REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Criminal Appeal 144 of 2005

PATRICK MACHARIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence in Meru Chief Magistrate's Court Criminal

Case No.1799/2 004 by J.R. Karanja CM

on 18.8.2005)

JUDGMENT

1. The appellant, Patrick Macharia was the accused person in Meru Chief Magistrate's Court Criminal Case Number 1799/2004 where he had been charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. It had been alleged that "**on the 25th day of July 2004, at Makutano, Ntima Location in Meru Central District within the Eastern Province jointly with others not before the court robbed Catherine Nguta cash Kshs. 1200 and a Mobile phone make Nokia 3310 worth 6,000/= and at or immediately after the time of such robbery used actual violence to the said Catherine Nguta."**

2. The evidence leading to the appellant's arraignment, trial and conviction before the subordinate court was as follows:-

3. PW1, Catherine Nguta was going home on 25.7.2004 at 12.30 am and when she approached her gate, 3 men confronted her, demanded her mobile phone and money and threatened to kill her if she failed to comply with the demand. She screamed for help and while they took her mobile phone and Ksh.1, 200/= in cash, she held onto one robber and people alerted by her screams assisted in apprehending that robber. The others disappeared but the one apprehended, she said, was the appellant who was handed over to the police. She said that she had not previously known the appellant.

4. PW1 added that because she was beaten up during the robbery, she went to hospital and was issued with a P3 form. She also said that she saw none of the robbers with any weapon.

5. PW2, Francis Mwiti said that on 25.7.2004 at about 12.30 am he was asleep in his house within Makutano area Meru Town when he was woken up by screams from a nearby road. He rushed there and found PW1 screaming and holding on to a person on the ground. He identified that person as the appellant and when other people came to the scene, the appellant was apprehended, tied with ropes and handed over to the police, but not before being beaten briefly by the mob of people that had gathered at the scene.

6. PW3, Harrient Nthiira, a friend of PW1 had walked her half-way to her home and turned back to her own home but shortly heard her screaming and she rushed to assist. She found PW1 screaming and holding a young man whom she identified as the appellant. The crowd that formed at the scene then apprehended the appellant and later handed him over to the police.

7. PW4, Wilson Namu, a Clinical Officer attached to Meru Hospital examined PW1 on 25.7.2004 and she had visible injuries as a result of the alleged attack and produced the P3 form indicating the extent of the injuries.

8. PW3, James Felix Maina was asleep on the material night but was woken up by PW1 screaming and when he rushed to her aid as her neighbour, he found the appellant who had been apprehended and was being beaten by members of the public. The appellant was later taken to the police station.

9. PW6, Cpl Gilbert Mbaabu investigated the matter after the appellant had been apprehended, issued a P3 form to PW1, recorded statements from witnesses and then charged the appellant with the offence of robbery with violence.

10. In his defence, the appellant stated that he was doing casual work at Makutano area until midnight on 25.7.2004 when there was a power blackout. He decided to walk home but not his way, PW1 grabbed him and started screaming. Other people joined her, beat him up and handed him out to the police. Later, he was charged with the present offence which he denied committing. The learned trial magistrate found that the case had been proved beyond reasonable doubt and convicted the appellant accordingly and sentenced him to death, hence this appeal.

11. Mr. Ugude for the appellant argued all the grounds of appeal as one and they were as follows:-

i. That the learned trial magistrate erred in law and in fact in failing to find that the prosecution had not proved beyond reasonable doubt that the appellant robbed the complainant.

ii. That the learned trial magistrate erred in law and in fact in failing to appreciate that it was upon the prosecution to lay the basis for finding the exact people who robbed the complainant as the complainant had stated that she was robbed by a group of three (3) people.

iii. That the learned trial magistrate erred in law and fact in failing to find that there was no clear evidence as to when the complainant was robbed whether it was at day time or at night.

iv. That the learned trail magistrate erred in law and fact in failing to find that the prosecution had not done thorough investigation before charging the appellant.

v. That the learned trial magistrate erred in law and fact in failing to appreciate that the appellant was confronted and apprehended by the complainant at his gate and still holding the keys to the gate.

vi. That the learned trial magistrate misdirected himself when he failed to consider the defence tendered before him either sufficiently or at all and hence arrived at a bad decision.

vii. That the learned trial magistrate himself in point of law and fact when he misapprehended the evidence presented before him and hence arrived at a worthless conclusion.

viii. That the learned trial magistrate erred in law and in fact when he failed to appreciate doubt in the prosecutions case and/or award the benefit of such doubts to the appellant.

ix. That the learned trial magistrate erred in sentencing the appellant and which sentence was excessive in the circumstances.

