



REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 69 of 2008

SILAS MURATHI NYAGAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

From original conviction and sentence in Cr. Case No. 1848 of 2006 at the CHief Magistrate's Court at Embu by HON. S.N. RIECHI – CM on 19/3/2008

J U D G M E N T

SILAS MURATHI NYAGA the Appellant herein was initially charged with the offence of Robbery with Violence contrary to section 296(2) of the Penal Code.

After a full hearing the learned trial Magistrate reduced the said charge to Robbery contrary section 296(1) Penal Code by virtue of the provisions of section 179(2) Criminal Procedure Code. He was eventually sentenced to eight (8) years imprisonment. And being dissatisfied with the Judgment he filed the present appeal raising the following grounds.

- 1. That the trial Court erred in both points of law and fact to put reliance on identification alleged by PW1, PW2 and PW3 which was surrounded by doubts.**
- 2. That the learned trial Magistrate erred in law and fact when he relied in the evidence of the statement which PW1, PW2 and PW3 made to the Court which was full of fabrication and afterthought whereby the statements in the Court and statements at the police station differed and taken as different exhibits.**
- 3. That the trial Magistrate erred in both points of law and fact when he misdirected himself by putting reliance on the evidence adduced by PW3 that he knew the Appellant by the name “Mura” which does not appear on the charge sheet.**
- 4. The trial Court erred in law and fact by relying on contradictory, uncorroborated and inconsistent evidence adduced by the Prosecution witnesses which could not meet the standard of conviction.**
- 5. That the learned trial Magistrate erred in both points of law and fact when he overlooked, misdirected and failed to consider the occurrence book No.7/28/7106 that the date of the Appellant's arrest did not support the charge before the Court.**
- 6. That the trial Court erred in law and fact by imposing the conviction and harsh sentence upon the Appellant while rejecting the Appellant's defence which was not challenged by the Prosecution**

as required by section 212 Criminal Procedure Code and section 169 Criminal Procedure Code.

7. That the trial Magistrate failed in law and fact to rely on the evidence adduced by PW5 that the Appellant mentioned robbers to him whereby the said confession was not written.

8. That the trial Court failed to consider that the Appellant was not arrested with the items alleged to have been stolen to connect the Appellant in question.

When the appeal came for hearing he presented the Court with written submissions. A reading of these submissions shows a repetition of the grounds filed.

The learned State Counsel opposed the appeal. She stated that PW1 – PW3 identified the Appellant as P.W.1 had been drinking with the culprits at Weavers bar. They attacked and robbed him of a phone and shs.600/=. PW2 and PW3 had known the Appellant prior to this date of incident. She submitted that the sentence was lenient.

This being a 1st appeal this Court is enjoined to reconsider and reevaluate the evidence that is on record and come to its own conclusion. I also bear in mind that I never saw nor heard the witnesses. I am guided by the cases of;

1. OKENO -VS- REPUBLIC [1972] EA 32

2. NGUI -VS- REPUBLIC [1984] KLR 729

The brief facts of the case are that on 29/7/2006 at 9.30am PW1 left Embu for Chuka by public means. Reaching Runyenjes the driver decided not to go further. PW1 decided to spend the night in Runyenjes. He booked himself a room and thereafter went to enjoy himself. He had on him a walker, Nokia phone and cash shs.1000/=. He landed at Beavers bar which was lighted by electricity lights. He was joined on his table by two young men and after a while a relationship struck. He bought beer for them. They were together for 1½ hours. When he told them he wanted to go and sleep they offered to reciprocate his kindness and buy him a beer at another joint. They agreed and left with the two new friends leading. They went through a dark place and that's when they struck and dropped him down. They took his phone and shs.600/=. He screamed and those at Beavers came to his rescue. The two good friends ran away but the bar customers knew them as Mulla and Rombo. PW2 and PW3 were among those who came to assist PW1. They had been in the bar and had seen PW1 with Mulla and Rombo. Infact its PW2 and PW3 who gave the names of the suspects to the police. Mulla was said to be the Appellant. The police managed to trace and arrest him after about a week.

In his defence the Appellant explained how he was arrested on 28/7/2006 at 1pm after polishing shoes for a customer. He produced the witness statements of PW1, PW2 and PW3 as his exhibits (EXB 2). I will deal with all the grounds of appeal together.

The leaned trial Magistrate found no element of assault established and so reduced the charge to simple robbery which he convicted the Appellant.

The main ingredient of the offence is stealing and force applied. PW1 explained he was hit and floored down before being robbed. He said he was a student and had shs.1000/= and a phone on him when he entered the bar. But by the time he was leaving he had the phone and shs.600/=. He screamed when he was being roughed up. I am satisfied an offence of robbery took place. PW1 was robbed by people he had been drinking with at Beavers Bar. There were other customers in the said bar. Among them were PW2 and PW3. The robbery took place just a few metres from the joint of drinking. Infact its the watchman who called the patrons out to come and assist the complainant. The bar had been lit by electricity light. Therefore visibility was not a problem.

It is PW2 and PW3 who assisted PW1 identify the attackers as they knew them plus even their nicknames. PW1 went to the station and was shown the Appellant and he identified him as the person who had robbed him. Since he did not identify him at an identification parade his identification amounted

to dock identification. However the evidence of PW2 and PW3 was evidence of recognition.

In his grounds he complains that the watchman was not called as a witness yet its him who heard the commotion. The failure to call the watchman was not fatal. Watchmen are workers who keep on moving from one place to another. Getting him may have not been easy. I would find as the Court did that the evidence of PW2 and PW3 was sufficient.

I have looked at the occurrence book (DEXB 1) and the statements (DEXB 2) and find them to support the evidence adduced by the witnesses.

The Appellant in his defence stated that he was arrested on 28/7/2006 which is not true. All he did explain was how he was arrested. He did not touch on the date in issue which was the night of 29th and 30th July 2006. When his defence was considered alongside the Prosecution case it was found to be wanting. I am satisfied that the learned trial Magistrate considered the evidence before him carefully and came to the correct conclusion by convicting the Appellant for Robbery contrary to section 296(1) Penal Code. I therefore uphold the conviction.

Coming to the sentence I do note that the Appellant was a 1st offender. The items stolen were cash sh.600/= and a phone valued at shs.6000/=. They were never recovered. The victim was not injured. Though the offence carries a sentence of 14 years each case must be looked at based on its own peculiar circumstances. Considering what was stolen and the fact that the victim was not injured I find the sentence of eight (8) years to have been too harsh. He was convicted and sentenced on 19/3/2008. He has served five (5) years of the eight (8) years. He had been in prison remand for two (2) years before his matter was finalised. I will therefore reduce his sentence to the period already served. To that extent only does the appeal succeed.

Appellant to be set free unless otherwise lawfully held under a separate warrant.

DELIVERED, SIGNED AND DATED AT EMBU THIS 25TH DAY OF APRIL 2013.

**H.I. ONG'UDI
J U D G E**

In the presence of;

**Mr. Miiri for State
Appellant
Njue – C/c**