



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Criminal Appeal 78 of 2006

BAHATI HARISON CHARO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant Bahati Harrison Charo has appealed against the conviction and sentence imposed upon him by the Principal Magistrate Mombasa. The Appellant had been charged before the court with Robbery with Violence contrary to Section 296(2) Penal Code. The facts of the case were as follows:-

“BAHATI HARRISON CHARO: On the 15th day of August 2005 at Kibokoni in Mombasa District within the Coast Province jointly with others not before court robbed PAUL OMONDI one mobile phone make Motorola 288fm valued at Kshs.1,600/- and immediately before or after the time of such robbery, threatened to use actual violence to the said PAUL OMONDI”

The Appellant pleaded not guilty to the charge and on 31st January 2006 the hearing commenced. The prosecution called a total of two witnesses and upon close of their case the Appellant was ruled to have a case to answer. He gave an unsworn defence in which he denied the charges. The learned trial magistrate delivered her judgement on 15th February 2006 in which she convicted the Appellant of the lesser offence of Robbery contrary to Section 296(1) Penal Code. After hearing mitigation from the Appellant the trial magistrate sentenced him to serve a term of four (4) years in prison. Being dissatisfied with both the conviction and sentence the Appellant has now appealed to the High Court.

Being a court of first appeal we are mindful of our duty to consider and re-evaluate the evidence

adduced before the trial court making due allowance for the fact that we did not hear the witnesses testify. In the case of **Ajode –vs- Republic KLR [2004] page 81** the Court of Appeal sitting in Kisumu held that:-

“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that”

The Appellant relied wholly upon his written submissions which had been filed in court. Mr. Ondari learned State Counsel who appeared for the Respondent State gave oral submissions in which he told us that he was conceding this appeal.

We have carefully considered the evidence adduced before the lower court in support of this charge. Paul Omondi the complainant told the court that on 15th August 2005 the accused approached him at around 11.00 A.M. and lured him to a place called “***Mlango wa Papa***” in the Kibokoni area of Mombasa under the pretext that he was taking the complainant to meet a potential customer. Upon arrival there the accused persuaded the complainant to switch off his mobile phone due to the insecurity in that area. The complainant complied whereupon a group of four men suddenly emerged and joined the accused in attacking the complainant and relieving him of his mobile phone. The men then escaped. The complainant stated further that the following day 16th August 2005 he spotted the accused near Barclays Bank along Nkrumah Road. He apprehended the accused and took him to the police station.

The complainant was in effect the only eye-witness to this incident. **PW2** PC. Samuel Kongo was the arresting officer and did not witness the robbery. As such the conviction of the Appellant was based upon the uncorroborated evidence of a single witness. Although the learned trial magistrate did warn herself of this fact at page 11 line 12 when she states that –

“The complainant was the lone principal witness”

The obvious question that would arise is whether the evidence of a single identifying witness is a sufficient basis for a conviction. We note with concern that no identification parade was conducted by the police yet the complainant stated clearly that he did not know the accused before this incident. In the case of **Kiarie –vs- Republic [1984] KLR 739** the Court of Appeal held at page 744 that –

“Where the evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction Such identification is almost worthless without an earlier identification parade”

The failure of the police to conduct an identification parade seriously weakens the evidence of identification in this case.

We do further note that the complainant told the court that he made no report to the police until **after** the accused had been apprehended. At page 7 line 18 of his evidence complainant states –

“That day I did not report to the police”

Did the complainant not consider the incident worth reporting? It is very strange and in our view highly unlikely that one would go through an incident of this nature, be assaulted and beaten by four men and not think to report to the police. This in our view raises a reasonable doubt as to whether this robbery as described by the complainant actually happened.

Lastly, we find that the trial magistrate noted on page 12 line 4 of her judgement as follows:-

“Thirdly the court will decide whether immediately before or after the time of such robbery actual

violence was used or threatened on the complainant. I am afraid this ingredient has not been proved. The complainant said 4 men attacked him yet no P3 form has been exhibited before me to show any injuries to the complainant”

Despite this observation she proceeded to render a conviction. In as much as the learned magistrate reduced the charge to that of simple robbery under S. 296(1) of the Penal Code this anomaly i.e. lack of evidence of any injury to the complainant ought to have led to an acquittal. It is inconceivable that the complainant would have endured a beating from four grown men and yet remained unscathed. At the very least he would have had bruises to display. Yet the complainant apparently suffered no injuries and did not seek any medical attention. This is an anomaly which casts doubt on the prosecution case.

The upshot of all this is that we do agree with the decision of the learned State Counsel to concede this appeal. Evidence of identification is wanting and the evidence adduced by the prosecution is at best weak. For the above reasons we find this present appeal succeeds. The conviction of the Appellant is hereby quashed and the subsequent sentence is also set aside. The Appellant to be released forthwith unless he is otherwise lawfully held.

Dated and Delivered at Mombasa this 16th day of November 2009.

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F. AZANGALALA

JUDGE

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M. ODERO

JUDGE

Read in open court in the presence of:

Mr. Ondari for Respondent

Appellant in person

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M. ODERO

JUDGE

16/11/2009