



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 314 OF 2007

MARK KAHINDU WANJIKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgment in the Chief Magistrate's Court at Nyeri in Criminal Case No. 4550 of 2004 by Mr. E. J. Osoro - SRM delivered on 7/11/2006)

JUDGMENT

The appellant was charged with Robbery with violence contrary to Section 296/2 of the Penal Code.

The particulars of the charge were that on the 15th day of December, 2004 at Ring Road Estate Nyeri District of the Central Province of Kenya the appellant robbed Joram Wambugu Kshs.300 and at or immediately before or immediately after the time of such robbery used actual violence to the said Joram Wambugu.

PW1 was the Taxi driver employed by Mr. Maina to drive Taxi Reg. No. KRQ 465 Datsun 120J who plied the Kangemi hospital route and had worked for one year and resided at his home at Kigwandi, Thegenge Division. On the 15/12/2004 at 7.00 am he reported at work and in the evening at 7 pm he was approached by the appellant whom he did not know, to take him to Ring Road next to Kamakwa.at a charge of Kshs.200. The appellant entered the vehicle and promised to pay later.

When they reached the residence of Wambui Kibaki, the appellant put a cold object on his neck and told him to give all he had. He gave the appellant Kshs.300 that he had and switched off the engine of the vehicle. The appellant complained that Kshs.300 was little and still held the cold object at his neck. He asked for the keys but the complainant refused to give hence he was hit on the head but he was not injured. Later there was a struggle and the complainant overpowered the appellant with the help of the police and members of the public. The object the appellant used to threaten complainant was said to be a herpic green plastic container. The appellant was taken to the police station and later charged.

PW2 was a police officer in the C.I.D Anti Narcotics Nairobi. Initially he was stationed at Nyeri Police Station performing general duties and an assistant investigating officer to IP Ochido.

On 15th of December, 2004 at 7 pm he was at Nyeri Report Office when 5 Presidential Escort guards who were escorting Mrs. Wambui Kibaki at her residence brought the appellant to the police station and said that they had found him robbing the complainant of Kshs.300. The guards had responded to the alarm of the complainant who had claimed that the appellant used a herpic plastic container pretending that it was a pistol. The appellant was charged with the offence of Robbery with Violence

contrary to section 296(20) of the P.C.

PW3 was Grace Gathoni Gituru a hawker who sells 2nd hand sweaters and trades her wares at Kamakwa Tetu. She had been in the business for two years. She purchased her wares in Nyeri town and used to sell the same at Kamuyu in Nyeri.

On the 15/12/2004 she left her home and went to Nyeri at 1.00 pm and on her way back home in the evening she was walking along Mumbi road at around 6 pm when she saw a saloon car with its doors wide open and two people besides it fighting, one was bleeding from the head. She looked closely and found that the two people were not playing and she screamed and members of public went and arrested the two people. The appellant was one of the two people who were fighting and the complainant was the other who claimed that he was being robbed of his car by the appellant. She said that PW1 was also bleeding from the head which means that both men were bleeding from the head.

In his defence the appellant, a farmer from Kamakwa at Ring Road stated that on 15/12/2004 at noon, he left Nyeri town for home with his brother who resides at Naivasha. He later escorted him to back to town where they went to Kungu Maitu to see another person and while there he took a soda as his brother was talking to the other person.

At 6.00 pm they parted company as his brother went to Naivasha whilst the appellant took the complainant's taxi back home at a charge of Kshs.300 and sat on the back seat due to his bad leg. When they had passed Wambui's residence, the taxi driver upon confirming that they had not passed the appellant's home he complained that the journey had become long and therefore asked for an addition of Kshs.50 but the appellant declined as he did not have money. They went upto the house and he paid the driver Kshs.300 as agreed but the driver demanded to be added some money which the appellant refused. The taxi driver threatened to drive him back to town and actually began driving him back to town and the appellant threatened to report to the police. The taxi man decided to stop the car near Mary Wambui's residence and a struggle ensued. Police came and took both the appellant and complainant to the police station and put the appellant in the cells and later charged him with the offence of robbery with violence.

The trial magistrate after hearing testimonies from both sides retired to writing his judgment.

The trial magistrate correctly found that there was a confrontation between the appellant and complainant as the two had attacked each other and that as a result of the confrontation the complainant had serious injuries while the appellant had minor injuries. The court found that the evidence of PW1 was well corroborated with the evidence of PW3 and therefore agreed with the evidence of the prosecution and dismissed the evidence of the defence. The magistrate went further to convict the appellant with the offence of simple robbery contrary to section 296(1) of the Penal Code.

The appellant has appealed to this court on the following grounds:

- 1. That the learned trial magistrate erred in law and facts in convicting the appellant in reliance of inconclusive prosecution evidence.***
- 2. That she erred in law and facts in not finding that some very essential witnesses were not availed to testify.***
- 3. That she erred in law and facts in not finding that my fundamental rights as enshrined under section 72(3) (b) of the former constitution were grossly violated.***
- 4. That she erred in law and facts in not finding that the alleged exhibit MF1 and MFI-2 were later fabrications.***

We do find that failure by the Investigating officer to testify was fatal to the prosecution's case as the investigating officer should have been called to demonstrate to the court how the herpic plastic bottle was used as a toy gun. It was necessary to call the investigating officer to shed light on the use of this

plastic container a gun as there was a possibility that the same was a fuel funnel used by the taxi driver as such. Apart from the taxi driver nobody testified that the plastic container was used as a pistol.

The court has evaluated the evidence of PW3 and does find that it supports the finding that a fight ensued between the appellant and complainant and not that there was a robbery at all as she did not know why the two people were fighting.

The upshot of the above is that these court finds that there were serious doubts as to whether the appellant robbed the complainant of the said amount of money as alleged as the evidence on record is the word of the complainant against the word of the appellant hence not sufficient to convict. The appellant's defence was plausible in view of fact that the independent witness only states that she saw the two men fighting and therefore there was a possibility that they had disagreed on the charges.

The appeal is allowed, the conviction quashed and the sentence set aside.

Dated, signed and delivered at Nyeri this 22nd day of November 2013

J. WAKIAGA

JUDGE

A. OMBWAYO

JUDGE