



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 462 of 2006

KELVIN MUNYUA NDUNG’U.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in criminal case Number 1720 of 2005 in the Chief Magistrate’s court at Makadara – Mr. Muneeni, S.R.M. on 1st August, 2006)

JUDGMENT

The appellant was charged jointly with 3 others with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. After a full trial his co-accused were acquitted while he was convicted and being a minor at the time of the commission of the offence, was committed to Prison to serve at the mercy of the President of the Republic of Kenya. This appeal follows the said conviction and sentence.

This appeal had been argued before Khaminwa J. and Warsame J. who however are not available to write the judgment. Upon confirmation by the appellant this appeal has been placed before us with a view to writing this judgment. The appellant had already made his submissions and the State had replied thereto according to the record before us.

The complainant was accosted by two men at the gate of his house. One of these was the appellant herein and another who held a gun. These people demanded his mobile phone and money. In so doing, they injured him at the elbows joint. These two people walked away. He reported the matter at Huruma Police Post and later on he was called by the police to participate in an identification parade whereat he picked the appellant herein who he had known by the name Ndung’u.

The appellant was arrested by P.W. 2 upon a report received from a reportee. The identification parade was conducted by P.W. 3 and when the appellant was put on his defence denied the offence and attributed his arrest to differences between the complainant and his father.

In convicting the appellant the learned trial magistrate had this to say.

“P.W. 1 – Kimani said he saw accused 1 – Ndung’u at the time of the robbery. He also picked him from the identification parade. He did not identify the other accused. I warn myself of the danger of relying on the evidence of single witness (uncorroborated evidence) to convict the accused. However, I find safe so to do given that the incident took place in broad daylight. Secondly, P.W. 1 - Kimani knew accused I – Ndung’u before. Thirdly the phone was recovered. Fourthly, allegations of bad blood between accused 1 – Ndung’u’s father and P.W. 1 –

Kimani are futile means by accused 1 – Ndung’u to hide the truth. All prosecution witnesses credible”.

As required of us being the first appellate court, we have assessed and evaluated the evidence on record. The offence took place at about 9.15 a.m. The complainant knew the appellant by name. This was a case of recognition, as opposed to identification. To reinforce that recognition, the complainant picked the appellant at an identification parade. That removed every doubt that the appellant was one of the assailants who robbed him.

The appellant’s accomplice was armed with a gun with which they threatened the complainant. It is our view that the offence under Section 296 (2) of the Penal code was proved beyond any reasonable doubt and that the conviction was well founded.

Being a minor the sentence delivered by the learned trial magistrate was legal. This appeal is hereby dismissed.

Orders accordingly.

Dated and delivered at Nairobi this 14th Day of March, 2013.

A. MBOGHOLI MSAGHA
JUDGE

L.A. ACHODE
JUDGE