REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 30 OF 2020

MAKAU KIMENGEI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal originating from the original judgment of Hon. Mwaniki J. (C.M) in Makueni

Chief Magistrate's Court CMCRC No. 519 of 2018 delivered on 13th November, 2018).

JUDGMENT

1. The Appellant was charged in the magistrates' court with robbery contrary to section 296(1) of the Penal Code. The particulars of offence were that on 26th December 2017 at Kithoni market in Wote Sub-county within Makueni County robbed Muinduko Kithuka Mainga Kshs.24,000/= and immediately before the time of such robbery, used actual violence to the said Muinduko Kithuka Mainga.

2. He denied the charges. After a full trial, he was convicted of the offence and sentenced to serve five (5) years imprisonment with effect from 05/04/2018.

3. Dissatisfied with the conviction and sentence of the trial court, the Appellant has come to this court on appeal. Initially he appealed only on sentence but at the time of filing written submissions he relied on grounds that challenged both the conviction and sentence. In summary, his grounds of appeal are as follows –

1. That the Complainant Pw1 did not tender truthful evidence.

2. That it was not true that he stole from the Complainant though he worked in the Complainant's posho mill.

3. That Pw2's evidence was not truthful as he had a grudge against the appellant since he started working in the posho mill.

4. That he was a truthful worker and had worked for the Complainant for 9 years in the posho mill without stealing a cent from the Complainant.

5. That the Complainant Pw1 was not happy because the Appellant had got another job in town.

6. That as Pw1 was attacked in darkness at around 8 pm.

7. That Pw2 was not happy with the Appellant because the Appellant had started a marriage relationship.

4. The appeal proceeded by way of filing written submissions. Both the Appellant and the Director of Public Prosecutions filed their respective written submissions, which I have perused and considered.

5. This being a first appeal, the court is required to evaluate the evidence on record afresh and come to its own independent conclusions and inferences – see **Okeno –vs- Republic (1972) E.A 32.**

6. In proving their case, the Prosecution called two (2) civilian witnesses. No Police Officer testified. Pw1 was the Complainant Miunduko Kithuka who testified that as he closed his shop at 8 pm, the Appellant approached and offered to escort him home. Though Pw1 declined the request the Appellant followed him to a corner and grabbed him from behind, fell him down and took his Kshs.24,000/= from the back trouser pocket – then Appellant said "*mjinga huyu nenda*".

7. Pw2 was Benson Mutinda whose evidence was that on 26/12/2017, as he walked home from Kithoni market, he saw two people struggling. When he approached he noted that one was Appellant who said – "*nimemalizana na yeye tugawane*". This witness saw a third person in the vicinity but who disappeared. The witness then escorted Pw1 back to the shop to sleep.

8. When put on his defence, the Appellant tendered unsworn testimony and stated that he had worked for Pw1 upto July 2017 and when he resigned Pw1 became angry. He denied being at home (Kithoni) on 26/12/2017 and said that he came back home on 6/1/2018. He denied stealing from the Complainant and said that the Complainant implicated him for no reason.

9. I note that neither the Investigating Officer, nor any Police Officer tendered evidence in this criminal case. That notwithstanding, however, the only two witnesses at the scene Pw1 and Pw2 tendered their evidence in court. In my view, though the Investigating Officer was an important witness in this case, he was not a crucial witness on the allegations against the Appellant were straight forward and all the two eye witnesses testified before the trial court. The Appellant knew both witnesses before.

10. The Appellant has said on appeal that both Pw1 and Pw2 had grudges against him. With regard to Pw1 he said at the trial that he had a grudge against him because he left working at Pw1's posho mill in July 2017. He however did not state how just leaving work would have precipitated a grudge. I find that no grudge existed between Pw1 and the Appellant. With regard to Pw2, the Appellant says on appeal that Pw2 also had a grudge. Looking at the evidence on record, find no issue of grudges raised anywhere either in the cross – examination of Pw2 or in the Appellant own unsworn defence. In my view what the Appellant is raising on appeal about a grudge is an afterthought. I find that no grudge existed between the Appellant and Pw2.

11. The incident occurred at night 8 pm, and ordinarily it would be dark unless the scene was well lighted. Having perused the evidence on record, I see no evidence of lighting tendered either regarding the shop where the Complainant Pw1 said the Appellant offered to escort him, nor at the scene of the alleged robbery which was described by the Complainant Pw1 as "a corner". Thus the circumstances for visual identification must have been very difficult. Several court cases have dealt with the need for courts to warn themselves and take caution before convicting on such evidence of visual identification at night or in situations of darkness. Pw1 knew the Appellant before and this was thus a case of recognition rather than mere identification. However, caution is still necessary before convicting.

12. In the long line of court decision, I will only cite the case of **Wamunga –vs- Republic (1989) KLR 424** where the court stated that evidence of recognition is one of the best evidence when dealing with the offence charged. It is more reliable than identification of a stranger. But even when a witness purports to recognize a familiar face, the court needs to be cautious that mistakes in the recognition of close relatives and friends are sometimes made.

13. In the circumstances of this case, the court did not caution itself before convicting the Appellant in a situation where none of the prosecution witnesses mentioned the existence of any light either at the shop of Pw1 at the scene, where the Appellant was alleged to have approached Pw1 and then rob him. On that account, as the prosecution failed to prove his involvement in the alleged crime beyond reasonable doubt – see **Woolmington –vs- DPP (1935) AC 462.**

14. As a consequence, the appeal against conviction will succeed. I will also set aside the sentence posed.

15. To conclude therefore, I find merits in the appeal. I allow the appeal, quash the conviction and set aside the sentence imposed. I order that the Appellant be set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 23RD DAY OF MARCH, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE