



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 82 OF 2011

BETWEEN

KENNETH KARIUKI MAINA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Siakago Criminal Case 487 of 2010 by Hon. S.M. Mookia, PM on 26th May 2011)

JUDGMENT

1. The appellant was charged with two counts of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars of the first count being that on the 5th day of January 2010 at Kathigagacheru village in Mbeere South District of the Eastern Province, jointly with others before court while armed with crude weapons namely stones and pangas robbed Cyprian Nyaga Nthiga Ksh 3,900/= and immediately before or immediately after the time of such robbery used actual violence to the said Cyprian Nyaga Nthiga.
2. The particulars of the second count were that on the 5th day of January 2010 at Kathigagacheru village in Mbeere South District of the Eastern Province, jointly with others before court while armed with crude weapons namely stones and pangas robbed Stanley Macharia Njeru of Ksh 5,000/= cash and immediately before or immediately after the time of such robbery, used actual violence to the said Stanley Macharia Njeru.
3. The prosecution called seven witnesses in support of its case. The accused gave a sworn statement and denied committing the offence. After weighing the evidence tendered, the trial court found the prosecution had not proved the offence of robbery with violence. It however found that the facts disclosed the offence of robbery and by dint of **section 179(2)** of the **Criminal Procedure Code** proceeded to convict the appellant on two counts of the offence of robbery and sentenced him to imprisonment for five years for each count, the sentences running concurrently.
4. It is the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own independent conclusions in deciding whether the judgment of the trial court should be upheld. In doing so, it must also take into account the fact that it lacks the privilege of hearing or seeing the witnesses testify. (See **Okeno v Republic [1972] EA 32**).
5. The prosecution case against the appellant was supported by two main witnesses who identified the appellant. PW1, Cyprian Nyaga Nthiga testified that on the material day he left Embu at 6.00 am via

Siakago route driving motor vehicle KBA 553C carrying 20 passengers towards Ishiara. At this time there was a country wide *matatu* strike. At Kamumu, a motor vehicle registration KAS 478R came from behind flashing its lights. Some people alighted from it. He was able to identify them as Wararu, a stage attendant at Embu, Kago, Kariuki Philip who is the appellant and others. The men carried stones and rungs. They threw stones at PW1's vehicle but he managed to drive away to Kathigagaceru. The Nissan which still pursued him blocked him and one Gitonga held PW1 by the neck and asked him to get out. As he was getting out, the appellant hit him on the left thigh as a result of which he fell down. The appellant took his driving licence, wallet and PSV badge. He also took Kshs. 3,900.00 which was in his wallet. Only the wallet and the driving licence were returned to the front cabin of his vehicle. PW1 testified that the other people who were with the appellant took all the money the conductor had. One of the passenger's money was stolen. PW1 reported the incident at Siakago Police station and was referred to Mbeere district hospital. PW1 confirmed the photographs as being those of motor vehicle KAS 478R. He stated that he knew the appellant as Kariuki Phillip who was his co-driver at some point.

6. PW4, Stanley Macharia was the conductor of the ill-fated *matatu*. His testimony was similar to that of PW1. According to him, the vehicle that was pursuing them, one KAS 478 R caught up with them at Kathigagaceru where its occupants started attacking them as they were operating on a day that there was a *matatu* strike. The attackers threw stones at them and also beat them with sticks. PW4 testified that one Mwiti took Kshs 5,000/= from him. The driver was also attacked and another passenger. He claims that he identified the appellant and their other attackers as Dave Kifaru, Wararu, Kago, Gitonga and Mwiti. He identified the photographs in court as those of the vehicle that pursued them.

7. PW3, John Mwangi, a clinical officer based at Mbeere District Hospital, testified on behalf of his colleague, Naomi Ngungi following an application by the prosecution under **section 72** of the **Evidence Act**. He confirmed that PW1 was examined at Mbeere District Hospital. He produced the P3 forms for PW1 confirming that he sustained injuries on the left thigh clavicle bone and right side of the face and that the right thigh was swollen and tender. The degree of injury was assessed as harm. PW3 also produced the P3 Form and medical notes for Stanley Macharia, PW4, who was also attended to at the facility on the same day as he complained of head and back pains. He testified that Stanley sustained injuries on the back and head.

