



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
Criminal Appeal 152 of 2008

NGUMA CHANGAWA KARISAAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Nguma Changawa Karisa (the appellant) was convicted on a charge of robbery contrary to section 296 (1) Penal Code and sentenced to five (5) years imprisonment.

The appellant had denied the charge whose particulars stated that on 22nd January 2008 at Majenjeni village in Malindi District of the Coast Province, robbed Daniel Katana Lewa of one mobile phone make NOKIA 3510 and cash 1000/- all valued at Kshs. 4000/- and or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Daniel Katana Lewa.

Daniel Katana Lewa (PW1) testified before the trial court that on 22-01-08 at 4.30pm, he was driving his *tuk tuk* along Uhuru gardens towards Dosajee, when the appellant who was known to him, stopped him and requested to be taken to Marereni. They drove until they reached the petrol station and appellant said he usually pays 1000/- but would pay Ksh. 1500/- for a return trip. They were at the petrol station which is along Lamu Road, when PW1 asked appellant to give him money for fuel, but appellant said he would give the money at home. Appellant told PW1 to tell the pump attendants to fuel and PW1 would pay later. So they spoke to the petrol station owner and were given fuel worth Kshs. 300/- and they continued with their journey. When they got to Marereni appellant requested PW1 to stop so that he could go and call a certain woman – he used PW1’s phone to make the call and they drove again. Appellant again requested PW1 to stop so as to call a friend, PW1 gave appellant his phone, then appellant told him, to give up all the money he had or he would kill him. PW1 had kshs 1,000/- in his pocket, which he gave to the appellant. Appellant then ordered PW1 to leave; remaining with PW1’s phone Nokia 3510. During the incident appellant had a knife which he used to threaten PW1. PW1 never screamed for help as he was in a bushy area which he did not even know.

Eventually appellant was arrested.

On cross-examination PW1 said:

“I cannot forget your face. You robbed me in broad daylight ...I am sure you are the one who robbed me.”

PW2 Samuel Masha Kalama worked as a pump attendant at Lamu road filling station and he recalled that on 22-01-08 at about 4.00pm while at the petrol station, he filled PW1’s *tuk tuk* with fuel worth kshs. 300/- and PW1 said he would pay upon return. He noted that PW1 as in the company of appellant who spoke to him telling him to put fuel in the *tuk tuk* and he would get paid later.

When PW1 returned he informed PW2 that he had been robbed by appellant and so had no cash to pay but would go home and get some money to pay for the fuel. After 3 days PW1 told him that the person who had robbed him was in cells. So PW2 went to the police station where upon seeing the appellant he confirmed him as the person he had seen in PW1's company.

On cross-examination PW2 confirmed that when he saw appellant and PW1 at the petrol station, it was about 4.00pm and that appellant was a passenger. He saw the appellant's face.

Pc Timothy Muchiri received the report about the incident where a passenger turned into a robber. He commenced investigations and arrested appellant within Malindi town. On cross-examination he stated:

"PW1 had marked your face."

And upon re-examination he said

"Pw1 told me that he had heard the robber had been arrested. I then went to the cells, removed accused and PW1 confirmed that accused had robbed him."

In his unsworn defence, appellant told the trial court that he was a palm wine seller and was with his friend Francis Baya who owed him some debt. Baya said he would pay the debt at the police station, but when they got there PW1 came to the police station and he was removed from the cells, and PW1 left with the police officer.

The trial magistrate in her judgment stated that the prosecution witnesses appeared truthful and she accepted their evidence as being the correct account of the events of 22-01-08, she noted that appellant gave evidence as to his arrest and not relating to 22-01-08.