12. With those grounds in mind and having regard to the submissions by both counsels appearing, our obligation as was set out in Okeno V Republic [1972] E.A. is to submit the evidence as set out above to a

fresh and exhaustive examination, weigh the conflicting evidence, draw our own conclusions and ultimately reach our own final decision on that evidence. In doing so, we consider it important to address the following issues:-

a. circumstances of the alleged robbery and the role of the appellant in it, if at all

b the credibility of PW1 as a reliable and credible witness

c. the appellant's defence and its credibility

d. the offence of robbery with violence and proof thereof

13. Firstly, it is clear from the evidence of PW1, PW2, PW3 and PW5 that sometime at around 12.30 am on the material night PW1 was accosted by 3 men who threatened to kill her if she did not give out her money and mobile phone. When she resisted, she was attacked and she fought back. As some of the robbers took her money and phone, she grabbed one while screaming and PW2, PW3 and PW5 were among the people who came to her rescue as she clung to that robber who turned out to be the appellant. The evidence of all these witnesses was hardly challenged and we see no reason to do so. Mr. Ogude made references, at length, to identification at night in unfavourable circumstances and by a single identifying witness. Those oft-quoted phrases have relevance in situations such as had obtained in Gikunya Karuma and Mburu Mbugua V Republic [1977] KLR 23 which he quoted but that case is wholly irrelevant to the situation in this case. This case rotates around the fact that a daring victim of robbery clings onto one of three robbers and refuses to release him until other witnesses came to her rescue. Identification is not an issue where the offender is apprehended at the scene and red-handedly for that matter. Granter that no item of robbery was found on him but there is no doubt that his confederates who ran way did so with the phone and the cash belonging to the complainant.

14. Secondly, the credibility of PW1 was faulted but we saw no substance in submissions along those lines because PW1 and PW2 had parted for only a short while before PW1 screamed and PW2 rushed back only to find her struggling with the appellant. PW3 and PW5 corroborated that evidence and we cannot see that at 12.30 am on that night. PW1 suddenly conjured up a plan to frame the appellant! We see no substance in those submissions.

15. Thirdly, the appellant in his defence admitted being at the scene; admitted being grabbed by PW1 who was screaming; admitted being apprehended by members of the public allegedly for robbing PW1; admitted being handed over to the police and later being charged. How can such a defence exonerate the appellant even as we are aware that he had no onus to prove anything? A defence is a reasonable explanation from an accused person regarding his circumstances and when the explanation is unreasonable or is an admission of certain adverse facts then it cannot be of benefit to the offender. We reject the defence tendered as a mere afterthought and as a weak attempt at twisting adverse facts to fit the appellant's situation.

16. Fourthly, and more importantly in our independent evaluation of the evidence before us, the offence of robbery with violence is proved if any of the following circumstances are shown by credible evidence.

i. That the offender is armed with any dangerous or offensive weapon or instrument; or

ii. That the offender is in company with one more other person or persons or;

iii. That at or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other persons violence to any person

17. These circumstances flow directly from the language of section 296(2) of the Penal Code and were discussed exhaustively in Oluoch V Republic [1985] KLR 549. We heard submissions that tended to the view that the appellant, if at all, should have been charged with the offence of robbery contrary to section 296(1) of the Penal Code. We have looked at the circumstances of this case elsewhere above and

applying the definition of offence, once the appellant was in the company of two other robbers, and the complainant, by the evidence of PW4, was injured during the robbery and therefore violence was meted out to her, in our very humble view the offence of robbery with violence was proved beyond reasonable doubt.

18. Having therefore evaluated the evidence afresh, as we think we have, we see no merit in the appeal and cannot find reason to interfere with the appellant's conviction and sentence. All the grounds of appeal must fail and we so hold.

19 The appeal must and is hereby dismissed in its entirety.

20. Orders accordingly.

Dated and delivered at Meru this 19th day of February 2008.

ISAAC LENAOLA

JUDGE

WILLIAM

JUDGE