

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 279 OF 2007

JOHN MAINA MACHARIA ALIAS MASH APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the judgment of S. NDAMBUKI, Ag. Principal Magistrate in Principal Magistrate's Criminal Case No. 2896 of 2006 at Murang'a)

JUDGMENT

The appellant was charged with Robbery with violence contrary to section 296(2) of the Penal Code. He was tried before the Principal Magistrate's Court at Murang'a and was convicted as charged. He was then sentenced to death. He has filed the present appeal against conviction and sentence. At the hearing of this appeal learned state counsel Ms. Ngalyuka stated that she was conceding to the appeal because the prosecution did not prove that the appellant was with the complainant. In our view that concession was quite right. This is the first appellate court. As such we are expected to submit the lower court's evidence to fresh and exhaustive examination. We need to weigh conflicting evidence and to draw our own conclusion. In doing so we need to make allowances for the fact that the trial court had advantage of hearing and seeing the witnesses. See *Okeno Vs Republic [1972] E.A. 32*. PW 1 was a bar man at Kenol trading centre. On 21st October 2006 at 1 a.m. he left South Tetu Bar in the company of his girlfriend PW 2. PW 2 was also a bar maid. They were on their way home. PW 1 stopped to talk to someone and PW 2 continued walking. PW 1 followed her and met with the appellant. He enquired whether he had seen PW 2 and directing him in the direction she had gone PW 1 began to go that way. On walking about 3 metres he looked behind and saw the appellant following him. He said that the appellant ordered him to stop. Before he could stop he hit him with a metal bar on his left shoulder. PW 1 stated, "*He held the metal bar against my neck side that he was strangling me with it. I fell down. He stole from me On seeing them (police) the person who was attacking me started running away from the scene.*" He stated that the appellant was there after arrested. That he had stolen from him his National Identity card, Elector's card, Bank plate for Equity Bank and his wallet. These were recovered but he did not recover Kshs.400 and a mobile phone. He was treated at Murang'a District Hospital. PW 2 stated that she was in the company of her friend PW 1 on 21st October 2006. They were on their way home. She went ahead of him and waited for him. As she was there waiting for him she noted two people struggling with each other. At first she thought that they were fighting but later she noted that one of them was being attacked by the other. She decided to go home. She did not realize that the person who was being attacked was being PW 1. It was only later that she was told she was the one. Before going home she alerted the police about the attack. On being cross examined she stated, "*I had just seen people who seemed to be struggling or fighting.*" PW 3 was a police officer. On the material date at 3a.m. whilst on patrol duty within Murang'a Township he met a lady running along Biashara street. He was in the company of another police officer PW 4. They stopped PW 2 and asked her why she was running. She responded that she was running because her friend was following her. The police officers then saw the two people ahead of them. PW 2 confirmed that one of them was her friend. PW 4 ran towards the two people and at that point the appellant ran away from the scene towards PW 3's direction. PW 3 had the appellant drop something like an iron bar. When the appellant saw PW 3 he ran back towards the scene. He was however arrested with the assistance of a watchman. On being searched nothing was recovered from him. He was taken to the police station and later PW 3 and 4 returned to the scene and recovered a wallet containing an ID card, Electoral Card and a Bank plate. These were identified by PW 1 as belonging to

him. On cross examination he stated that the appellant threw away the things that he had stolen from the PW 1. On another question being put to him PW 3 stated, “*I did not believe you when you said you had been beaten because you were fighting.*”

PW 4 was the other police officer and in his evidence he stated that on approaching the two men both of them ran away. He stated that PW 2 when they met with her was walking slowly and told them that her friend was being attacked.

On being put to his defence the appellant gave sworn testimony. He stated that on that night at 3a.m. he met with PW 2 and asked her where he could spend a night. He asked her whether she could assist him to get a room. She told him that she could get him a house if he had money. He gave Kshs.300 and she promised to show him a room. About 20 minutes someone approached them and PW 2 began to hid and started moving away. That person who was approaching came to him and asked him where the lady had gone. He showed the direction in which she had gone. That person then grabbed him by the shirt and threatened to beat him. He tried to free himself and the person hit him on the jaw and on the cheek. As they struggled they both fell down. That person then began to step on him. When the police officers arrived that person began to run. The appellant also ran but was arrested. He was then charged with the offence before court. the prosecution did not cross examine the appellant. Accordingly therefore his evidence was unchallenged. It should be noted that the defence offered by the appellant was put to PW 1 in cross examination. Having reexamined the lower court’s evidence we find that we are in agreement with the learned state counsel as well as with the appellant. That evidence had inconsistencies which should have been resolved in favour of the appellant. The evidence of PW 2, 3 and 4 was that they saw two people who seemed to be fighting. Indeed when the police approached them according to PW 4 and the appellant the complainant ran just as much as the appellant ran. Immediately on being arrested none of the alleged stolen items were found on the appellant. Even the evidence of PW 3 and 4 did not specify where the alleged items were recovered in relation to where the struggle took place. It is after all possible that the wallet could have been dropped during the struggle. The police recovered the wallet many hours later and it is possible that someone else could have stolen the money and the mobile phone. We are of the view that the prosecution’s evidence did not prove the charge of robbery with violence. It is possible that the appellant and PW 1 were fighting and it is likely that the fight could have been over the girl PW 2. That could be the reason PW 2 was running away when PW 3 and 4 approached her. Indeed the trial magistrate in his judgment found that there were inconsistencies in the prosecution’s evidence but he was of the view that those inconsistencies did not weaken the prosecution’s case. We beg to differ and find that there was no basis for convicting the appellant. The appeal is well merited and do hereby allow it. We hereby quash the appellant’s conviction and set aside his sentence. We order that the appellant be set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 30th day of January 2009.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE