



REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRA NO.67 OF 2008

(Appeal arising from BGM CM. CR. NO.517 of 2008)

EZEKIEL GICHUKI MAINA.....APPELLANT
VRS
REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was convicted by Bungoma Resident Magistrate of the offence of attempted robbery contrary to section 297 (1) as read with section 389 of the Penal Code and sentenced to five(5) years imprisonment. He lodged this appeal against the said judgment.

In his petition of appeal the Appellant relies on the following grounds:

- 1. That he was not produced in court within 24 hours as required by the law.**
- 2. That the offence was not proved beyond any reasonable doubt.**
- 3. That evidence of the witnesses was contradictory.**

The State opposed the appeal. Mrs. Leting argued that the conviction was safe based on the consistent and water tight evidence. It was the State counsel's contention that the sentence was lenient.

Two key witnesses PW1 & PW2 testified in this case. PW1 told the court that he was Ugandan national residing at Kampala and working for Charter Investment Company which deals with buying and selling of vehicles. Most of their vehicles are imported from Japan. On the material day, PW1 was driving one of the newly imported vehicles of the company chassis no.AE115-0015058 from Mombasa port headed for Kampala. On 12/3/2008 the driver was in Eldoret in the morning hours. He gave a lift to the appellant who wanted to be dropped at Malaba. On reaching Webuye, PW1 was stopped by PW2 who also wanted a lift to Amagoro. On reaching near Amagoro town the Appellant requested that the vehicle stops so that he could attend to a call of nature. When PW1 stopped, the Appellant told him in Kiswahili that he wanted PW1 to hand over the vehicle he was driving to the Appellant. PW1 resisted and attempted to drive off but the Appellant held onto the steering forcing the vehicle to veer off the road. The two men struggled with each other while PW2 who was seated in the rear of the car called for help. Members of the public came to the scene and found the Appellant running away. He was chased and arrested within a few minutes. CID officers from Teso District heard screams and went to the scene. They found the crowd baying for the blood of the Appellant and they rescued him. The Appellant was taken to the CID office where he was interrogated and later charged with the offence. PW2 corroborated with the evidence of PW1 on how the Appellant attempted to rob PW1 of his vehicle. PW3 was the investigating officer who arrested the Appellant at the scene.

The Appellant in his defence told the court that he is a shoe trader at Kitale. On the material day he had gone to Amagoro to visit his girlfriend one Maureen. A scuffle arose between him and a police officer

from Teso Police Division who had a love affair with his girlfriend. The officer caused the arrest of the Appellant and he (officer) was left with Maureen. He was taken to CID Office, Malaba and later remanded at Amagoro Police Station. He was later charged with the offence which he denies committing.

PW3 the investigating officer testified that when he interrogated the appellant he told him that he had asked PW1 to give him a lift to Malaba to go and buy shoes for his trade. When a personal search was conducted on the appellant he had no money in his pocket except an identity card, a voting card and an Equity Bank ATM Card.

The trial magistrate did not believe the defence of the Appellant that the case was framed against him by a police officer from Teso. I agree with the reasoning of the magistrate that it is highly unlikely that the policeman would manipulate the two witnesses PW1 & PW2 whom he did not know before the incident to give false testimony against the Appellant. PW1 was a Ugandan national driving a vehicle on transit to Uganda and was not known to the CID in Teso District who arrested the Appellant. PW2 was also a stranger to Pw1 since she had just hiked a lift from the complainant at Webuye. The Appellant did not call his girlfriend Maureen as a witness. The offence took place between 10.00 and & 11.00a.m. in the morning. The circumstances were conducive for positive identification. The Appellant was arrested within the vicinity and the crowd who arrested him did not lose sight of him. I am satisfied that the trial magistrate rightly rejected the defence of the Appellant and that identification was positive. There was no need of holding an identification since the Appellant was arrested at the scene and immediately identified by PW1 & PW2. The evidence on record was consistent and overwhelming against the Appellant. I find that the conviction was based on cogent evidence.

The Appellant contended that his Constitutional rights were violated because he was remanded in custody for more than 24 hours. The record shows that the Appellant was arrested on 13/3/2008 and taken to court on 17/3/2008. The Appellant was remanded in police custody for a period of 48 hours which is over and above the 24 hours allowed by section 72 of the former constitution. This issue was not raised before the trial court so as to give the prosecution an opportunity to explain the cause of delay. I am therefore unable to declare at this stage that the Constitutional rights of the Appellant were violated. However, the Appellant has a right under section 72 (6) of the former constitution to institute civil proceedings to claim compensation from whoever over detained him in custody subject to proof.

The maximum sentence provided for the offence is 7 years imprisonment. The sentence of five years imprisonment is neither harsh nor excessive and this court will not interfere with it.

It is my finding that the appeal has no merit. The conviction and the sentence are hereby upheld.

**F. MUCHEMI
JUDGE**

Judgment dated and delivered this 18th day of May 2011 in the presence of the Appellant and the State Counsel Mr. Ogoti.

**F. N. MUCHEMI
JUDGE**