REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILINDI

CRIMINAL APPEAL 131 OF 2007

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 1034 OF 2005

OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT KILIFI)

ABDUL MOHAMED HAKIM ……APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

JUDGMENT

Abdul Mohamed Hakim (the appellant) was convicted on a charge of robbery with violence contrary to section 296(2) Penal Code and sentenced to death. He denied the charge, and prosecution called a total of four witnesses to prove their case.

The prosecution case was based on particulars that on 3rd November 2005 at about 10.00am at Bofa area in Kilifi District, while armed with dangerous weapons namely, a hammer and a file robbed Jane Ngumbao Koi of cash Ksh. 1100/-, a Nokia 3310 mobile phone, a pulse and cosmetics all valued at Ksh. 6965/- and at or immediately before or immediately after the time of such robbery, wounded the said Jane.

He had faced an alternative charge of handling stolen goods contrary to section 322(2) Penal Code, for which he was acquitted.

Jane (PW1) told the trial court that on 3-11-05 she was going to Mabirikani when she passed the appellant who had building equipment namely a hammer and a file. He followed her, knocked her down, pulled her to the bush, strangled her and pierced her neck using the file. She pulled his genitals and he let her go; fleeing with her handbag. She screamed for help, people gathered, gave chase and appellant was apprehended. He was taken back where PW1 was and her mobile phone was recovered.

On cross-examination she stated that was her first time to see the appellant and that there was money inside the handbag. She identified the hammer and file in court. She stated that the incident which occurred on a Muslim holiday took 15 minutes and it was just the two of them, no one else witnessed the actual attack.

Daniel Pekesha (PW3) a shoeshiner was on his way to work, when he heard someone screaming in the bush. He went to check and found PW1 crying saying she had been robbed of a mobile phone, money and a bag, and that the person had entered a bush. Other people had gathered by then, a search was

mounted and appellant was found after a chase. The phone was recovered from him, as was the hammer and file. On cross-examination he said the incident was at about 9.30am although he was not sure about the time.

PC Nassir Odha of Kilifi Police station received both appellant and complainant – a report was made about the robbery and he was given the recovered items. He got the phone photographed and released the phone to complainant as the case was taking too long to start.

Complainant was examined by Dr. Mutinda (PW2) who found that she had injuries on the neck and assessed degree of injury as harm – he produced the duly filed P3 form as exhibit 1.

Appellant in his sworn evidence told the trial court that complainant was his former girlfriend. On 3-11-05 he was at home as it was during Ramadhan. On 4-9-05 went he went to visit PW1, she said her brother had been arrested and was at the police station – so he accompanied PW1 to the police station – to his surprise he heard her say;

"***this is the person"*** and he was locked up and charged with robbery. Later on, the complainant went to see him and asked why he was happy when she was being beaten at the market, and that it was payback time. He did not understand why he was charged.

In his judgment, the learned trial magistrate noted that even during cross-examination appellant had raised the issue of PW1 being his girlfriend and tht PW1 denied it, saying it was her first time to see the appellant. He then considered the recovery of the phone and weapons and concluded that PW1 and PW3's evidence s credible and consistent stating thus:

"***Having been found with the phone minutes after it had been stolen lends weight to Jane's testimony. He noted that although the phone was released to the complainant, she had it and produced it in court during her testimony."***

The trial court was satisfied that appellant was positively identified, having been arrested within the vicinity of the attack and he was also arrested with the hammer and file used to attack and injure the complainant.

The learned trial magistrate was persuaded that prosecution had shown that appellant was armed with a dangerous weapon and had used violence on PW1.

Appellant's defence was dismissed as not casting any reasonable doubt on the prosecution evidence.

The appellant was dissatisfied with these findings and appealed on grounds that

1. That the charge is defective as the particulars of the charge do not tally with PW1 and PW4 evidence.

2. The trial was conducted contrary to section 197 of the Criminal Procedure Code.

3. The trial was marred by glaring contradictions

4. The trial was conducted partly without full coram.

5. The appellant was a victim of mistaken identity as the money allegedly stolen (ksh. 1100/-) from PW1 was not recovered from him.

6. The doctor's evidence is inconclusive as it is not supported by treatment notes.

7. The case was not proved beyond reasonable doubt against him.

8. The trial magistrate failed to follow provisions of section169(2) of the Criminal Procedure Code to this judgment and conviction

9. Appellant's defence statement was not considered alongside the prosecution case.

In his written submissions, appellant pointed out that the charge sheet was defective and was at variance with the evidence because PW1 in her evidence in chief did not say that she had Ksh 1100/- and cosmetics and her evidence referred to a handbag which was not in the charge sheet. He also points out that whereas the charge sheet referred to the incident having occurred on 3-11-05, PW4 the police officer referred to 2-11-05 as the date appellant was taken to the police station.

He urges the court to acquit him due to these inaccuracies.

On this point, the learned counsel for the State, Mr. Ogoti, in opposing the appeal, submitted that there is no defect in the charge and that it was properly formulated.

In terms of formulations of the charge, we are in agreement that the particulars of the charge conform with the requirements of section 137 Criminal Procedure Code regarding drafting of a charge and its particulars.

There is no defect.

We take note of the discrepancies cited by the appellant – as regards the date with respect to evidence of PW4 (the police officer), it seems there was an error in the typed proceedings, the original handwritten clearing reads 3-11-05 in the evidence of PW4.

The charge sheet refers to "pulse" which seems to mean "purse" – PW1 on cross-examination clarified that it was not a handbag but a wallet – that discrepancy is of such little significance that it does not affect the material particulars – which is basically that the complainant was attacked and robbed of her property among them, a phone and money.

Appellant also submits that the trial was a nullity because after his plea was recorded, the trial magistrate did not sign the record and that this contravened the provisions of section 197 Criminal Procedure Code. Mr. Ogoti's response to this is that the omission is curable under section 382 Criminal Procedure Code. The original handwritten record in fact shows that after recording the appellant's plea, the learned trial magistrate appended his signature. It would again appear that this is not reflected in the typed proceeding – so that limb cannot stand.

Appellant also submits that there is contradiction in the evidence with regard to which ear the complainant was injured – she said in her evidence in chief that it was the right ear, then changed to say it was the left ear. Also that whereas PW3 claimed the incident occurred at 9.30am, PW1 said it was at 10.00am.

Appellant cites the case of **Augustino Njoroge V R Cr. Appeal No. 99 of 1986** to point out that contradicted evidence is unreliable and that where it is difficult to distinguish the truth from the truth, then that must be resolved in his favour.

To this, Mr. Ogoti's response is that there are no contradictions apparent on the face of the record, and if they are, then they are so minor, they do not affect the prosecution case.

It is true that PW1 in her evidence stated that the incident occurred at 10.00am whereas PW1 said it was at about 9.30am – we are of the view that the variance is not fatal, bearing in mind that PW3 used the approximation word "about" and he even qualified it further by saying "I cannot be sure of the time" - that does not in any way make either PW1 or PW3 a liar or warrant them being referred to as unreliable witnesses.

It is however true that PW1 initially said she had been injured on the right ear, then changed it to say it was her left ear, whilst the stated it was a cut on her left ear. The doctor also noted that she had complained of pain on the neck with difficulty.

Our finding is that this contradiction so regards which ear got injured does not alter the fact that she was injured not just on the ear but also the neck.

Applicant also submits that the coram was incomplete because the court clerk is not shown as being present and he wonders who was doing the interpretation on those dates and it is his contention that he was greatly prejudiced.

Mr. Ogoti in response submitted tht the absence of the court clerk did not render the trial a nullity as a court clerk does not participate in the trial except in assisting court in swearing witnesses and ensuring the court is in order. We think Mr. Ogoti has left a very vital role which the court clerk plays which is interpreting what is said by a witness, accused person, the prosecutor and the presiding court officer from the language used by either of these persons to the language accused understands and vice versa.

However the official languages in the lower court are Kiswahili and English – which means that the presiding magistrate may well use Kiswahili in conducting the proceedings. This being the case then on 7-11-05 when the court clerk is not shown as being present, the trial magistrate may well have been the one who read the charge to appellant in Kiswahili as the record shows that the charge was read over and explained to appellant in Kiswahili and he therefore suffered no prejudice by the absence of the clerk.

