REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL 13 OF 2009

(From original sentence and conviction in Criminal Case No. 1021 of 2005 of the Senior Principal Magistrate's Court at Malindi)

MADZUMA KATANGALIA ……..……..……APPELLANT

VERSUS

REPUBLIC ……..……PROSECUTOR

JUDGMENT

The appellant Madzuma Katangalia was convicted on a charge of robbery contrary to section 296(1) Penal Code and a second charge of willfully and unlawfully damaging property contrary to section 339 (1) Penal Code.

The appellant denied the charges and after hearing in which prosecution called a total of five witnesses, the appellant was sentenced to 4 years imprisonment for the charge of robbery and 18 months imprisonment for the charge of malicious damage to property. The sentences were to run concurrently.

The appellant is a younger brother to the complainant Kahindi Katangalia who told the trial court that on 31-10-05, he was at home when the appellant got there and announced that he wanted to build a house there. He had a panga and begun demolishing Kahindi's house. He then grabbed Kahindi (PW1) strangled him and took away Ksh 600/-. PW1 screamed for help and neighbours came. Police were called and appellant was arrested. The money was recovered from the appellant – PW1 explained that this was money paid to him by someone for his (PW1) coconuts.

Later PW1 was recalled and shown some photographs of knife which he identified in those photographs.

On cross-examination he said appellant was using a panga and a knife. PW2 Mary Kahindi (wife to the complainant) was at home with PW1 and she witnessed the attack and destruction of the house. Her evidence basically was similar to that of PW1.

On cross-examination she said appellant wanted to build a house on the same spot where the house he demolished stood and that after the attack, appellant left a panga and knife behind.

She also saw appellant taking away money from PW1. Later on PW1 was again recalled to identify Ksh. 600/- which he said was the money stolen from him.

PW3 Dr. Gachiri of Kilifi District Hospital who examined the complainant found that he had a laceration on the upper lip and the likely object used was blunt in nature.

Pc Wangari (PW4) who recorded the report regarding the incident told the trial court that appellant and complainant were brought in by members of the public. Appellant was accused of robbery and the complainant had an injury on the upper lip. Upon searching appellant, she recovered Ksh. 600/- from him. She visited the scene and found a house with a damaged roof.

On being put to his defence, the appellant in his unsworn testimony said they had a family meeting on 31-10-06 at home as their mother had called them there. He gave views which differed with those of his brother's and so his brother called the chief who told them that if they could not agree then they should report the matter to police. So appellant went to the police station, later his brother too went to the police station. Police then took away his wallet which contained Ksh. 600/- and he was charged.

The learned trial magistrate found that although the appellant admitted to being together with complainant on the date in question and that Ksh. 600/- was found in his possession, he did not address himself to the prosecution evidence. The trial magistrate took into consideration what PW1 and PW2 said about appellant's conduct on that day and description of the incident, the injury as observed by the police officer Pc Wangare and confirmed by Dr. Gachuri (PW3) and concluded thus:-

"***Having admitted he was found with 600/-, it is not a conclusion (sic) that Kahindi reports 600/- stolen and the accused is found with exactly 600/-. The court finds that evidence that accused took the 600/- from Kahindi after injuring him and also damaged his house. The accused's defence has failed to cast any doubt on the prosecution evidence which is credible consistent and proved beyond reasonable doubt."***

Appellant challenged the findings on grounds that:

1) The evidence was uncorroborated.

2) The learned trial magistrate failed to detect the contradiction and inconsistencies in the evidence given by witnesses.

3) The trial magistrate failed to consider that complainant and his wife have long family grudge against him.

4) The learned trial magistrate erred in rejecting his defence totally.

Appellant filed written submissions wherein he pointed out that the charge sheet was defective and that the evidence was at variance with the charge, since the charge which was read to him was stealing from the person and malicious damage to property and that in fact the trial magistrate's judgment referred to stealing.

Mr. Naulikha for the State opposed the appeal and submitted that appellant was convicted for the offence of robbery contrary to section 296(1) and sentenced to 4 years imprisonment and the charge sheet was not defective as it was read over to him in a language he best understood.

With all due respect to Mr. Naulikha, he seems to have missed the point. Appellant's complaint is that the charge which was read to him was stealing from the person, then the learned trial magistrate in his judgment referred to accused as having been charged with the offence of stealing from the person using violence, and convicted him of robbery.

From the original trial court's record shows plea was taken on 1-11-05 when three counts were read to the appellant. The signed charge sheet dated 1-11-05 reads.

1) Malicious damage to property contrary to section 339 (1) as read with section 339(3) (b) Penal Code.

2) Assault causing actual bodily harm contrary to section 251 Penal code.

3) Stealing from a person contrary to section 279(a) Penal Code.

However on the same day, the prosecution informed the court that he wished to substitute the charges to robbery and the matter was listed for mention on 3-11-05. It is then shown that the prosecution informed the trial magistrate.

"*I have the substituted charge"*

The charge was then read over and explained to appellant in Kiswahili language and he pleaded not guilty. This substituted charge sheet now had the counts of robbery replacing the stealing

2) Assault contrary to section 251 Penal Code

3) Malicious damage to property contrary to section 339 o(1) seemed to have remained.

The plea was then taken in respect of the substituted charge only.

This is confirmed by the court record where appellant initially said on 24-1-07,

"*I was only given one charge sheet and later on 31-1-07 appellant informed the court as follows:-*

I now have the charge sheets" - a confirmation that the two sets of charge sheets were within appellant's possession and knowledge.

