

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 309 of 2006

ISAAC NGANGA MACHARIAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 6804 of 2005 of the Chief Magistrate's Court at Kibera by Mrs. Wasilwa – P.M.)

JUDGEMENT

The appellant Isaack Nganga Macharia was charged with robbery with violence contrary to section 296(2) of the Penal code the facts being that on 15th September 2005 along Ngotho road in Riruta area within Nairobi Province jointly with others not before court while being armed with dangerous or offensive weapon namely a pistol robbed Alex Miganza Mbohani of a mobile phone Nokia 2600 valued at Kshs.6,500/= and cash Kshs.3,000/= all valued at Kshs.9,500/= and at immediately before or immediately after the time of such robbery threatened to use actual violence to the said Alex Miganza Mbohani. After full trial he was convicted and sentenced to death. The basis of the conviction was that there was ample evidence linking the appellant with the offence that was committed on 15th day of September 2005.

There is no doubt that PW1, complainant was attacked and robbed of the items mentioned in the charge sheet. He was attacked as he was going to work to pick his vehicle in Satellite. According to him he was attacked at about 5.00 a.m. in the morning by two men who after stopping him took away his phone and Kshs.3,000/=. He proceeded to where the vehicle was parked and after a short while he saw two boys at the spot where he was robbed. He slowed down the vehicle and after being joined by his conductor, he followed the two boys who ran away but he managed to arrest one of them being the appellant. No item was recovered from the appellant and he was handed over to PW3 and PW4 who conducted what they called investigations.

The appellant gave un-sworn testimony and denied having robbed the complainant. He says that on the material day he woke up in the morning and went to the stage in order to go and buy milk. On reaching the stage he found another person waiting for a motor vehicle. He says suddenly a motor vehicle came and the driver of the said vehicle came out shouting that we were thieves. He says he could not run because he was not a thief hence he was arrested and taken to the police station and charged with the present offence.

The basis of the appellant's conviction is the evidence tendered by PW1 that the appellant was one of the persons who attacked him and robbed him of his mobile phone and Kshs.3,000/= on the material night. PW1 further states that after picking his motor vehicle he found the appellant together with his accomplice on the spot where he was earlier robbed. On the other hand the appellant says he was innocent and that he was in his normal business at the time he was arrested on the stage. The question that arises is whether the evidence of the complainant is consistent with the guilt of the appellant. It is pertinent to appreciate whether the prosecution has discharged all possibilities of mistaken identity. PW1 does not say how he was able to identify the appellant since the incident happened at around 5.00 a.m.

and since the offence was conducted in dark area. It has not been highlighted that the appellant was seen in the direct beam of torch light or with other lights that would enable the complainant to properly recognize the appellant as one of the attackers.

Having addressed our mind to all the issues we are not satisfied that in all the circumstances of this matter the complainant did properly identify the appellant. The prosecution did not discharge the possibility of mistaken identity making the conviction of the appellant improper. We think that the conviction of the appellant was not based on sound and credible evidence. The circumstances at the time of the robbery and the circumstances that led to the arrest of the appellant give a distinct impression that there could be a possibility of mistaken identity. In short we think the conditions prevailing at the time of the attack did not favour a positive identification.

In the premises it was an error of the trial court to convict the appellant on the single evidence of the complainant. The trial court did not warn itself of the dangers of basing its conviction on that kind of evidence. We think that was a misdirection which should be resolved in favour of the appellant hence the evidence of identification on which the lower court relied on is quite incredible and cannot sustain the appellant's conviction. In conclusion we allow the appeal, quash the conviction, set aside the sentence and order that the appellant be released forthwith unless otherwise lawfully held.

Dated, signed and delivered at Nairobi this 29th day of October, 2008.

J. B. OJWANG

M. WARSAME

JUDGE

JUDGE