



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.37 OF 2017

BETWEEN

ELIAS MARINDI OSUMBA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in the PM's court at Mbita Criminal Case No.700 of 2016 – Hon. S.O. Ongeri, PM, dated 18th August, 2017)

JUDGMENT

[1] **ELIAS MARINDI OSUMBA** (herein, the appellant), appeared before the Principal Magistrate at Mbita charged with robbery with violence, contrary to **Section 296 (2)** of the **Penal Code**, in that on the 15th November 2016 at Sindo Trading Centre in Suba, Homa Bay County, jointly with another not before court, being armed with dangerous weapon namely a homemade pistol robbed **ROSE KERUBO OBIRI** of Kshs.5,000/=, vegetables, ½ kg meat, tomato, charcoal and cooking salad all valued at Kshs.270/= all valued at Kshs.5,270/= and immediately before the time of such robbery threatened to use violence against the said **ROSE KERUBO OBIRI**.

[2] After a full trial, the appellant was convicted and sentenced to suffer death. He was aggrieved by the outcome and preferred the present appeal on the basis of the grounds in the petition of appeal filed herein. He represented himself at the hearing of the appeal and relied on his written submissions in support of his case.

[3] **MR. OLUOCH**, the learned prosecution counsel, appeared for the respondent/State and opposed the appeal mainly on conviction. He submitted that PW1 stated that she held on to the appellant while screaming for help during the robbery. It was then that members of the public appeared and apprehended the appellant. He (appellant) was therefore arrested while committing the offence in the company of another who grabbed the complainant's bag and fled.

[4] The learned prosecution counsel, also submitted that the evidence of PW1 was corroborated by PW4 who was with her (PW1) and who assisted in holding the appellant. That, PW2 arrived at the scene and found the appellant already arrested. That, a toy pistol in possession of the appellant was used in the course of the robbery.

The learned prosecution counsel, contended that the appellant was not mistakenly identified and that his conviction was based on credible evidence.

[5] With regard to the death sentence, the learned prosecution counsel submitted that the offence was not aggravated in nature and therefore, this is a proper case for interfering with the sentence. That, the offence disclosed was actually a simple robbery and not a capital robbery.

[6] In response to the submissions by the learned prosecution counsel, the appellant contended that he was mistakenly identified and submitted that although PW1 stated that it was dark, she did not mention the presence of any light. That, the arresting officer was not called to testify yet he was arrested by the police. That, PW1 never said anything about the home made gun yet it was allegedly recovered from him by the police.

The appellant contended that there was no evidence to prove that the offence was committed by more than one person. He urged this court to allow his appeal.

[7] As a first appellate court, the duty of this court was to revisit the evidence adduced at the trial and arrive at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses [See **OKENO –VS- REPUBLIC (1972) E.A. 32 and MWANGI –VS- REPUBLIC (2004) 2 KLR 28**].

Accordingly, the prosecution case was briefly that on the material date at about 7.00 p.m., the complainant **ROSE KERUBO OBIRI** (PW1) was walking to her home after purchasing charcoal, meat, maize, cooking fat, tomatoes and kales when she met two people who asked her about one Mama Joy. They then walked ahead of her before stopping and holding her. A pistol was pointed at her but she knocked it off and held the person who pointed it. People came to her rescue but the second person escaped with her shopping and money in the sum of KShs.5,000/=. The first person whom she identified as the appellant was apprehended by the people and handed over to the police.

[8] At the material time, the complainant (PW1) was in the company of her son, **RONALDO AYIENGA OBARA** (PW4). He indicated that the appellant pointed a toy gun and ordered them to sit down while the second suspect grabbed his mother's paper bag and fled. He (PW4) assisted his mother to hold the appellant after she had hit the toy gun causing it to fall down. He confirmed that the appellant was apprehended at the scene and handed to the police.

[9] A teacher, **COLLINS OWINO AGALO** (PW2), was in his house when he heard screams and went out of the house only to find a crowd of people with the complainant whom he had previously known.

One of the two persons who had attempted to rob her had been arrested allegedly with a homemade gun which he saw. He identified the appellant as the person who had been arrested. He was told that the second person had escaped.

[10] **CPL WILLIAM KIBUYE** (PW3), investigated the case when it was referred to him. In the process, he visited the scene and recorded statements from witnesses. He also took possession of the toy pistol (**P. Exhibit 1**) and re-arrested the appellant who was held at the Sindo A.P. Camp. He later preferred the present charge against the appellant.

[11] The appellant's defence was a denial of the charge and a contention that he knew nothing about it. He stated that he was selling grains in a market on the material date but proceeded home at 2.30 p.m. when suddenly a police vehicle arrived there with police officers who asked him why he was dressed in dreadlocks. He was asked to produce a permit for the dreadlocks and then bundled into the police vehicle where he found another dreadlocked person.

[12] The other dreadlocked person and himself (appellant) were taken to Sindo AP Camp and locked in the cells. Officers from Mbita later arrived at the camp and asked them to call their relatives so that the matter may be sorted out. The other dreadlocked person was released after parting with KShs.10,000/= while he was taken to Mbita police station and arraigned in court thereafter.

[13] From the foregoing evidence, it is apparent that the basic issue arising for determination was whether the offence of robbery under **Section 296 (2) of the Penal Code** was committed against the complainant and if so, whether the appellant was positively identified as the person or one of the person responsible for the same.

[14] Under **Section 295 of the Penal Code**, "*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.*"

[15] Under **Section 296 (2) of the Penal Code** "*if the offender is armed with any dangerous or offensive weapon or instrument; or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wound, beat,, strikes or uses any other personal violence to any person, he shall be sentenced to death.*"

[16] Whereas **Section 295** of the **Penal Code** gives a definition of robbery, **Section 296 (2)** qualifies it for purposes of determining the appropriate sentence to be meted out to an offender. Therefore, the question herein would be whether the material ingredients of the charge in terms of **Section 296 (2)** were established by the prosecution to the required standard.

[17] In its judgment, the trial court found that the prosecution had established the ingredients of **Section 296 (2)** of the **Penal Code** even though there was no dangerous weapon used in the robbery and no person was injured.

[18] The only reason for which **Section 296 (2)** of the **Penal Code** was sustained by the trial court was that the offence was committed by more than one person (i.e. two persons).

This court would agree with the trial court's finding that the toy pistol said to have been used in the robbery was not a dangerous weapon (See, **KIMEMIA –VS- REPUBLIC (2004) e KLR**) and that nobody was injured in the process.

[18] The evidence by the complainant (PW1) and her son (PW4) clearly and credibly showed that she was confronted by the people and robbed of her property. It also showed that neither herself nor her son were injured in the process even though the sight of something appearing like a pistol was quite threatening. Whether indeed a toy pistol or a real pistol was used was a fact taken with uncertainty as demonstrated in the evidence by the complainant and her son.

[19] The complainant alluded to a real pistol (i.e an actual firearm) whereas her son alluded to a toy pistol. She (complainant) disputed that the pistol shown to her in court was the one she saw during the robbery yet the pistol produced in court (**P. Exhibit 1**) was the alleged toy pistol as identified by her son (PW4).

From the foregoing, it was doubtful whether a pistol real or toy was used in the robbery.

[20] Given that there was no firearm or dangerous weapon used in the robbery and the fact that no injury was inflicted on any person, it may safely be said as contended herein by the respondent that what occurred to the complainant was not a case of aggravated robbery as no form of violence was used. It was indeed a case of simple robbery for which **Section 296 (1)** of the **Penal Code** was not appropriate rather

Section 296(2).

[21] However, among the necessary ingredients of **Section 296 (2)** is that the offender must be in the company of one or more persons. So, even in the absence of any dangerous or offensive weapon or in the absence of any injury to any person, the charge would still be sustainable on account of the offender being in company with one or more person. Herein, the offenders were two. Therefore, the trial court was correct in sustaining the charge (See, **JOHANA NDUNGU –VS- REPUBLIC Criminal Appeal No.116 of 1995 (Court of Appeal)**).

One of the ingredients of the charge was established and so, the charge was proper and sustainable.

[22] Indeed, there was no dispute to the fact of robbery. The bone of contention was the appellant's responsibility for the same. He denied such responsibility and implied that he was arrested for merely wearing dreadlocks (i.e. a type of hair style) and for declining to **"bribe"** some police officers. However, this defence was disproved by credible evidence from the prosecution through PW1, PW2 and PW3 establishing that he was apprehended at the scene of the offence during the occurrence of the same. He failed to escape the complainant's and her son's firm grip of him after his accomplice 'bolted' from the scene and managed to escape.

[23] It is therefore this court's finding that the appellant was positively identified as being among the two people who offended the complainant on that material date and time. He was thus properly and lawfully convicted by the trial court.

However, with regard to the death sentence, it is no longer mandatory in terms of the recent decisions of the Supreme Court and the Court of Appeal in the case of **FRANCIS K. MURUATETU & ANOTHER –VS- REPUBLIC – SUPREME COURT PETITION NO.15 OF 2015** and **GODFREY NGOTHO MUTISO –VS- REPUBLIC – Criminal Appeal No.17 of 2008** and **WILLIAM O. KITTINY – CRIMINAL APPEAL NO.56 OF 2013**.

[24] The foregoing decisions related mostly to the death sentence in murder cases but they apply equally to any other provision of the Penal Code carrying a mandatory death sentence including Section 296 (2).

[25] Accordingly, the death sentence imposed on the appellant must and is hereby set aside and substituted for a sentence of four (4) years imprisonment. Otherwise, the appeal is hereby dismissed.

J.R. KARANJAH

JUDGE

28.06.2018

{Delivered and signed this 28th day of June, 2018}