On 13-2-06 when again no name of a clerk is recorded, it seems to have been a mention as no proceedings took place and so again appellant suffered no prejudice – the same case appears to the dates 23-6-06, 26-6-06, 7-7-06 – no adverse orders or any proceeding took place which was prejudicial to appellant and we find that the incomplete coram due to absence of the court clerk, occasioned no prejudice whatsoever.

Appellant also submitted that this as case of mistaken identity as shown by evidence of PW1 who claimed that appellant was wearing overalls whereas PW3 said the man was in a kanzu. He argues that in view of the broken chain of events – the attack – escape, later apprehension by the mob, create room for the possibility of mistake. Mr. Ogoti submits tht there was no mistake, that the event took place in broad daylight at 10.00am and there was no break in the chain of events from the time of attacking her to defending herself, him running away and being apprehended and taken back where she was and her phone recovered.

He poses the question – in that short moment where did appellant get the mobile phone which was identified by complainant.

With the greatest respect to the learned Counsel for the State, the chain of events was actually broken. After the attack, the attacker fled – by the time PW3 appeared, appellant was nowhere near PW1 – she was alone screaming that she had been robbed. So a search was mounted and the appellant apprehended – was he the same person who had attacked her? PW1 said it was her first time to see him, could she have made a mistake as regards the person who attacked her? In cross-examination she said appellant wore a black underpant – just how she got to see this piece of clothing is not established by the evidence – did he lower his covering garment, had he sagged it – which later brings in the question, what was he dressed in? The situation becomes even more complex when upon being recalled on 18-6-07, she was cross-examined and her answer was

"***The hammer was in your hands, the file in your overall."***

How then does this compare with the evidence of PW3 to the effect that

"***The man was in a kanzu***

*…..**you wore green clothes, the top and down"* –** so was this the same person? Might he have within the

short time between the attack and apprehension have changed from the overalls to the *kanzu*? – there is no evidence to suggest that. The evidence had to be keenly tested under the circumstances – the trial magistrate did not resolve the contradiction. But then there is the evidence that the phone that was recovered from appellant belonged to PW1. What proof is there? PW1 did not give anyone a description of the phone tht had been snatched off her? There was no reference to make any physical features, any document of ownership e.g receipt – nothing – she just claimed the recovered phone was hers and it was taken away from appellant and given to her – what proof was there that the recovered phone belonged to PW1? We find none and one cannot therefore not use the doctrine of recent possession. This made the conviction unsafe.

As regards the medical evidence i.e the P3 form, appellant submitted that the same was improperly produced as PW1 claimed she was examined in Nairobi and further that PW2 was not even the maker of the said P3 form. Also that it was not even explained to the court why the maker could not be called to come and give evidence and produce it. Appellant also pointed out that PW2 did not even demonstrate to the trial court that he was able to identify the handwriting and signature of the maker.

Mr. Ogoti concedes to this limb, observing tht the P3 form shows it was field by Dr. Mlaza and produced by Dr. Mutinda and no basis was laid as to why Dr. Mutinda had to produce it or his competence thereto as no evidence was led to show that Dr. Mutinda and Dr. Mlaza ever worked together or that Dr. Mutinda knew Dr. Mlaza's handwriting or signature.

Due to this "fault" Mr. Ogoti requests us to reduce the charge to simple robbery.

We need not belabour the point here, obviously the production of the P3 form was irregular as alluded to by both Mr. Ogoti and the appellant and we find that indeed its production as prejudicial to the appellant. We are persuaded that we must allow the appeal on two grounds;

(1) The identification was not conclusive in terms of (a) appellant (b) the recovered phone.

(2) The production of the P3 by one other than the maker, without a proper legal basis having been heard was prejudicial to the appellant.

Consequently the conviction is quashed, the sentence is set aside and appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this **30th** day of **June 2009** at Malindi.

L. NJAGI **H. A. OMONDI**

JUDGE **JUDGE**