



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 172 OF 2012

JOHN NYAGA KIUMAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From original conviction and sentence in Cr. Case No. 235 of 2012 at the Principal Magistrate's Court at Siakago by HON. S.M. MOKUA – SPM on 14TH NOVEMBER 2012

J U D G M E N T

1. **JOHN NYAGA KIUMA** the Appellant herein was initially charged with the offence of Robbery with Violence contrary to section 296 (2) Penal Code which was later reduced to assault contrary to section 251 Penal Code of which he was convicted and sentenced to three years imprisonment.
2. After a full hearing the Appellant was convicted and sentenced to three (3) years imprisonment while his two co-accused were acquitted under section 215 Criminal Procedure Code. And being dissatisfied with the Judgment he filed this appeal against the conviction and sentence. He raised the following grounds of appeal;
 1. *That the learned trial Magistrate erred in law and when he failed to consider that there was grudge between Appellant and PW2 who alleged that he was the one who directed the police officer to arrest the Appellant and during the Court proceeding PW2 evidence was contradicting with PW1 who alleged that when they returned at the scene they found nobody and when Appellant raised the issue of grudge was ignored.*
 2. *The learned trial Magistrate erred in law and facts when he failed to consider that the Appellant was framed on alleged offence since the complainant alleged incident occurred on 20/3/2012 at 8.50pm and he reported the same day but the investigating officer testified that he received report from complainant on 8/4/2012 which is difference of 15 days between the alleged offence by complainant and incident that was investigated by PW3.*
 3. *The learned trial Magistrate erred in both law and facts when he failed to consider that the Evidence Act section 77 was not complied with for prosecution allowed the pW3 PC Calvin Mwadonga the investigating police officer and also arresting officer to produce medical report (P3 form) and testify on behalf of the Doctor whom to the best of my knowledge was not qualified when Appellant and complained lower Court ignored.*
 4. *The learned trial Magistrate erred in law and facts when he convicted Appellant that the charge sheet was defective since the Appellant was charged with offence of robbery with violence but he was convicted with the offence of assault.*
 5. *The learned trial Magistrate erred in law and facts when he failed convicted Appellant without considering that the Appellant was not found in possession of anything belonging to complainant and there was no eye witness who witnessed the alleged offence that Appellant was charged and convicted for.*

3. The case of the Prosecution was that PW1 was on 20/3/2012 at 8.50pm driving his motor vehicle registration No. KBM 340U towards Nairobi. After leaving Ishiara he stopped at the roadside to buy charcoal. Two children emerged as the ones selling the charcoal.
4. He bought two bags of charcoal and paid shs.1300/= to the children. The Appellant then appeared and took the shs.1300/= from the children and demanded for shs.40/= from PW1.
5. PW1 did not give him the shs.40/= and decided to drive off. The Appellant could not allow him to go. He held the steering wheel and pulled him out of the vehicle shouting "*thief, thief*".
6. He removed PW1's tie, and buttons from his shirt. He pushed him to the ground threatening to kill him. PW1 managed to escape and later went to Ishiara. He took a matatu back to the scene where they found the Appellant next to his motor vehicle.
7. He suffered injuries on his ear drums, nose, ears, neck hands and forehead. The Appellant took his shs.1300, charcoal, tie and shirt.
8. PW2 was a passenger in the matatu PW1 boarded back to the scene. He said they found PW1's motor vehicle, charcoal and the Appellant. The Appellant refused to return PW1's money.
9. He also confirmed that when PW1 boarded the matatu he had no shirt on himself. He knew the Appellant. They then left for the police station (Ishiara) where the matter was reported and the Appellant's name given.
10. PW1 was then taken to the Ishiara District Hospital as his face was swollen and he was bleeding from the eardrums.
11. PW3 was the arresting officer. He confirmed having received the report. He is the one who arrested the Appellant. He also produced the P3 Form under section 77 Evidence Act as the Appellant did not object to its production – (EXB3).
12. In his unsworn defence the Appellant said on 25/12/2011 he complained against a brother of one of the witnesses. On 20/3/2012 Mr. Mwandoga advised him to go to the Police Station for his bond. Later the same Mwandoga asked him to go and see the O.C.S. He went and was arrested. He denied the charges.
13. When the appeal came for hearing the Appellant presented the Court with written submissions, expounding on his grounds.
14. He also submitted that there was no eye witness to the incident and the Court relied on circumstantial evidence which was not watertight. He referred the Court to the cases of;

1. *NZIVO –VS- REPUBLIC [2005]1 KLR 699*
2. *WAMBUA & 3 OTHERS –VS- REPUBLIC [2008] KLR 142* which dealt with circumstantial evidence.

15. The State through learned State Counsel Mr. Wanyonyi opposed the appeal. He submitted the learned trial Magistrate considered all the issues raised by the Appellant and addressed them. And that the Court cannot be faulted for reducing the offence as it has power to do so under section 179 Criminal Procedure Code.

