REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

HIGH COURT CRIMINAL APPEAL NO. 484 OF 2013

JAMES KIIRU NJIRU …….. APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(From original conviction and sentencing in Criminal Case No. 152 of 2011 at the Senior Resident Magistrate's Court at Kigumo by M.W. Mutuku – Senior Resident Magistrate on 20th April, 2009)

JUDGEMENT

The appellant was charged jointly with another with the offence of robbery with violence contrary to Section 296 (2) of the Penal code. They both denied the offence but a full trial he was convicted while his co-accused was acquitted. Upon the said conviction he was sentenced to be held at the President's pleasure as provided by law, because at the time of conviction he was under the age of 18 years. Aggrieved by the said conviction he filed this appeal.

In his appeal he has challenged the conviction on the basis that the particulars of the charge were not supported by the evidence adduced which evidence was full of contradictions. It is also his case that P.W. 6 who produced the medical report was not qualified to do so and was therefore incompetent. Further, P.W. 1 did not give evidence on oath and therefore that evidence should be disregarded. Finally his alibi defence was not considered.

His appeal is opposed by the Republic which contends that the appellant has not given any reasons why the decision of the lower court should be overturned.

The evidence adduced before the learned trial magistrate was brief. The complainant was on his way home. On reaching his gate he was attacked by two people armed with an axe and machete. He held one of the attackers and felled down. In the process he was robbed of two mobile phones before one of the attackers disappeared. He raised an alarm and his wife who heard him screaming also raised an alarm. Some neighbours came and assisted to disable the person he was holding. It occurred to him that it was somebody he knew, and that is the appellant herein.

The appellant is said to have told the complainant that he had been sent by his co -accused one Kiriba to attack him because he owned him some money. The appellant was then escorted to Kinyona Police Post. His co-accused was arrested on the following day.

The people who came to the aid of the complainant were P.W. 2 his brother, P.W. 4 his wife and P.W. 3. another neighbour. It is the evidence of the complainant that he suffered some injuries upon being attached by his assailants. These injuries were contained in a P3 Form Produced by

P.W. 6 in evidence.

On being called upon to defend himself, the appellant gave an alibi that he was not at the scene of alleged robbery because after his daily chores, he retired home and never left until the following day at 6 a.m. when some two people came to his home and told him to accompany them to the shopping centre. At the shopping centre he was informed that he had been mentioned in connection with the attack on the complainant. That is where also he found his co-accused having been arrested. He was escorted to Kinyona Police Post and then Kigumo Police Station and later charged with the present offence. He called some witnesses to support his alibi. The learned trial magistrate believed the evidence of the prosecution witnesses dismissed the defence advanced by the appellant and convicted him.

As the first appellate court it is our duty to access and evaluate all the evidence adduced before the lower court and come to independent conclusions. In his evidence, the complainant alleged that he lost some money amounting to Kshs. 2070/= and two phones. The charge sheet stated that he lost two phone all valued at Kshs. 6,800/=. This is the discrepancy that the appellant has alluded to in saying that the particulars of the charge were not supported by the evidence adduced. In our view, that submission has no basis because what is important in an offence of this nature is whether or not the complainant had been robbed and whether or not the ingredients of Section 296 (2) have been satisfied. It is enough that the appellant was attacked by some people who it is alleged included the appellant herein.

As to the identity of the appellant there is evidence from the complainant's brother, his wife and other neighbours that the appellant was found at the scene having been pinned down by the complainant. From the time the complainant got hold of the appellant he did not let him loose. In the words of the complainant.

"I never left him to go after I got hold of him". There is no way therefore that the appellant can escape the conclusion that he was at the scene of the commission of the offence.

Beside the complaint and the appellant there was an axe and a machete. These were the weapons that had been used to attack the complainant. The injuries of the complainant were assessed by a Dr. Charles Kamau Kamotho who filled the the P3 form exhibit 3b produced by P.W. 6 Rahab Muthoni. Rahab Muthoni was not the author of the P3 form and her qualifications have not been stated in evidence. It is not clear whether or not she ever worked with the author of the P3 Form or whether or not she was familiar with his signature and hand writing. The basis for the production of that evidence was not laid before the court.

That is not to say that the complainant was not injured. He said as much in his evidence and remained firm under cross-examination in that regard. Even if the evidence of P.W 6 were to be discounted, the offence to robbery contrary to Section 296 (2) was proved. We say so because, only one ingredient of all the ingredients set out therein needs to be proved to justify a conviction. There is evidence that the appellant was in the company of another and that he was armed with weapons found at the scene. That was sufficient evidence to justify the conviction.

It is true that the record shows the complaint was not sworn upon commencement of his evidence in chief. That notwithstanding, we do not find any prejudice occasioned to the appellant because the he cross-examined this witness extensively.

In view of the fact that the appellant was not released by the complainant after he was held, and in fact found at the scene by the witnesses who answered the call by the complainant, his defence cannot be true. In our judgment, it was properly rejected by the learned trial magistrate. The conviction was therefore justified.

The sentence imposed by the learned trial magistrate was in line with the statutory provision and cannot be faulted. We find that the appeal is lacking in merit and is therefore dismissed.

Orders accordingly.

SIGNED, DATED and DELIVERED in open Court this 29th day of November, 2013.

A. MBOGHOLI MSAGHA **RADIDO STEPHEN**

JUDGE **JUDGE**