



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 32 OF 2016

AYUB MUTHINE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No.2558

of 2014 of the Chief Magistrate's Court at Maua by Hon.

S.M.S Soita – Senior Principal Magistrate)

JUDGMENT

The appellant, **AYUB MUTHINE**, was Charged with an offence of robbery contrary to section 295 as read with section 296 (2) of the Penal Code.

The particulars of the offence were that on 16th June 2014 at Nkandune village in Igembe North District of Meru County, the appellant jointly with another not before court while armed with daggers robbed **ZAKAYO NTOITI** of cash Kshs. 1000/= and during the time of the said robbery threatened to use personal violence to the said **ZAKAYO NTOITI**.

The appellant was convicted and sentenced to suffer death. He now appeals against both conviction and sentence.

The appellant raised four grounds of appeal that can be summarized as follows:

1. That the charge sheet has two different dates of his arrest.
2. That the learned trial magistrate erred in law and fact by failing to make a finding that two witnesses were related to the complainant.
3. That the learned trial magistrate erred in law and facts by failing to find that the prosecution evidence was full of contradictions.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the case are briefly as follows:

The appellant in company of another entered into the complainant's shop. The appellant went where he was while armed with a knife and demanded to be given some money. He gave him Kshs. 1000/=. While he was demanding more, the complainant saw some people passing by and he raised an alarm. The accomplice of the appellant escaped but the appellant was arrested in the shop.

In his defence the appellant contended of an existing grudge with the complainant. He said the complainant owed him some money.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32.**

The appellant is right to complain about the date on the charge. Though he says there are two dates on the charge sheet, I do not find any such two dates. However, I note that the charge sheet gives the date of arrest as 17.6.2014, the evidence of witnesses indicate that he was arrested on 16.6.2014. In my opinion, this discrepancy is minor and not material. It did not prejudice the appellant.

There is no law that precludes relatives from testifying in a case. However, it would be an issue of concern if other material witnesses were left out and only the complainant's relatives were called. In this case this issue was not raised during cross examination or during the appellant's defence. The learned trial magistrate had no basis of making the finding the appellant raised issue with.

Zakayo N'toiti M'Mungama (PW1) is the complainant in this case. He testified that the appellant entered into his shop and demanded for some money while wielding a knife. He gave him Kshs. 1000/=. When he raised an alarm, some men went to assist him . The appellant's accomplice managed to escape. Since the appellant was resisting arrest he went on a motor bike and called the police who rearrested the appellant from members of public who were threatening to lynch him.

Peter Ntoiti (PW2) testified that he responded to cries for help from a canteen. With his companion they rushed to the canteen and saw a man fleeing. They grabbed the appellant from behind and managed to disarm him. It was at this juncture that the complainant rushed to call the police and returned shortly with officers who rearrested the appellant. at the time there were many members of public at the scene. This is what Petro Mungathia testified to.

The contention that the complainant owed him some money and the manner he claimed to have been arrested came late in the day and he never challenged the complainant or the other witnesses with such facts during cross examination. The learned trial magistrate was right in dismissing this line of defence as an afterthought.

I find that the conviction of the appellant was based on sound evidence on record. The learned trial magistrate cannot be faulted. The appeal is therefore dismissed.

DATED at Meru 20th day of December 2016

KIARIE WAWERU KIARIE

JUDGE