With regard to identification, the trial magistrate observed that the incident occurred during the day time and so conditions were favourable for identification. Further that both PW1 and PW2 saw appellant and spoke to him – so they had sufficient time to see his face as it was early evening and visibility was clear – she thus held:

"The conditions for identification were favourable. It was day time. Both PW1 and PW2 identified accused at the police station...the time lapse between the robbery and the date of accused's arrest was less than a month and as such the memories of PW1 spent time with the accused when they went up to Marereni. They conversed along the way and as such I believe PW1 had enough time and opportunity to have a good look at the accused person. I am satisfied that the accused person was properly identified"

She noted that appellant had demanded PW1's money and threatened to kill him if he did not hand over the cash.

The appellant contested both conviction and sentence on grounds that:

- (1) Evidence on identification was unsatisfactory because
 - (a) There was no identification parade conducted so as to exclude the possibility of mistaken identity.
 - (b) No descriptions were given to police to assist the investigations
 - (c) The person who informed PW1 about appellant's arrest did not testify
- (2) the case was poorly investigated
- (3) His arrest had no connection with the offence in question
- (4) The prosecution case was not proved beyond reasonable doubt
- (5) The trial magistrate rejected his defence which would have cast doubts on the prosecution case.

He relied on his written submissions in which he stated that the charge sheet was defective and should not have been relied on as it did not have the police OB reference number nor was the OCS' rubber stamp dated. Also that the time of the offence was not stated

He further argued that identification was not satisfactory since PW1 never gave a description of his features to the police and he cited the case of **Juma Ngodia v R Cr. App. No. 118 of 1983 C.A. Nrb** which held that the identification of a suspect was not satisfactory because the witnesses were not able to describe the assailants' features or clothing, or anything else that could enable them to recognize the assailants. Appellant urged the court to take note that none of the appellant's property was recovered from him.

The appeal was opposed and Mr. Naulikha submitted on behalf of the State that the offence took place in broad daylight and there was ample opportunity for identification as the appellant and PW1 and PW2 had a conversation.

He urges court to take note that appellant was arrested over a different issue and complainant simply learnt about his arrest that someone who had some characteristics similar to the one who had attacked him had been arrested and he went to the police station and found the appellant there.

Both PW1 and PW2 were consistent as to the time when appellant was seen with PW1 – it was at 4.00pm, which is still daytime. The chain of events as described by PW1 up until the time they left the petrol station with the appellant is well corroborated by the evidence of PW2. I find that opportunity, in terms of time spent with the appellant and the prevailing conditions, were favourable for positive identification. The fact that there was no identification parade carried out does not negate the ability of the two prosecution witnesses for identifying appellant, given the evidence on record – of course the identification at the police station was prejudicial to the appellant because he was simply called from cells and shown to the two witnesses as the serial *tuk tuk* robber, and they confirmed he was the person they had seen – however that was not the only opportunity for identification. Then there is the question as to whether PW1 gave any description of him – he didn't yet as Mr. Naulikha stated it was the trait in his mode of operation of robbing *tuk tuk* drivers that drew PW1 to go to the police station. Certainly his arrest was not immediately related to the report made by PW1 as the police officer had indicated, several *tuk tuk* drivers had made reports about being robbed by a passenger who would suddenly turn against them, in Marereni area. His defence was considered and I have had opportunity to evaluate it – the trial magistrate made a proper observation, that it made no relevant reference to the incident in question and instead he just described events of the day of his arrest.

The other issues raised in his submission about the charge being defective did not form grounds of appeal and amount to an ambush and offends the provisions of section 350(2) Criminal Procedure Code which states that an appellant shall not be permitted at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal. From my re-evaluation of the evidence; there was no error in the findings made by the trial magistrate – the conviction was safe and I uphold it.

The sentence of 5 years is legal as the offence carries with it a maximum of 14 years. Was it a harsh sentence?

Given the manner and circumstances under which appellant executed his operations, I would say the penalty satisfies the offence – I find no reason whatsoever to interfere with the sentence and I uphold it. Consequently the appeal is dismissed.

Delivered and dated this 11th day of **February 2010** at Malindi.

H. A. OMONDI
JUDGE