



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CRIMINAL APPEAL No. 39 of 2017

BETWEEN:

EDWARD MAGHANGA MSHILA.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon. G. M. Gitonga RM at SPM's Court Wundanyi. CR. Case No.10 of 2014 delivered on 27th May 2016)

J U D G M E N T

1. The Court has before it an appeal against conviction and sentence. The Appeal arises from the Judgment of Hon G. M. Gitonga at the SPM's Court Wundanyi on 27th May 2016. On that day the Appellant was convicted of robbery contrary to Section 296(1) **of the Penal Code**.

2. The particulars of the offence and what the Appellant was convicted of is that at some time on the 26th day of December 2015 at Werugha location within Taita-Taveta County, the Appellant robbed JOSEPH KUBO NJUMA of his motor cycle Registration No KMDA 444U, a Bejaj Boxer and immediately after or immediately before the time of such robbery threatened to use actual violence to the Complainant. The Appellant was arrested on 3rd January 2014. The Appellant pleaded not guilty but was found guilty by the Learned Trial Magistrate.

3. Although the Judgment was made and delivered by Hon G. M. Gitonga, he records in his evidence that the Ag. Principal Magistrate Hon Orange heard the entirety of the prosecution evidence and as the second magistrate hearing the matter under Section 200(3) of the Criminal Procedure Code he heard the evidence for the Defence only. The Learned Trial Magistrate records that he did direct his mind to that fact and gave it due allowance in his decision.

4. The Appellant filed Amended Grounds of Appeal on 5th June 2018. The Grounds relied upon are:

"(1) That the Learned trial magistrate erred both in law and facts by failing to consider that the sentence was dispensed by a Resident Magistrate without jurisdiction, hence the sentence was unlawful rendering the conviction unsafe.

(2) That the pundit trial magistrate erred both in law and facts by failing to consider the circumstances were not conducive and favourable for positive and accurate identifications.

(3) That the Learned trial magistrate erred in law and facts by failing to consider dock identification is not warranted in law in that the Complainant (PW1) was not subjected to identify the assailant during the identification parade.

(4) That the Learned trial Magistrate erred in law and facts by disregarding my ALIBI defence while the prosecution failed to prove their case beyond reasonable doubt as required by Law c/s 109 and 110 of the Evidence Act

(5) That unless the appellant invokes section 350(v) of the CPC in filing the same I the appellant in this appeal would stand to suffer grave injustice.

(6) That it is utmost important that this application be heard and determined."

5. In summary therefore the Appellant is Appealing against the Conviction and Sentence because the trial was in effect conducted by a judicial officer who was not of the correct jurisdictional status to try that offence, nor to hand down a sentence of 7 years. Secondly, there is a challenge to the identification evidence on the basis that it was the evidence of a single witness and the circumstances were such as to make

the identification uncertain. Thirdly that his alibi was not considered. Fourthly, that the Prosecution did not prove their case to the required standard of beyond reasonable doubt. The Appellant was convicted on 27th May 2016. The Petition for Appeal was filed on 15th May 2017, nearly one year later.

6. The Appellant has filed detailed written submissions. The Respondent's Written Submissions were filed on 23rd July 2018 and the Appellant filed further Written Submissions in Reply.

7. The evidence that the Court heard was that on the evening of 26th December 2013 at around 9 pm at or near the Wundanyi Stage the Complainant (PW 1) was approached by a customer asking to be taken to Werugha. He was told the fare would be KShs.200/- but he changed his mind and asked to be taken to Sangenyi for which the fare was to be KShs.500/- which was bargained down to KShs.450/-. They stopped at a Shell Petrol Station to refuel for which the Customer paid Kshs.100/-. When they reached Mlondo the customer asked for a jacket because he was cold. At Vifaru he asked to be dropped after the shops. The Customer had a black bag, maybe a rucksack on his back. When he alighted he returned the jacket. The Complainant expected to be paid but the customer reached into his bag and pulled out a Panga which he used to threaten the Complainant. He switched off the ignition of the bike and pushed the Complainant off and then rode off with the bike. The Complainant reported the matter to the Police in Wundanyi and was given an OB No 2/27/12/13 which suggests that when he reported the matter it was after midnight. The Complainant identified the Appellant after which he was arrested but was not part of an identity parade because that would have been contrary to the guidelines. Neither the motor bike nor the panga were recovered. The Appellant was arrested in Werugha which is the first destination he chose.

