



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU Criminal Appeal 128 of 2007

BENSON NJOROGE KIMANI.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

J U D G M E N T

Benson Njoroge Kimani hereinafter referred to as the Appellant was charged with the offence of Robbery Contrary to Section 296(1) of the Penal Code before the Senior Resident Magistrate Baricho. He pleaded not guilty to the charge and the matter proceeded to hearing.

The complainant Mary Wanja Njagi told the trial court that she was on her way home on the night of 21st of December 2006. She said that it was about 6.45 p.m. and that it was not dark but was getting to dusk. Ahead of her she saw 3 men who were coming from the opposite direction. One of the men was the appellant herein. As she was by passing them, the Appellant is said to have grabbed her by the collar and demanded to be given money and her cell phone. Before she could react the Appellant is said to have grabbed the purse in which was KShs.2,000 and a Panasonic cell phone and some documents. They then left with the items leaving the complainant in shock. Some other people came by and she reported to them what had happened to her. They tried to follow the Appellant and his friends to no avail. The complainant therefore went to the local police station and reported the matter. She told them that she knew the Appellant well before physically but did not know his name. She nonetheless knew his other siblings and also his home. She even described the clothes the Appellant was wearing that night.

The Appellant was arrested 2 weeks later after the complainant spotted him at the market place and alerted the police. He was taken to the police station by PW3 where he was charged with the robbery charge. It is noted that after the complainant testified on 8/6/07 after the matter had been adjourned severally, the same was fixed for further hearing on 18/7/07. On that date, instead of proceeding with the other witnesses, the appellant applied that he be allowed to recall the complainant saying there were other questions that he wanted to ask her. The court indulged him and the complainant who was in court was recalled and cross-examined further at length. From her answers however, it is clear that the Appellant was not asking anything new and he just repeated the questions which had been asked and answered before. That would explain why the prosecutor did not even see the need to re-examine the witness. When the next witness was called, the appellant said he was not ready to proceed with him and asked for an adjournment. The court prosecutor opposed the application saying it was yet another delaying tactic on the part of the appellant. The court found the application untenable and rejected it. The learned trial magistrate noted that the Appellant had had ample time to prepare given that he had even been supplied with the statements of the witnesses much earlier. In my considered view that application for adjournment was frivolous and the same was properly denied. Having been denied the adjournment, the Appellant should have gone ahead and handled the witnesses. PW2 and PW3 testified but the appellant did

not cross-examine them. The prosecution closed its case and he was placed on to his defence. After the provisions of Section 211 of the CPC were explained to him on 25/7/07, the appellant opted to remain silent. The learned trial magistrate therefore proceed to prepare his judgment in which the appellant was convicted and sentenced to 14 years imprisonment. Being dissatisfied with the said conviction and sentence, he filed this Appeal. He proffered 6 home made grounds of appeal as hereunder:-

1. *That the charges were substituted without being explained to me.*
2. *That the trial magistrate denied my constitution rights that I proceeded with the case suffering peptic ulcers failing to consider that I was unfit to stand for the trial that day.*
3. *That I was denied a chance to cross-examine the prosecution side and to defend myself.*
4. *That my case was engineered and that the trial magistrate was very hash to me whereby even the case proceeded in my absence.*
5. *That I had written the application to the high court seeking intervention whereby the trial magistrate failed to wait for the response.*
6. *That there occurred a manifest miscarriage of justice and inaccuracies in delivering the judgment.*

He urges the court to allow his appeal. During the hearing he submitted a written submission in which he attempted to add 3 more grounds. I looked at the grounds and noted that they were not introducing anything new that was not covered in the earlier grounds and since they were filed without this court's leave, I decided to go by the grounds filed earlier. I have read his submission and considered the contents thereof.

Learned counsel for the state opposed the appeal. He said that the Appellant was not denied any opportunity to cross-examine the witnesses or to testify and that he made a conscious decision not to do so. He also said that it was not true – as alleged by the Appellant that the case was heard in his absence.

I have outlined the evidence adduced before the trial court above. From the lower court file, I note that indeed the charge was substituted on 8/6/07. I nonetheless note that the facts and particulars of the charge remained the same only the words “*with violence*” were omitted from the substituted charge sheet. The record also clearly shows that the fresh charge was read over to the appellant as required by law and he pleaded not guilty to the same. The law in that aspect was followed to the letter and his ground 1 therefore lacks substance and the same must fail. I also find that indeed the Appellant requested for adjournment several times before and in my view the court over indulged him. Although he was always claiming to be sick and orders were made for him to be taken to hospital, no evidence was ever availed to the trial court to show where the appellant was ailing from or if he was indeed sick. When he says that he was unfit to stand trial on 18/7/07, that cannot be true because it was the day he made an application for the complainant to be recalled. The complainant was therefore recalled and the Appellant cross-examined her at length. That was hardly the conduct of somebody who was unfit to stand trial. If indeed he was sick, he would have made the application for adjournment before he made his application to recall the complainant. Even when he asked for the adjournment, it was not on account of sickness, but because he was “*not ready*” to proceed with PW2 and PW3. He did not give reasons as to why he was not ready to proceed with them given the fact that he had been supplied with their statements long before that date.

Indeed, looking at the history of the matter before the trial court, it is clear that the Appellant was just a difficult ‘client’ who did not appear to want to be subjected to the judicial system. He wanted to manipulate the court and be heard on his own terms at his own convenience.

His refusal to cross-examine the PW2 and PW3 was as stated by the state counsel a conscious decision. It was his right also to opt to remain silent and the court cannot be faulted for it. There was no miscarriage of justice whatsoever in the manner the trial before the

subordinate court was conducted.

None of his grounds therefore has any merit.

On the evidence adduced before the trial court, the complainant said that it was not dark. Indeed, she was able to see the appellant and the others. She clearly described the clothes the Appellant was wearing to the police when she made her report and also to court. The circumstances prevailing at the scene of crime were in my considered view conducive to a proper identification. She narrated clearly how the Appellant grabbed her purse and walked away along with his companions. Her evidence was found to be credible and I have no reason to doubt it given the fact that I did not see her testify. Overall therefore, I see no reason as to why I should upset the conviction and sentence of the learned trial magistrate.

Although the appellant was given the maximum sentence, it is noted that he offered no mitigation and the learned magistrate actually noted that he was not remorseful at all. It was a lawful sentence and I have no reason to interfere with the same.

This appeal therefore fails. The same is hereby dismissed.

W. KARANJA
JUDGE

Delivered signed and dated at Embu this 16th of the June 2010.

In presence of:- The Appellant in person and Mr. Wahoro for the State.