Case Number:	Criminal Appeal 67 of 2012
Date Delivered:	20 Dec 2016
Case Class:	Criminal
Court:	High Court at Meru
Case Action:	Judgment
Judge:	Kiarie Waweru Kiarie
Citation:	Charles Kimathi Michuki v Republic [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	B. Ochieng
County:	Meru
Docket Number:	-
History Docket Number:	Criminal case No.1288 of 2012
Case Outcome:	Appeal is dismissed
History County:	Meru
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 67 OF 2012

CHARLES KIMATHI MICHUKI ..... APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(From the original conviction and sentence in criminal case No.1288 of 2012 of the Principal Magistrate's Court at Tigania by Hon. B. Ochieng – Senior Principal Magistrate)

JUDGMENT

The appellant, **CHARLES KIMATHI MICHUKI**, was charged with an offence of robbery contrary to section 296 (2) of the Penal Code.

The particulars of the offence were that on 15th September 2010 at Amatu village in Meru County, the appellant jointly with others not before court robbed **MAURICE GITUMA CHABARI** of a motor cycle registration number KMCJ 846 H valued at Kshs.82,000/= and cash Kshs. 2500/= and immediately before the time of the said robbery threatened to use actual violence to the said **MAURICE GITUMA CHABARI**.

The appellant was convicted and sentenced to suffer death. He now appeals against both conviction and sentence.

The appellant was represented by Mr. Kimathi, learned counsel who raised four grounds of appeal as follows:

1. That the learned trial magistrate erred in law and fact by relying on contradictory evidence to convict the appellant.

2.That the learned trial magistrate erred in law and fact by failing to ascertain that the appellant was properly identified.

3. That the learned trial magistrate erred in law and facts by convicting the appellant without sufficient evidence.

4. That the learned trial magistrate erred in law and facts by imposing an excessive sentence.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the case are briefly as follows:

The complainant is a rider of motor cycle taxi commonly known as Boda Boda. He was hired by the appellant to take him to his sister's home to collect some items. Along the way, the appellant asked him to stop and was joined by two other men and they robbed him of the motor cycle he was riding and his

jacket.

In his defence the appellant denied involvement in the offence. He contended that he was framed by one Mary Kinya.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32.**

Though one of the grounds of appeal was an allegation of contradiction in the prosecution evidence, none was highlighted. My perusal of the record did not yield any material contradiction.

The issue of identification is very crucial especially where the obtaining circumstances were not favourable for a positive identification. The incident in this case occurred during day time, at about 4PM or thereabouts. Prior to the robbery, the appellant had negotiated with the complainant (PW1) to ferry him to his (appellant's) sister's home. At the time, there was no apprehension of any danger. I find that the complainant was in a position to recognize him as a person known to him.

As the two passed through Mulika, Ezra Murimi Chabari (PW2) saw them while on motor cycle which PW1 was riding. The appellant was being taken to Mikinduri. He said he knew the appellant very well and that they used to play football together.

The complainant testified that when they reached near an SDA church, the appellant asked him to stop. He complied but before he could switch off the engine, some three men joined and demanded that he releases the motor cycle or die. They tried to cut him with a machete and he gave up the struggle. They took the motor cycle.

Josephine Karimi (PW5) testified that she had just entered into the SDA church compound. When she rushed out in company of others, she saw the appellant on top of a motor cycle with another person while the owner was chasing on foot. She testified that she had known the appellant since his childhood. Mary Kinya (PW6) denied that she framed the appellant.

The evidence of Kinya (PW6) and that of Josephine Kirimi (PW5) contradicted that of the complainant (PW1) and PW2 when they testified that they found the appellant was seated near the gate of the church when they passed there. This contradiction in my view is not material when taken together with other evidence on record.

Victoria Karethi (PW4) testified that at about 5.45PM, the appellant went to her home with a motor cycle. They negotiated to go and purchase some miraa from her. They excused themselves to go and get some money from a nearby canteen. They left the motor cycle they had. When she learnt of a stolen motor cycle, she informed the police about the motor cycle in her home. She said she had known the appellant by appearance. Though this witness was not asked to explain how she knew the appellant, from the evidence on record it appears the incident happened in an area where most people knew each other. I have no reasons to doubt the evidence of this witness.

The court of appeal enumerated the ingredients of robbery under section 296(2) in the case of **JOHANA NDUNGU V REPUBLIC[1996] eKLR** as follows:

In order to appreciate properly as to what acts constitute an offence under section 296 (2) one

must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

1. If the offender is armed with any dangerous or offensive weapon or instrument, or

2. If he is in company with one or more other person or persons, or

3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.

Analysing the first set of circumstances the essential ingredient, apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in S.295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.

In the instant case, the appellant was in company of more than one person, they were armed, and threatened to use actual violence. This means that the offence fell within the purviews of section 296 (2) of the Penal Code.

The upshot of the foregoing analysis of the evidence on record is that the prosecution case against the appellant was watertight. I accordingly dismiss it.

DATED at Meru 20th day of December 2016

KIARIE WAWERU KIARIE

JUDGE