REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 112 of 2005

DAVID MUNYAO MAMUU ……..……. APPELLANT

VERSUS

REPUBLIC ……..... RESPONDENT

(Being an appeal from the whole judgment and conviction of Mr J.M Munguti, RM dated 11/11/2005 in Makindu Criminal Case No. 2715 of 2005).

JUDGMENT OF THE COURT

1. The appellant herein, DAVID MUNYAO MAMUU, was arraigned before the Resident Magistrate's Court at Makindu charged in the first count with Robbery contrary to section 297 (1) of the Penal Code. It was alleged that:-

"**On the 13th day of June 2005 at Kaseve in Makueni District within Eastern Province, jointly with another before court robbed ERIC MWANZIA KYUNGU cash Kshs.6,000/= and 1 mobile phone make Motorolla T/190 valued at Kshs.6,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ERIC MWANZIA KYUNGU (Total value 12,000/=."**

2. In the second count, he was charged with malicious damage to property contrary to section 339 (1) of the Penal Code. It was alleged that on 13/06/2005 he willfully and unlawfully damaged one windscreen valued at Kshs.20,000/= the property of ERIC MWANZIA KYUNGU.

3. The appellant pleaded guilty to both counts when he appeared for plea on 11/10/2005. The record shows that the language used during the plea was Kiswahili and Kikamba.

4. The facts of the case were that on 13/06/2005 at about 10.30 p.m at Kaseve stage in Makueni District, the complainant was ferrying sand in a lorry registration Number KAR 620 P. That the complainant was accompanied by his turnboy. That just before the junction of the main Mombasa-Nairobi Highway, they found the road blocked with stone, sand and logs. That when the complainant stopped the lorry to remove the road block, the appellant and other people emerged from the bush and started throwing stones at them. That the complainant made an attempt to reverse the lorry but that before he could do so, they were robbed of a mobile phone Motorolla T'190 valued at Kshs.6,000/= plus cash of Kshs.6,000/=. That during the stone throwing, the windscreen of the complainant's lorry was damaged. That the complainant identified the appellant as one of the attackers and after making a report to the

police, the appellant was eventually arrested and charged with the two offences.

5. The appellant admitted the facts as given, was found guilty on both counts and accordingly convicted. In mitigation, the appellant told the court that he had agreed to pay the complainant for the loss and that the complainant only took the matter forward when the appellant failed to pay the balance. On the first count, the appellant was fined Kshs.200,000/= in default to serve 10 years in prison, while on the second count, he was fined Kshs.50,000/= in default to serve 2 years in prison. The two sentences were to run consecutively.

6. The appellant appealed to this court against both conviction and sentence. There are four grounds of appeal in the Petition of Appeal dated 24/11/2005 and filed in court on 9/02/2006. They are that:

a. The Magistrate erred in law and fact in convicting the accused on charges which were not proved beyond reasonable doubt;

b. The Learned Magistrate erred in law and fact in convicting the appellant on plea which was not unequivocal;

c. The Learned Magistrate erred in law and fact when he relied on a defective charge sheet to convict the appellant;

d. The Learned Magistrate erred in law and fact in imposing an excessive sentence on the appellant.

7. At the hearing of the appeal, Mr Wang'ondu, State Counsel conceded the appeal but asked the court for a retrial. He said that the learned trial magistrate erred in law when he gave an option of a fine on a robbery charge under section 296(1) of the Penal code. Mr Wang'ondu asked the court to order a retrial on grounds that:-

i. There was admission of guilt by the appellant and that if a retrial is ordered, the appellant would not be prejudiced in any way;

ii. For the ends of justice, this matter should be retried since there is clear evidence that a robbery took place on 11/10/2005;

iii. A very serious and prevalent offence was committed.

iv. The prosecution witnesses would be readily available to testify and that since the case was concluded only on 11/11/2005, the appellant would not be prejudiced even if he were not to plead guilty.

8. On his part, Mr O.N. Makau, for the appellant opposed the prosecution's plea for a retrial and also contended that on the basis of grounds 1, 2 and 3 of the appeal which were argued together, the charge of which the appellant was convicted was defective and that the plea was also not unequivocal. Mr Makau contended that the first count was defective in stating that the appellant was charged with another before court without naming who that other was. Mr Makau submitted further that though the appellant may have admitted the facts, he does not seem to have fully understood the charge which said that he committed the offence with another before the court. Mr Makau also submitted that the charge was bad for duplicity, but with due respect to learned counsel, the first count is not duplex. Section 295 of the Penal code which provides for offences that are committed either under section 296 (1) or 296 (2) says as follows:-

"**295. Any person who steals anything, and at or immediately before or immediately after the time of stealing it, uses threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."**

9. Since that is the way section 295 is worded, and since that wording is implied into section 296 (1) of the Penal code, one cannot argue that the charge in count one is duplex.

10. Mr Makau also submitted that the language used is not clear during the taking of the plea.

11. As the appellate court of first instance, it is my duty to consider and evaluate afresh the evidence on record with a view to coming to my own conclusion in the matter regardless of whether or not the state has conceded the appeal. I have carefully reconsidered the evidence on record and my view is that the plea was properly taken in this case. The record shows that the interpretation was in Kiswahili and Kikamba and it also shows that after the charges were read over and explained to the appellant he answered in the Kikamba language and told the court that the charges as read were true. It is therefore not true that the taking of the plea was defective in any manner. The court was careful to observe the procedure for the taking of a plea as set out in the case of ADAN versus REPUBLIC (1973) EA 445.

12. As to whether the 1st count is duplex, Mr Makau cited the case of CHERERE S/O GUKULI versus REGINAH – CR.A No. 75 of 1955. In response, Mr Wang'ondu submitted that the complaint of the irregularity should have been raised earlier than at the hearing of the appeal, relying as he did on section 382 of the CPC which provides as follows:-

"**382. Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice.**

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

13. The major complaint raised by Mr Makau is the inclusion of the words 'with another before court." In my considered view such an irregularity did not occasion any failure of justice, and I am therefore not prepared to set aside the finding on that ground.

14. Should this case be taken back for retrial? I do not think that there is any reason for such an order. I can however deal with the issue of sentence on the two counts. The learned trial magistrate erred in law in giving the appellant the option of a fine when there is no statutory provision for such a fine. In the circumstances, I allow the appeal on sentence on both counts to the extent that the fines of Kshs.200,000/= and 50,000 on the first and second counts respectively are set aside and in lieu thereof, the appellant shall serve the sentences imposed upon him by the learned trial magistrate, except that the two sentences shall run concurrently.

15. In the result, and save as to the extent of sentence as above stated, the rest of the appellant's appeal fails.

16. Orders accordingly.

Dated and delivered at Machakos 29th day of January, 2008.

R.N. SITATI

JUDGE