REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Criminal Appeal 24 of 2009

ZAKAYO MWITI JOHN……..……..…..APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Judgment arising from the Senior Principal Magistrate's Court at Nanyuki in Criminal Case No.509 of 2007 by Ndung'u H. N. (Miss) – Ag.S.P.M. dated 2nd February 2009)

JUDGMENT

Zakayo Mwiti John, the Appellant herein, was tried on a charge of robbery with violence contrary to Section 296(2) of the Penal Code. After undergoing a trial, he was convicted and sentenced to suffer death. Being aggrieved he preferred this appeal.

On appeal, the appellant put forward the following grounds in his petition:

1. That the learned trial magistrate erred in both law and fact when she convicted me in this case while relying with the mistaken identity made by the Complainant PW1 herein without her not considering that the same was mere fabrication of which was never supported by neither with his first report he made at the police station.

2. That learned magistrate erred in both law and fact when she convicted me in this case under section 296(2) p.c. of which the statement written by the complainant at the police station stated a case of fighting.

3. The learned trial magistrate erred in both law and fact when she convicted me in this case while relying on the contradicted evidence adduced by the prosecution witnesses.

4. That the learned trial magistrate erred in both law and facts when she harshly convicted me in this case without her not putting considerations that, the complainant wrote his statement late when I was already in prison for 5 good months.

5. That the learned trial magistrate erred in both law and fact when she convicted me while relying

on unfair trial.

6. That the learned trial magistrate erred in both law and fact when she convicted me in this case while being so impressed with my mode of arrest without her considering that the prosecution side failed to prove for any arrest as we were both being arrested with the complainant without further explanation to why?

7. That the learned trial magistrate further gravely erred in law and fact when she rejected my defence without her explaining proper reasons for its rejection and thus violated the law provision under section 169(1) P.C.

When the appeal came up for hearing before us, Miss Maundu, learned State Counsel conceded the appeal on the ground that the offence was not proved beyond reasonable doubt.

We wish to set out the case that was before the trial court before dealing with the appeal. It is the prosecution's case that on 15th March 2007 at about 2.00 p.m. Andrew Mugambi (P.W.1), the Complainant, was invited by one Gacheri to share a drink with her. Inside that house, the Complainant found four people. Amongst those people was the appellant. Gacheri is said to have requested the Complainant to buy the Appellant some drinks. Gacheri searched the Complainant's pockets for money when he declined to buy beer as requested. The Complainant pushed aside Gacheri and jumped out. It is said the Appellant in conjunction with Gacheri held the Complainant by the jacket. The duo are said to have removed the Complainant's jacket and stole Ksh.800/= from his rear trouser pockets after attacking P.W.1. In the ensuing struggle, the Complainant's trouser got torn. A complaint was reported to the nearby A.P. camp. It is said the Appellant offered to compensate the Complainant for the damage at the A.P. Camp. The appellant was arrested when the complainant refused to reconcile. The Appellant, when put on his defence, denied committing the offence. He told the trial court that on the fateful day he met four (4) men who robbed him of his money. He reported at the Police Station. He said the Administration Police came calling while he was recording his statement at the Police Station and informed him he was required at the Majengo A.P.'s camp. The next day he visited the aforesaid A.P. Camp where, the Appellant claimed he met a man who appeared to be drunk. He claimed the drunk man was armed with stones while he was being teased by some street boys. The Appellant claimed he saw the drunk man throw stones at those boys. The stone hit him. It is said the Appellant went and grabbed the assailant. Shortly, A.P.s came and separated them. They handcuffed them and took them to the Police Station where both men were booked in for the offence of affray. The Complainant was later released and the Appellant was charged with the offence of robbery with violence. The trial magistrate came to the conclusion that the offence was proved to the required standards in criminal cases. She formed the opinion that the Appellant and his accomplices attacked the Complainant in a group of more than two men hence the offence of robbery with violence.

Having set out in brief, the case that was before the trial court, we now turn our attention to the merits or otherwise of the appeal. We have already indicated that the State conceded the appeal on the ground that the offence was not proved to the standard of beyond reasonable doubt. We have re-evaluated the case that was before the trial court. There is no doubt in our minds that the Appellant and the Complainant were in the house of a lady by the name Gacheri having a drink. A scuffle ensued between the Appellant on one hand and the Complainant and M/S Gacheri on the other hand. In the process of the struggle the Complainant got injured and lost Ksh.800. In fact there is evidence that the Complainant and the Appellant were locked up by the Police who in turn preferred a charge of affray against the duo. It would appear the fight between these individuals was spontaneous and involved people who were enjoying a drink. In our humble view we do not see how the offence of robbery with violence can fit into the circumstances of this case. It is possible the persons involved just fought as drunkards and in the process the Complainant was injured and lost some money. It is also possible that the money may have been spent on drinks. With respect, we agree with Miss Maundu, that the offence of robbery with violence was not established beyond reasonable doubt. We commend her for readily conceding the appeal.

In the end, we allow the appeal. The conviction is quashed and the sentence set aside. The

Appellant is hereby set free forthwith unless lawfully held.

Dated and delivered at Nyeri this 8th day of June 2012.

J. K. SERGON

JUDGE

J. WAKIAGA

JUDGE