



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL APPEAL NO. 53 OF 2019

(Being an appeal from the original conviction and sentence in Criminal Case No. 742 of 2017

at Malind, before Hon. Dr. Julie Oseko dated 20th July 2018)

RASHID ABDALLA OMAR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant was charged with Robbery with Violence contrary to Section 296(1) of the Penal Code. The Particulars of the offence are such that the Appellant using a knife robbed the complainant of a handbag worth Kshs. 1000/=. He found guilty of a lesser offence of simple robbery and sentenced to 2 years imprisonment.

The grounds of appeal as per the memorandum of appeal are that the Hon. Trial magistrate erred in law and in fact by failing to consider that the conviction and sentence is founded on a defective charge sheet, by failing to consider the pre-trial custody upon sentencing, failing to consolidate the two sentences so that they run concurrently, failure to consider sharp contradictions in the prosecution evidence and lastly, failure to consider his defense.

As this is a first Appeal, I'm obliged to subject the evidence on record to my own evaluation and assessment and come up with an independent decision on the issues raised before me. I shall also give due regard to the findings and determinations arrived at by the Learned Trial Magistrate who had the added advantage of physically seeing and listening to the witnesses testify before him. (See OKENO V R (1972) EA 32).

I have perused the evidence on record, the grounds of appeal, the mitigation and the law relating to simple robbery and robbery with violence. I also noted that there was no response against this appeal by the state.

The incident transpired at the entrance of Lawford Hotel in Malindi. The complainant was walking with his wife just outside the gate of Lawford Hotel when the Appellant grabbed the complainant's handbag, started pulling it. He produced a knife which he used to cut the handle of the handbag and in the process, he cut the complainant's arm. He managed to take the bag away and ran towards the direction of the cemetery. PW2 confirmed in his testimony.

Pw5, the security guard at the said Hotel witnessed the incident as described by the complainant. He identified accused as the one whom he saw rob the complainant and ran away. He pressed the alarm.

The Law

The Appellant was convicted of the offence of simple robbery and sentenced to 2 years imprisonment. Section 296(1) of the Penal Code reads as follows:

“Any person who commits the felony of robbery is liable to imprisonment for fourteen years.”

The above-cited provision of law is couched in singular form. It clearly shows that the offence of robbery can only be committed by a single person who steals anything capable of being stolen through the application of actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.

The facts of this particular case may still support the offence of robbery. Under section 295, robbery is defined as follows:

“Any person who steals anything, and, at or immediately before or immediately 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 its being stolen or retained, is guilty of the felony termed robbery”.

The above provisions create a felony termed robbery by setting out the elements of that offence. Section 296(1) penalizes the offence of robbery and provides its sentence. The ingredients of the offence of robbery are as following:

a) proof of theft and

b) proof of application of actual violence or threat to use it on any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, at or immediately before or immediately after the time of stealing

c) Positive identification of the assailant.

Findings, Analysis and Determination.

This is a very straight forward case. Undisputedly, the prosecution proved all the ingredients of the offence of robbery beyond reasonable doubt. On identification, the offence was committed in broad day light. The appellant was chased and caught with the items he had stolen. Several prosecution witnesses including PW5 and the complainant were on point as regards the identification of the Appellant as the perpetrator of the robbery.

As regards, proof of theft, the Appellant forcibly took away the complainant’s handbag, he was chased, caught with and handed over to the police. The said handbag he had stolen was produced by the prosecution as proof in court. It was marked as Exh.1. Therefore the fact of theft was proved beyond reasonable doubt.

On the use of threats or violence, I note that this element was proved beyond reasonable doubt. It was the complainant and PW5’s testimonies that the Appellant used a panga to return the handbag from the complainant. And in the process, he injured the Complainant with a panga on his arm. The doctor’s evidence corroborates the same facts and a P3 was produced to that effect. I have no doubt whatsoever that violence was used in the process of the robbery.

Having found that all the ingredients of the offence of robbery are present in this particular case, I wish to note that the Appellant ought to have been liable to a sentence not less than 14 years imprisonment.

However, the Hon trial magistrate in her wisdom found in proper to sentence the Appellant to 2 years imprisonment. I find the sentence to be very lenient and does not warrant any alternation.

In the premises, the Appellant's appeal is dismissed for lack of merit. His conviction and sentence ought to stand.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF JANUARY 2020

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R. NYAKUNDI

JUDGE