8. PW2, Corporal Reuben Manyara, of crime scene support based at Embu confirmed that the photographs produced in evidence were those of Nissan Matatu KAS 478 R. PC Joseph Ringine, PW5, of DCIO's office Mbeere testified that on 1st June 2010, he received information from an informer that the appellant was amongst other suspects at Check Inn Bar involved in stealing motor cycles at Check In Bar. The appellant was arrested and handed over to the investigating officer.

9. PC James Wachira, PW6, of CID Makuani also testified as to the circumstances that led to the arrest of the appellant. PW7, the owner of the motor vehicle KAS 478R confirmed the vehicle was his and that that he knew the appellant as driver in Siakago Township.

10. In his sworn defence, the appellant denied committing the offence and relied on alibi evidence. At the time of his arrest, he was a *matatu* driver. He testified that he was in hospital on the day the alleged offences were being committed. He stated that he had left his house at about 7.00am and proceeded to Mbeere District hospital where he remained up to almost 1pm. He then went to Glory hotel and took tea and later went to his house where he rested the remaining part of the day.

11. The appellant based his appeal on various grounds. He took issue with the rank of the investigating officer whom he complained was a police constable and according to him not qualified to investigate a case of such magnitude. He further pointed to contradictions in the evidence of the prosecution witnesses. The appellant appeals against both the conviction and sentence. The prosecution supports both the conviction and sentence.

12. The question then is, do the facts set out in the earlier part of the judgment sufficient to convict the accused on the offences of simple robbery or robbery with violence? From the evidence it is clear that the accused was in the company of other people. The testimony discloses that the appellant together with

others, who were armed with sticks and stones, caused personal violence on PW1 and PW4. That alone proves the second element of the offence of robbery with violence. This leaves the question whether the element of stealing is proved from the evidence tendered in order to complete the offence of robbery.

13. The evidence of PW5, PW6 and PW7 I must say, is not useful in this regard as it is couched primarily on hearsay accounts. The testimony of PW2 is also not useful in this respect. This leaves the testimonies of PW1 and PW4, the driver and conductor respectively, who were attacked on the material day and the complainants. Their testimony is that Kshs. 5,000 was stolen from PW4, and Kshs. 3,900 from PW1.

14. The evidence reveals that the common motive of the attackers was not stealing but to stop the operation of the *matatu* in view of the then ongoing *matatu* strike in the country. I am far from satisfied that the money was stolen as alleged and as such, the prosecution evidence falls short of proving to the required standard, that of beyond reasonable doubt that either the offences of robbery or robbery with violence were indeed committed.

15. I am however satisfied that the facts of the matter disclose commission of the offence of assault causing actual bodily harm. **Section 179(1)** of the ***Criminal Procedure Code*** permits the court to convict on a minor offence where the facts prove commission of a minor offence other than the one charged. **Section 251** of the ***Penal Code*** provides for the offence of assault causing actual bodily harm in the following terms; “*Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years.*” It is no doubt that PW1 was roughed up by the attackers as a result of which he incurred injuries in the process, a fact that is corroborated not just by the PW1 and PW4 but also by the evidence of PW3. I am satisfied that the appellant was properly identified as one of the attackers, the offence having been committed in day time by people well known to the complainants who are also in the *matatu* business.

16. I have considered the alibi defence of the appellant and find it to be incredible in view of the clear evidence of PW1 and PW4. The appellant alleged that at the material time he was at the hospital. He did not produce treatment card in court or other evidence to support his alibi, this being a fact that was within his knowledge.

17. In light of the evidence, I substitute the two counts of offence of robbery with that of assault occasioning actual bodily harm contrary to **section 251** of the ***Penal Code***. I convict the appellant on two counts of the offence of assault causing bodily harm to Cyprian Nyaga Nthiga and Stanley Macharia Njeru.

18. As the appellant is a first offender, he is sentenced to time already served on both counts. He shall be released forthwith unless otherwise lawfully held.

DATED and **DELIVERED** at **EMBU** this 16th December 2013.

D.S. MAJANJA

JUDGE