on the 15<sup>th</sup> day of October 2016 while at stage, the accused/appellant approached him and told him that he wanted to be taken to Olenguruone for a fee. On the way they gave a lift to a lady who later alighted at a place called Kaptagich. They proceeded on up to Olenguruone where he met his friends. He told him to proceed further till they reached a forested area. The appellant proceeded to snatch the keys of complainants motor bike and threatened to stab him with a knife. He drove off with the motorcycle.

The following day they got information that the accused/appellant had been seen at Keringet area. They proceeded there but did not find him.

He was later arrested at Chesoin by police officers. They proceeded to Chesoin police station where they found the motorcycle registration No. KMDW 583W red in colour.

PW2 (Wilson Chepkwony) testified on ownership of the motor cycle registration No. KMDW 683W. he is the one who had employed the complainant as a boda boda rider. The complainant had reported that the motor bike had been snatched from him by the appellant.

They reported the matter to police and commenced a search. The accused/appellant was later arrested by police and the motor bike taken as an exhibit. He went and identified it.

PW3 testified that the appellant had presented himself on 17/10/2016 at 10.15 a.m at Chepsoon police station. He claimed that the previous night the OCS had detained his motor cycle registration No . KMDW 583W demanding that he presents ownership documents. However, they had information from OCS Bomet that the motor cycle had been stolen. Both the accused and the motorcycle were detained awaiting collection by police from Bomet.

In his defence the appellant testified that he does the trade of packing potatoes but previously he was working for PW3 as a sand harvester. They disagreed when his employer PW3 started making allegations to the effect that he had spoilt his daughter . He left his employment and went to work at Chepsoon. On the day he was arrested he had gone to a bar, where he met a lady and bought her a soda upon her request. A man approached him and demanded to know why he had bought the lady the soda. They fought. Police officers were called and he was arrested taken to Chepsoon police station and later Bomet police station where he was later charged with robbery with violence. It was alleged that he had stolen a motor bike belonging to his former employer (PW3).

### **The law analysis and conclusion**

The appellant was charged with the offence of robbery with violence C/S 295 as ready with S. 296(1) of the Penal Code. The charge should not have been framed as that of robbery with violence as it did not fall under S. 296(2) of the penal code but under S. 296(1) of the same.

S. 296(2) of the penal code envisages that the offender

- (a) be armed with a dangerous and or offensive weapon
- (b) or the offender be in the company of one or more persons, or
- (c) he wounds strikes or uses personal violence.

In the present case the offender was alone. He did not wound, strike or use personal violence on the complainant. The prosecution case is that he produced a knife and threatened to stab the complainant who left the motorbike and ran away leaving it behind.

S. 295 of the penal code defines the offence of robbery thus:-

***“Any person who steals anything, and at or immediately before or after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to it being stolen or retained is guilty of the felony termed robbery”.***

A perusal of the evidence adduced before the court is indicative of the offence of robbery but not robbery with violence. The accused was properly charged with the offence of robbery C/S 296(1) of the penal code which provides for imprisonment for fourteen years.

The learned trial magistrate in her judgment did indicate that the accused was charged under S. 296(1) of the penal code. She erroneously proceeded to treat the charge as one of robbery with violence and ended up sentencing the appellant to suffer death whereas the maximum sentence was 14 years imprisonment.

It is noted that the appellant was convicted on 8/9/2017. He has already served one year. The conviction ought to have been that for

the offence of robbery C/S 296(1) of the penal code but not that under 296(2) of the penal code. The sentence to suffer death is altered and substituted for one of seven years imprisonment. The upshot is that the appellant will serve seven years imprisonment from the time of conviction.

Judgment delivered dated and signed this 13<sup>th</sup> December 2018 in open court and in the presence of learned counsel for the prosecution Mr. Barasa, learned counsel for the appellants absent

Applicant in person present

Court assistant Mr. Rotich

**M. MUYA**

**JUDGE**

**13/12/2018**



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