



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 219 OF 2009

(From Original Conviction and Sentence in Criminal Case No. 658 of 2009 of the Chief Magistrate's Court

at Mombasa – R. Kirui, Principal Magistrate)

YUSUF CHAMOSI ALI alias BROWN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

YUSUF CHAMOSI ALI alias **BROWN** (hereinafter referred to as the appellant) was charged with the offence of Robbery with Violence Contrary to Section 296(2) of the Penal Code before the Chief Magistrate's Court at Mombasa.

He was tried and convicted on the same charge and sentenced to death on the 9th November 2009. He has appealed against that conviction and sentence.

The brief facts of the case are that on the 7th February 1999, Joseph Ongeru Minari (hereinafter referred to as the complainant) was walking home from work. It was about 8.00pm, he was alone. He saw three men behind him and thought they were his colleagues from work. However, one of them grabbed him on the neck and threatened him with a knife.

The other two searched his pockets and robbed him of a mobile phone Nokia 2630 and a wallet containing Kshs.750/= all valued at Kshs.7250/=.

After the robbery, two of the attackers walked on leaving one holding the complainant. After he released him, the complainant screamed for help. As a result of the scream for help, two village elders emerged, he showed them where one of the robbers was. The robber was just a few metres ahead of the complainant. The village elders arrested the suspect, who has been identified as the appellant herein. The appellant is said to have been the one who apparently held the complainant and threatened him with a knife. Upon the arrest of the '**appellant**', the knife he had was recovered. He was taken to Likoni Police Station and charged accordingly. According to the complainant, when they reached the Police Station, he discovered the people who assisted him, and whom he had presumed to be village elders were in fact Police Officers. These officers were not dressed in police uniforms.

In his defence, the appellant told the court that, he was going to the Sea where he does fishing, when he met three people who ordered him to sit down. He obeyed. He was searched and bhang was recovered. He was taken to Likoni Police Station and he was charged with the offence of possession of bhang. He admitted that offence when charged and was convicted and sentenced. However the police officers who arrested him claimed he was the person who had committed the Robbery herein. He was charged accordingly and he denied the offence.

In convicting the appellant the Magistrate observed:-

“PW2 and PW3 confirmed they saw three people, chased and arrested one. They also recovered the knife he had and that further supports the evidence that he was one and the same as the one who had just held the complaint. It is thereof not true he was going to the sea but he was not one of the robbers”

The Learned Magistrate concluded:-

“I am therefore convinced beyond reasonable doubt the accused committed the offence as charged. Accordingly I find him guilty and convict him”

It is against this conviction and sentence that the appellant brought this appeal. He filed five amended grounds of appeal. We have considered the same and for ease of reference, we wish to summarize them as follows:-

- (i) That the charge was defective.
- (ii) That the identification of the appellant was doubtful.
- (iii) That the investigating officer did not testify.
- (iv) That the learned magistrate failed to adhere to the Provisions of Section 169(2) of the Criminal Procedure Code, while delivering his judgment.
- (V) That his defence was not considered.

At the hearing, the appellant appeared in person and argued his appeal by relying purely on the written submissions he filed. The State was represented by Mr. Gioche. The appellant submitted as follows in brief.

On the 1st issue, he submitted there was contradiction in the evidence relating to:

- i. The phone, that the complainant stated as his phone was a Nokia 2630 and yet the charge sheet indicates the same as Nokia 2330.
- ii. The value of the property alleged to be stolen. That the complainant stated was Kshs. 7,250/= and yet the charge sheet states, the total value of the stolen goods as Kshs. 7,342/=.

In support of his submission on this issue, he relied on **Section 137 of the Criminal Procedure Code** and the Case of **Alexander Nyachiro Mamure &**

Marure Vs Republic (Criminal Application No. 1590/84).

In response to this issue, Mr. Gioche submitted that Section 137(c) (i) of Criminal Procedure Code is described by Section 137(f) thereof, and that a typographical error of the phone does not render the charge sheet defective. The model of the phone merely describes the property stolen.

At this point, we wish to make reference to that Section 137 of the Criminal Procedure Code. It states

under sub section 3(c) (i).

“The description of property in a charge or information shall be in ordinary language, and shall indicate with reasonable clearness the property referred to, and if the property is so described, it shall not be necessary to name the person to whom the property belongs or the value of the property”.

Sub section 3(f) of the same Section (137 Criminal Procedure Code) states as follows:-

“Subject to any other provisions of this section, it shall be sufficient to describe a place, time, thing matter, act or omission to which it is necessary to refer in a charge or information in ordinary language so as to indicate with reasonable clearness the place, time, thing matter ct or omission referred to”

From the foregoing provisions of law, it's clear, what is required is that, whatever particulars are contained in the charge or information, the same have to be **“reasonably clear”**. In fact, Sub Section C (i) does not insist that the value of the property be described or the name of the owner be disclosed. Therefore we find the contradictions complained of by the appellant, are not only minimal but were not capable of rendering the charge neither defective nor prejudicial to him. In fact, that issue of inconsistency should have been raised at the trial during cross examination of the witnesses.

We have perused the Criminal proceeding in the Subordinate Court and we realise he did not raise the same. We therefore dismiss that ground of appeal as lacking merit.

We now turn to the 2nd ground of appeal. That of identification. He submitted in a nutshell that, the Lower Court did not caution itself on convicting him without taking into account it was dark when the offence was committed and the distance of the light, allegedly used by the complainant to identify him, to the scene, was not established. That, the nature of the light, it's intensity and distance was not established. He relied on the cases of:-

- (i) Republic Vs Ramadhan Bin Mirandu (1973) EACA.**
- (ii) Regina Tumbull & 107 others (1973) ALL ER 549.**
- (iii) Charles Omatangi Vs Republic Criminal Appeal No. 216/85.**

In opposing this ground of appeal, the State Counsel led the court to the evidence of the Complainant as to how the offence was committed and that it was corroborated by the Police Officers (PW2 and PW3) as to his arrest. That, the appellant was arrested 50 metres away from the scene. That, he was thus identified by recognition. We have perused the evidence of all the three witnesses and we find that hardly had the assault/robbers gone far, did the Police Officers emerge. They testified, they were shown the direction the robbers had taken, they followed the robbers, on seeing the officers, the robbers took off into different directions. Using the torches, they had, they chased one, and arrested him. That the person arrested is the appellant herein. He was found with a knife, which the Complainant identified as the one the appellant had used to threaten him. That they recovered a half smoked bhang. The appellant has admitted he had the bhang. So he is the one the officer arrested. He was thus arrested as stated. We therefore find he did not have an opportunity to disappear fully from the sight of the complainant and the officers and that is why he was arrested and the knife recovered. We therefore find no sound argument in his second ground of appeal and we dismiss it.

As regards, ground three, where he complains the investigating officer was not called to give evidence. He relies on the case of **Geoffrey Nguku Vs Republic Criminal Appeal No. 166/83**. That ground was opposed by the State Counsel who submitted that, the arresting officers acted in this matter as investigating officer.

In our considered opinion, we are unable to find how the evidence of the investigating officer, if any,

would have added value herein and we cannot see the prejudice, lack of the same caused the appellant.

We dismiss ground three of the appeal as lacking value.

We now turn to ground 4 of the appeal regarding Section 169(2) of the Criminal Procedure Code. The appellant, faults the Learned Magistrate for not specify the Law under which he was convicted section 169(2) of the Criminal Procedure Code states:-

“In the Case of conviction the judgment shall specify the offence of which and the Section of the Penal Code or other law under which, the accused is convicted and the punishment to which he is sentenced”

The State Counsel submits that the learned magistrate did comply with the above provisions of the law when he convicted the appellant. We have perused the evidence of the lower court. Indeed the Learned Magistrate did not specify the Section under which he convicted the appellant. But the question is this – Did that cause the appellant prejudice?

We find the answer in the negative on the following grounds.

- (i) The Learned Magistrate had already analysed the evidence (which is the substance of the case) and concluded the appellant was guilty and convicted him.
- (ii) That omission does not go to prove the appellant guilty or not. In other words, it does not go to the root of the case. We find it was not prejudicial to the accused or the Prosecution Case taking into account the total evidence adduced. We dismiss ground 4 of the appeal as lacking in merit.

We now finally consider ground 5 of the appeal.

The appellant laments his evidence in defence was not considered. The State contents, it was. We have noted from the judgment of the Learned Magistrate he said

“It is therefore not true he was going to the sea but that he was one of the robbers”

We find that, the appellants defence was considered. We dismiss that ground 5 of appeal as lacking merit.

The upshot of all these is that, the appellant’s appeal against conviction is **dismissed**.

We now turn to the Sentence. Apparently, the appellant does not seem to have addressed that issue in his submission. **But** we shall all the same deal with it. He was treated as a first offender though he was armed with a knife, he does not seem to have engaged it fully as there is no medical evidence of physical injury to the complainant. We are in no way down playing the threat to the complainant. However, taking into account the circumstances of this case, we think the case is appropriate for the application of section 179(2) of the Criminal Procedure Code which states:-

“When a person is charged with an offence and facts are proved which reduces it to a minor offence, he may be convicted of that offence, although he was not charged with it”

This case can thus be deemed to qualify for reduction of charges under the said section 179(2) of the Criminal Procedure Code. The accused can thus and we hereby do find him, guilty of a lesser offence of Robbery Contrary to Section 296(1) of the Penal Code. We therefore substitute the initial charge he was charged with offence of Robbery Contrary to Section 296(1) of the Penal Code.

In that regard, the death sentence cannot stand. We set aside that sentence, and we substitute it with an imprisonment term of seven (7) years and order accordingly.

In the resultant, the appeal against conviction is dismissed but the offence the accused is convicted thereof

is reduced as aforesaid and the sentence varied accordingly.

Dated and Delivered in Mombasa this 28th day of November, 2011.

G.L. NZIOKA
JUDGE

F. TUIYOTT
JUDGE