



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Appeal 41 of 2009

JULIUS MUSAU MUTUKUAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellant (Julius Musau Mutuku) was convicted on a charge of robbery contrary to section 296 (1) of the Penal Code after entering a plea of guilty. He was sentenced to serve six (6) years imprisonment.

The particulars of the charge were that on the 16th day of April 2009, at Kisumu Ndogo village, in Malindi District, jointly with others not before court, they robbed Boniface Muiruri 18 packets of fresh KCC 500ml valued at Kshs. 486/- and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Boniface Mururu.

The lower court's record shows that the charge was read over to the appellant in Kiswahili language and he replied;-

“It is true”

The prosecution then narrated how on 6th April 2009, the complainant was distributing milk for sale within Kisumu Ndogo area when he was attacked by three people, who included the appellant. They overwhelmed him and threatened to beat him. The complainant knew the appellant and he screamed for help resulting in the appellant being apprehended as his colleagues fled. Some ½ litres of milk was recovered from the appellant.

Appellant's response was

“Facts are true.”

In mitigation, appellant said he was remorseful.

The appellant contested the conviction and sentence saying the charge was defective and that he had not understood the language of the

court. Also that the sentence was manifestly harsh, especially considering that he was a first offender.

In his written submissions, appellant stated that the charge sheet and the OB did into read from the same script and cited the case of **Agostino Njoroge Ritho v R Cr. App. No. 99 of 1986 (Nrb)** which held that contradictory evidence is unreliable. It was his contention that the charge sheet is openly false and should not have been relied upon.

He then reconstitutes the scenario of the incident saying he was among the first people to respond to the complainant's screams for help but that the assailant fled leaving him to fall victim of the situation. He alleges to have been duped to plead guilty after complainant told police that if appellant admitted the charge, he would withdrew the complaint.

The appeal is opposed, and Mr. Naulikha on behalf of the State submitted that appellant was convicted on his own plea of guilty on the offence of robbery and there are no reasons whatsoever to warrant this court interfering with the jail term of six years.

I have read through the lower court's record, the charge was read to appellant in Kiswahili – which was his preferred language of choice even at the appeal stage – he cannot therefore begin to complain about language, indeed he does not even disclose which language he would have preferred to use in the lower court. To my mind, the appellant is simply blowing hot air on this limb.

I do not understand his complaint about the charge sheet being defective or false or evidence contradicting the charge. The charge as framed is proper – the facts as narrated supported the charge and there is nothing defective or false about the same.

As to being misled to enter a plea of guilty – I can only go by what is on the record, and the record clearly shows an unequivocal plea entered by himself. There was no error whatsoever on the part of the trial magistrate in convicting appellant on his own plea – that conviction was proper and it is upheld. What about the six year sentence? The offence attracts a maximum jail term of 14 (fourteen) years imprisonment – so the sentence of 6 years is within the law – but is it manifestly excessive? Taking into account the nature and value of the property involved, the fact that appellant did not even gain form his mischief as he was arrested on the spot, I think six years is rather harsh – I would to that extent interfere with the sentence by setting it aside and reduce it to the period already served. The upshot then is that appellant is deemed to have served the term for the offence and he shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 17th day of **February 2010** at Malindi.

H. A. Omondi
JUDGE