I think the confusion was created by the wording of the charge in the judgment by the trial magistrate judgment when he stated:

"*The accused … is charged with stealing 600/- from Kahindi Katangalia and using violence on him contrary to section 296(1) of the Penal Code"*

The description of the offence conforms with what is envisaged by section 296(1) Penal Code but is even fortified by the fact that the section under which appellant is charged is quoted by the trial magistrate.

The wording of the charge and its particulars conforms with the provisions of section 137 Criminal Procedure Code and I find no defect in the charge sheet nor was there any prejudice occasion to appeal.

Another ground of appeal is that there were contradictions and inconsistencies in the evidence of prosecution case and evidence was uncorroborated.

Appellant submitted that PW1's evidence was that appellant grabbed the shs. 600/- from him and took, yet the police officer's evidence was that a report of robbery was made against the appellant.

Further that whereas PW1 stated that appellant had a panga and began demolishing the house, PW2 said on cross examination:-

"*When you came, you had nothing in your hands"*

Appellant wonders that if these two people were at the same place at the same time, then which one of them was telling the truth –

Appellant urges this court to acquit him on the basis that contradictory evidence is unreliable – he has cited the case of Agostino Njoroge Riitho V R Cr. App. 99 of 1986.

I confirm there is some variance as to whether appellant had any weapon yet I pause to consider whether

this variance touches on the material particulars – which to my mind are, robbery complainant of Ksh. 600/-, violently PW1 getting injured and the destruction of the house. I don't think so. Further on cross-examination PW2 stated that appellant left a knife and panga behind – which then corroborates evidence of PW1 as regards the weapons – it is still moot though whether appellant came with them, armed himself with them at the scene and even if that was to be in his favour, it is clear that he is not charged with armed robbery contrary to section 296(2) of the Penal Code probably because there was no evidence of his having used the weapons to inflict injury on complainant or in the course of forcefully grabbing the Ksh 600/- from complainant. The evidence of PW1 and PW2 are otherwise similar and thus corroborated.

With regard to the P3 form, the appellant submits that the one produced belonged to Katangalia, and that prosecution ought to have produced Kahindi's P3 form to support its case and that the doctor who produced the P3 form was not the maker and so the P3 form was improperly produced.

Appellant also faults prosecution for failing to call certain persons who were mentioned as witnesses-with reference to Katana Katangalia witnesses and the chief and citing the case of Bukenya and others v Uganda [1972] EACA pg 549 which held that when the evidence called is inadequate the court may infer, that the evidence of an uncalled witness if called would tend to be adverse to the prosecutor and he asks this court to take the same approach.

In response, Mr. Naulikha submits that it is not clear what appellant is saying about the P3 form as it was marked and signed by the author, who produced it. As regards witnesses not being called, he states that appellant had an obligation to draw to the attention of the court that he wanted witnesses mentioned to come to court but he never did so.

(PW3) Dr. Gachiri who produced the P3 form told the trial court on cross-examination that he wasn't the one who treated the complainant. Is he the one who examined the complainant and failed to sign the P3 form?

The P3 form relates to the complainant, so whatever appellant is saying about Kahindi and Katangalia does not make any sense at all. I have looked at its contents – it shows the P3 form is signed by a Dr. Ondieki. There is no evidence that Dr. Gachiri and Dr. Ondieki are one and the same person, or that Dr. Gachiri ever worked with Dr. Ondieki and was familiar with his handwriting and signature.

There was also no attempt whatsoever to explain why the maker of that document was not the one producing it and to that extent the production of the P3 form by Dr. Gachiri who was not the maker of it and without a basis being laid for him to produce the same, was prejudicial to the appellant. Which would still not alter the evidence as regards threat to use violence and actual use of violence as there was evidence that complainant was strangled and that Ksh. 600/- was indeed taken from PW1 and the property destroyed. My only concern is this – was this violence being used to facilitate the stealing of the sh. 600/- from complainant or was it incidental to the emotional tension that prevailed following appellant's acts of destroying the home? I think the latter fits in more with the scenario given from the evidence and to my mind this charge ought never to have been substituted to robbery, it lay quite squarely with the offence created under section 279(a) of the Penal Code i.e stealing from the person – but which incidentally carries a similar maximum sentence as an offence under section 296(1) Penal Code. Resubstitution at this stage will serve no useful purpose. As regards failure to call Katana and the chief does raise suspicion – they were compellable witnesses. Were there any adequate reasons offered by prosecution for failing to call them especially with regard to the allegation of robbery and does the failure to call them create the impression that prosecution realizes that this was actually a family feud which would perhaps have been limited to malicious damage to property and not robbery.

I have been unable to find the mention of Katana by prosecution witness, PW1 on cross-examination said his brothers were not present and from evidence of PW2, the chief came after the destruction had taken place and appellant had even attacked the complainant who then screamed for help.

From the aforegoing, my finding is that the conviction was safe and I uphold it. What about the sentence? Appellant was in remand custody from November 2005 until March 2007 when he was

sentenced – that was already two years in custody – taking into consideration the circumstances of the case – these are basically family differences, the amount of money involved, the sort of destruction, I think that the sentence was rather harsh and a two year custodial sentence was adequate in the circumstances. I would, to that extent interfere with the sentence, set it aside and substitute it with a two year imprisonment term which is to take effect from the date of conviction.

If the period has been served, then appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 23rd day July 2009 at Malindi.

Appellant present.

Mr.Ogoti for State.

H. A. Omondi

JUDGE