16. He further submitted that PW2 knew the Appellant well and that both PW1 and PW2 found the Appellant at the scene. he referred the Court to the cases of;

(i) ANTONY MAINA –V- REPUBLIC NYERI HCRA NO. 154/10

(ii) NICHOLAS MUTUNGA & ANOTHER –VS- REPUBLIC MACHAKOS HCRA NO.125 & 126/12

(iii) SMK –V- REPUBLIC KERUGOYA HCRA NO.38/13

17. As a first appellate Court this Court is enjoined to reconsider the evidence adduced in the trial Court and arrive at its own conclusion. It is not lost to me that unlike the trial Court I never had the benefit of hearing and seeing the witnesses. I am guided by the cases of;

- i. *OKENO –VS- REPUBLIC [1972]EA 32*
- ii. *KIILU –VS- REPUBLIC [2005]1 KLR 174*

18. Being so guided I have considered the submissions by the Appellant and the State. I have equally considered the evidence on record plus the grounds of appeal.
19. In ground **NO.1** the Appellant raises the issues of a grudge he had with PW2. In his defence he said he had a grudge with one of the witnesses' brother. He never specified which one. The Prosecution presented **3** witnesses. And if it's true there was a grudge it was not with the witnesses but with a brother of one of them. The evidence of PW1 and PW2 was that when he returned to the scene in a matatu they found the Appellant standing by PW1's vehicle. It was at the Appellant's home that the Appellant was not found when the witnesses went with police officers to get him. There is therefore no contradiction in their evidence and ground No.1 must fail.
20. In ground **NO.2** the evidence of PW1 and PW2 is that the incident occurred on 20/3/2012. The date of arrest was 8/4/2012. Even the P3 confirms the date of reporting at the police post as 20/3/2012. The charge sheet clearly shows the date of offence as 20/3/2012. It's therefore clear that PW3 may have confused the dates. This ground also fails.
21. In ground **NO.3** it is true that PW3 produced the P3 on behalf of the Doctor, under section 77 of the Evidence Act. The record shows that the Prosecution made its application for the Court to allow PW3 produce the P3 form under section 77 of the Evidence Act and this was the response of the Appellant at page 11 line 8-9;

"I don't have the P3 Form, however I have no objection to this officer producing the said P3 Form"

The Prosecutor's application was then allowed. It is therefore not correct when the Appellant says he was ignored when he complained about this.

22. Ground **NO.4** has no legal basis as section 179 (1) Criminal Procedure Code provides;

1. ***When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
2. ***When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.***

The learned trial Magistrate was therefore within the law when he made a finding that the only ingredient proved in this particular charge of Robbery with Violence was the causing of injury to the complainant. And the injury was assessed as **"harm"**. This ground also fails.

23. In ground **NO.5** he says no one saw him commit the offence, and that he was not found in possession of anything belonging to PW1. The evidence of PW1 is that he stopped his motor vehicle to buy charcoal. It was at night and he said that his motor vehicle lights were on.
24. He struggled with the attacker for about an hour. In his evidence he stated that he was able to see the Appellant with the help of the lights from his motor vehicle especially the time he struggled to pull him out of the vehicle.
25. PW2 confirmed that when their matatu stopped to pick PW1 the latter had no shirt on and his face was swollen.
26. When PW1 returned to the scene in a matatu with PW2 they found the Appellant next to PW1's vehicle. The charcoal was still there. PW2 who knew the Appellant urged him to return the money or the charcoal but he refused. They saw each other well. Infact PW2 said at the time he was urging the Appellant to return the money the latter had money in his hands.
27. Though no one may have witnessed the Appellant assaulting PW1 the above evidence points to none other than the Appellant as the person who committed this offence. In his presence, PW1 explained to PW2 and others what the Appellant did to him but the Appellant refused to return the money or the charcoal. These facts fall within the case of **REPUBLIC –V- KIPKERING arap KOSKE & ANOTHER [1946] 16 E.A.C.A. 135.**
28. The evidence irresistibly points to none other than the Appellant as the culprit. He even

- disappeared after this incident.
- 29.I therefore find that the learned trial Magistrate correctly applied the law in reducing the charge from Robbery with Violence to assault contrary to section 251 Penal Code which is one of the ingredients in the charge of Robbery with Violence contrary to section 296(2).
- 30.On sentence the Appellant was sentenced to three (3) years imprisonment. The maximum sentence for assault contrary to section 251 Penal Code is five (5) years. Considering the circumstances under which this offence occurred, I find the sentence meted out to have been well deserved. Am sure if the Appellant had explained to PW1 why he had to pay another shs.40/=, PW1 would have given it to him.
- 31.His attack on PW1 was uncalled for. The learned trial Magistrate arrived at the correct decision and I have no reason to make me interfere with it.
- 32.The upshot is that the appeal is dismissed and the conviction and sentence confirmed.

DATED & SIGNED AT EMBU THIS 29TH DAY OF APRIL 2014

H.I. ONG'UDI

J U D G E

**DELIVERED IN OPEN COURT AT EMBU ON 30TH APRIL 2014 ON BEHALF OF JUSTICE
H.I. ONG'UDI BY;**

D.S. MAJANJA

JUDGE