



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 65 OF 2009

OMAR BAKARI APPELLANT

VERSUS

REPUBLICRESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 371 of 2007 of the Chief Magistrate's Court at Mombasa – Hon. Kirui - PM)

JUDGMENT

The Appellant herein was Convicted and Sentenced to suffer death for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

The particulars being that on the 12th day of October, 2007 at around 6:15 pm at Kisauni Msikitini stage Mombasa County jointly with others not before the Court and while armed with dangerous weapons namely pangas, robbed **MERCY ACHIENG SABANA** of a handbag containing mobile phone make safaricom 225, perfumes, National Identity card and cash Ksh. 5,000/= all of the value of Ksh. 15, 000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **MERCY ACHIENG SABANA**.

Briefly, the facts of this case are that on the 12th day of October, 2007 at about 6:45 pm, the Complainant, her husband and their daughter arrived from a safari and had alighted at a bus stage near their residence.

The Complainants husband and their daughter were walking slightly ahead when suddenly, the Accused who was known to her grabbed her hand bag and tried to wrestle it away from her grip. A struggle ensued between the two and when the attacker realized that she was not going to let go he produced a panga and cut her on the hand.

She released the handbag and the Accused ran away with it. The Complainant and her husband chased him but he disappeared in nearby houses. The matter was reported to police.

Later the Accused was traced and police were called and he was arrested but there was no recovery of the stolen items.

The grounds of appeal are that the Accused (appellant) was charged with a defective charge in that he was merely charged with robbery with violence contrary to section 296 (2) of the Penal Code but that he ought to have been charged with robbery with violence contrary to section 295 as read with section 292 (2) of the Penal Code.

The second ground is that of Identification wherein the appellants alleges that he was not properly identified as the prosecution witnesses did not know him before.

As the first appellate Court we are conscious of the fact that it is our solemn duty of analysing and re-evaluating the evidence which was before the trial Court and arriving at our own conclusion. See **Okeno -Vs- Republic (1972) EA 32.**

On the issue of defective charge where only section 296 (2) of the Penal Code was cited, the Court of Appeal in **Simon Materu Munialu – Vs- Republic (2007) e KLR (Criminal Appeal No. 302 of 2005)** held,

“ The ingredients that the appellant and for that matter any suspect before the Court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296 (2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296 (2) is not only a punishment section but it also incorporates the ingredients for that offence which attracts that punishment.

It would be wrong to charge an Accused person facing such offences with robbery under section 295 as read with section 296 (2) of the Penal Code as that would not contain the ingredients that are in section 296 (2) of the Penal Code and might create confusion “.

We find the contention that the charge was defective without merit.

On the issue of Identification the learned trial magistrate at page 26 line 24 had this to observe,

“They knew him before every well and it was only 6:45 pm. They saw him clearly and even chased him upto his house. They did not mistake him and had no reason to lie against him”.

We find that the Appellant was known to the Complainant and her husband before. The appellant himself concedes to this fact.

In his unsworn statement in defence he maintains that he had before the arrest taken his phone to the Complainant's husband for repairs but when he went to collect it he was told that it was not ready and on the second occasion he was told that it had been taken to another repairer and this caused a misunderstanding between the two which led to his arrest.

The Complainant's husband testified as PW 2. During cross-examination the appellant did not ask him any question relating to a mobile phone taken to him for repairs.

His defence is an afterthought. We agree with the finding of the learned trial magistrate that at the time of the robbery, there was enough light. The time was 6:45 pm.

The Complainant struggled with the Accused over the bag for quite some time before he cut her with a panga. She had ample time and opportunity to recognize him. Together with her husband they gave chase but he disappeared into some houses. Later when they saw him police were called and he was

arrested. We are of the considered view that the Conviction was safe. The Sentence is legal.

The appeal has no merit and its disallowed.

Judgment delivered dated and signed in open Court this 19th day of February, 2014.

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M. ODERO

JUDGE

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M. MUYA

JUDGE