8. In addition to the identification by the Complainant, the Appellant was identified by two other boda boda riders as a person who was seen at the Wundanyi Stage on the day and time in question asking to be taken to Werugha. The identifications were made during the ID parade and not in the presence of the Complainant. The value of the motorcycle was said to be KShs.88,000/=. The evidence of PW-1 was in part corroborated by the evidence of PW-3. He said, he too was a boda boda operator in that area. On 26th December 2013 he was approached by a customer who asked to be taken to Sangenyi but later changed his mind and said someone would pick him up. He was identified as wearing a red shirt and white trousers. PW-3 picked the Appellant out of about 10 people in an identification parade. He says he got a clear view of the Accused and there was sufficient light to see him. He says later the same evening he found PW-1 who said he had been robbed. The description of the robber was the same as the person who had asked to be taken to Sangenyi. PW-5 also identified the Appellant. His evidence was that he saw the accused at the stage. He identified him as having a red shirt and carrying a black bag. The customer wanted to be taken to Sangenyi. The Defendant's cross-examination of the prosecution witnesses raised the question as to whether the witnesses were able to identify him given that it was evening. All three witnesses confirmed that the areas in question were well lit and that their conversations were long enough to allow them to see him clearly and recognise him later.

9. After the robbery the suspect was arrested when the Complainant saw him in Werugha.

10. At the time of the trial the Appellant's defence was that he was either in Kisumu or Mombasa or somewhere in between but had spent part of the Christmas period in Werugha. He called no witnesses nor produced any documentary evidence to prove that he was where he said and/or undertook that journey at all.

11. Dealing first with the question of jurisdiction, the Appellant's position is that the Resident Magistrate did not have jurisdiction to try him. The Respondent relies on the 5th Schedule of the Criminal Procedure Code. The offence on the charge sheet was simple robbery. The sentence was 7 years and therefore within the jurisdiction of a subordinate court of the first class.

12. This being the first appeal this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions bearing in mind that neither saw the witness nor heard the evidence when parties were testifying to see their demeanor. See the case of **MARK OIRURI MOSE –VS- REPUBLIC [2013] e KLR Criminal Appeal No.295 of 2012** where the Court of Appeal stated: “It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.” See also the well known case of **OKENO –VS- REPUBLIC [1972] E.A. 32** which sets out the same principle. (**J O v Rep 2013 KLR**)

13. The Evidence the Trial Court heard is set out in the proceedings and summarised above. The Complainant was robbed. He identified the perpetrator. He says he saw the perpetrator when he came to engage his services, where it was well lit. He also saw him at the Shell Petrol Station which was also well lit. In addition, they spent the duration of the journey together. The trial court preferred the evidence of the Complainant. In the circumstances, what is suggested by the Appellant that there was a fleeting observation in a dimly lit setting is not borne out. Further, the evidence of the complainant in respect of the identity of the perpetrator is corroborated by subsequent prosecution witnesses. They were able to pick the Appellant out of an identity parade where the Complainant was not present and therefore they could not be said to have been influenced by his identification.

14. The evidence of the two boda boda riders who also saw the Appellant was circumstantial in that they did not observe the offence being committed but did observe the Appellant's proximity thereto. The Judgment shows that the trial court addressed its mind to that. Although circumstantial, the circumstances are that there was a person seeking a boda boda to take him to a particular place on boxing day (a public holiday) at 9pm. The chances of there being several men out at that time wanting to be taken to the same place are small. Further, the likelihood of each of those persons wearing a red shirt and carrying a black bag and having the same physique as the Appellant must be miniscule. Therefore, it is highly likely that the person asking for the services of a boda boda rider to take him to Sangenyi is the same person who was in fact taken to Sangenyi and then committed the offence complained of.

15. The circumstances of the arrest were that the Complainant recognised the perpetrator. There was no evidence placed before the Court to suggest that he had a motive for identifying the wrong person. Further, in the circumstances, the evidence identifying the Appellant was not the evidence of one witness but the evidence of three, and therefore in compliance with the quote from Deuteronomy relied on by the Appellant.

16. The Appeal Court should only interfere with the sentence of the subordinate court if it is shown that the trial court erred in principle or the sentence was inordinately severe. The Appellant has not shown that. In the circumstances, it is not open to this Court to simply impose a different penalty. However, **Section 296** of the **Penal Code** sets the punishment for robbery at 14 years. The use of personal violence may see that sentence increased to the death penalty. **Section 297(1)** sets the penalty for the use and/or threats of actual violence at or immediately before or immediately after in order to obtain the thing to be stolen is guilty of a felony and liable to imprisonment for 7 years. In this case the Appellant used actual violence in pushing the Complainant off the motorbike. The use of the panga was found by the trial court to be threatening violence.

17. For those reasons, the Appeal against conviction is dismissed. The Appeal against sentence is similarly dismissed

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 28th day of November 2018.

In The Presence of :

Court Assistant: Josephat Mavu

Appellant: In Person

Respondent: Ms Anyumba