REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 207 OF 2011

(An appeal against both conviction and sentence of the Senior Resident Magistrate's Court at Butere [E. S. OLWANDE, SRM]

dated 31st January, 2011)

CHRISTPIN OYARE SAYA ..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with attempted robbery contrary to Section 297 (1) of the Penal Code. The particulars were that on 2nd January 2011 at Ebuchero village, Wabuchire Sub-location, Kisa Central in Khwisero District within Kakamega County jointly with others not before court attempted to rob Joab Akatsa his bicycle and immediately before the time of the attempted robbery threatened to use actual violence to the said Joab Akatsa.

He denied the charge. After a full trial, he was convicted and sentenced to serve 7 years imprisonment. He has now appealed to this court. The grounds of appeal are as follows -

1. That the learned trial magistrate erred in law and facts by failing to appreciate the mental status of the appellant.
2. That he was epileptic and out of his mind during trial.

He also filed written submissions which I have perused. At the hearing of the appeal, the appellant asked the court to assist him. He submitted that he wanted to be retried because at the time he was arrested, he had actually been involved in an accident and was a victim of mental confusion.

Ms Opiyo learned counsel for the State opposed the appeal. Counsel submitted that the appellant was of sound mind. That there was no medical evidence of mental incapacity and that he actually defended himself well at the trial. There was therefore no basis for ordering a re-trial.

The facts of the case are in brief that PW2 Joab Akatsa was going home on 2nd February, 2011 at about 8.30 p.m. He had a bicycle which he was pushing along. On reaching Ikolomani market, he met three young men who asked him where he was going to. They then hit him with stones and he screamed. They tried to snatch his bicycle. However, he held tightly to it. Due to the screams, police officers arrived together with members of the public. The appellant was restrained and later charged. The police who came the scene were PW3 Ibrahim Wekesa and PW4 Michael Mwenga.

When put on his defence, the appellant gave an unsworn statement. His unsworn statement was an alibi. He stated that he was arrested at 7.30 p.m. In a shop in which he had gone to buy some sugar.

Faced with this evidence, the learned magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt, convicted and sentenced him. Therefrom arose this appeal. The appellant, in arguing this appeal filed written submissions which I have perused.

This is a first appeal. As a first appellate court, I am required to re-evaluate the evidence on record and come to my own conclusions and inferences.

The appellant has filed an appeal on technicalities stating that he was mentally unstable when he was arrested and thus wants to be retried. An accused person is presumed to be mentally sane unless it is proved to the court otherwise or the trial court forms the view that he is mentally unstable. There is no medical report filed on his mental condition. There is no record that he appeared mentally unstable at the trial. That ground of appeal by the appellant is dismissed.

In his defence, the appellant raised and alibi. An appellant does not require to prove his alibi defence. It is the responsibility of the prosecution to dislodge the alibi defence raised. I rely on the case of ***Sekitoleko -vs- Uganda [1967] EA 531***, where the High Court in Uganda stated as follows -

1. As a general rule of law, the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is alibi or something else. (Republic vs Johson [1961] 3AER 969 'Leonard Aniseth -vs- Republic [1963] EA 206 followed'.
2. The burden of proving an alibi does not lie on the prisoner and the trial magistrate had misdirected himself."

Having re-evaluated all the evidence on record, I find that though the incident occurred at night, the witnesses who arrested the appellant i.e. PW3, Ibrahim Wekesa Mukhwana and PW4, Michael Mwenga were truthful. They actually found PW2, the complainant being attacked. They managed to arrest the appellant on the spot. The evidence of the prosecution witnesses clearly displaced the alibi defence. The alibi defence was also raised very late in the day. The appellant had the opportunity to cross-examine PW2, PW3 and PW4. No single suggestion was made by him in cross-examination that he was not at the scene of the incident.

His present request for a retrial also shows lack of honesty. He does not appear to be eager to address the substantive issues on the allegations against him herein. In my view, with the evidence on record the learned magistrate was correct in finding that the appellant was part of the group of three people that attempted to rob the complainant of his bicycle and in the process hit him with stones and injured him. The prosecution proved its case against the appellant beyond reasonable doubt. I will uphold the conviction.

On sentence, the appellant was a first offender. He was charged under Section 297 (1) of the Penal Code. The maximum sentence provided by law is seven (7) years. He was sentenced to serve the maximum sentence of 7 years. In considering sentence, the learned magistrate stated as follows -

"I have considered the evidence presented. The offence the accused has committed is aggravated and calls for a stiff penalty. I sentence the accused to 7 years imprisonment."

In my view, the sentence imposed was excessive. It was true that the complainant suffered some injuries due to the stoning. Those injuries were however classified was harm. Therefore, though the offence was serious, since the appellant as a first offender, he did not deserve to be handed down the maximum sentence provided by the law. I will consequently interfere with the sentence imposed. In my view, a sentence of four (4) years imprisonment will be adequate in the circumstances.

To conclude, I uphold the conviction. I however set aside the sentence and order that the appellant will serve four (4) years imprisonment from the date on which he was sentenced by the trial court.

Dated and delivered at Kakamega this 22nd November, 2013

George Dulu

JUDGE