



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 57 OF 2016**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 58 OF 2016**

**SIMON KAMAU MWANGI.....1<sup>ST</sup> APPELLANT**

**DANIEL MWATHA NGIMA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

(Appeal from the judgment of the Senior Resident Magistrate's Court, Nyeri (Hon.K.Onesmus) delivered on 19<sup>th</sup> July, 2016 in Criminal Case No. 149 of 2013)

**JUDGMENT**

**FACTS**

1. The appellants, **Simon Kamau Mwangi** were charged with the offence of Robbery with violence contrary to **Section 296(2)** of the **Penal Code** and an alternate count of Handling Stolen Goods contrary to **Section 322(2)** of the **Penal Code**.

2. The particulars of the main charge was that on the 26<sup>th</sup> day of February, 2013 at around 2000 hrs at Ngabori Village of Muranga County, robbed John Mbau Mbugua of his mobile phone Nokia 1280 valued at 2,300/- and before such robbery used actual violence to the said John Mbau Mbugua.

3. In the alternative, the appellant was charged with handling stolen goods and the particulars of the offence were that on the 31<sup>st</sup> day of October, 2013 at around 1845 hrs at Muthithi Village of Muranga County otherwise than in the course of stealing dishonestly received or detained a pair of safari boots knowing or having reason to believe them to be stolen goods.

4. The appellants were tried and convicted at the Senior Principal Magistrate's Court at Kigumo on all three Counts but was sentenced only on Count I, to the mandatory death sentence. The sentences on the other two counts were held in abeyance.

5. Being aggrieved by the conviction and sentence, the appellant filed a Petition of Appeal on 30<sup>th</sup> April, 2014 and also filed Amended Supplementary Grounds of Appeal

6. At the hearing hereof the appellants were represented by whereas Prosecuting Counsel Mrs Gicheha represented the State; a brief summary of their rival submissions are as follows;

**APPELLANTS SUBMISSIONS**

**RESPONDENTS SUBMISSIONS**

**ISSUES FOR DETERMINATION**

7. After taking into consideration the forgoing submissions these are the issues framed for determination;

**ANALYSIS**

8. This being the first appellate court it is incumbent upon this court to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Refer to the case of **Okeno vs Rep (1972) EA**

### **FINDINGS**

9. For the forgoing reasons we make the following findings;

- i. This court finds that there is insufficient evidence to support a conviction for the offence of robbery contrary to Section 296(1) of the Penal Code. Needless to say we find that the trial magistrate erred in law and in fact in imposing the death sentence for the aforesaid offence.
- ii. We find that the appellant was not positively identified on all counts.
- iii. We find that this is a suitable case for substitution of the charge as there is circumstantial evidence of recent possession to support a conviction for the offence of Stealing from the Person.

### **DETERMINATION**

10. The appeal is partially successful.

11. The conviction for simple robbery is hereby quashed and substituted with a conviction for Stealing from the Person contrary to Section 279 of the Penal Code.

12. The matter is hereby referred to the lower court for resentencing.

Orders Accordingly.

**Dated, Signed and Delivered at Nyeri this 21<sup>st</sup> day of June, 2018.**

**HON. JUDGE MSHILA**