



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

Criminal Appeal 280 of 2005

(From original conviction (s) and Sentence(s) in Criminal Case No. 569 of 2004 of the Senior Principal Magistrate’s Court at Limuru (Ezra O. Owino - SRM))

PHILIP MWORIA TULU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

PHILIP MWORIA TULU was convicted for the offence of **ROBBERY** contrary to **Section 296(1)** of the **Penal Code** and sentenced to one year probation sentence. He was aggrieved by the conviction and therefore lodged this appeal.

The filed petition of appeal relied upon by the Appellant was filed on his behalf by Counsel **E. M. Wachira & Co. Advocates**. There are 15 grounds of appeal. I have perused these grounds and find that they are repetitive and argumentative but rotate around the following issues: -

That there was insufficient evidence to found a conviction for the alleged offence;

That there were inconsistencies in the prosecution evidence which the learned trial magistrate relied upon to convict and;

That the Appellants defence was not given due consideration.

This appeal was conceded bo by the State, **Miss Gateru** Learned State Counsel submitted that the conviction entered in the case was not safe as the evidence before the court did not prove that the Appellant robbed the Complainant of any money.

Mr. Wachira for the Appellant associated himself with the learned State Counsel’s submission. The Appellant’s advocate added that the learned trial magistrate relied exclusively on the Complainant’s evidence which was unreliable and failed to consider that of PW2 which evidence was favourable to the defence. **Mr. Wachria** continued to submit that the evidence of the Appellant was not mentioned at all in the entire judgment. He also submitted that the Complainant’s evidence was contradicted in the Doctor’s findings in the P3 form.

As expected of a first appellate court, I have analyzed and evaluated the evidence adduced in the lower court and drawn my own conclusion on both matters of law and fact while bearing in mind that I neither saw nor heard any of the witnesses. See **GABRIEL KAMAU NJOROGE vs. REPUBLIC [1982-88] KAR 1134.**

The evidence before the court was that of the Complainant who stated that on 31st December 2003 at 9.00 a.m. the Appellant demanded his Ksh.200/- which he had given her earlier. When the Complainant indicated that she had only Kshs.1000/- and needed to have change at the shop where she was going accompanied by PW2, the Appellant snatched the Kshs.1000/- and proceeded towards the shops. When the Complainant demanded her money back, the Appellant turned and gave her a thorough beating. The Complainant was only able to walk home with the aid of a lady whose name she did not know. She then was taken by her mother in a taxi to Tigoni Police Station to report the matter. The second witness was PW2 a child of tender years. PW2's evidence was that as she walked to the shop with the Complainant on 31st, the Appellant beat the Complainant.

PW3 was the doctor who examined the Complainant. He stated that the Complainant alleged she was assaulted on 31st December 2003 at 9.30 p.m. at Ngarariga. The Doctor filled the P3 form on 2nd January 2004. The other witness was PW4 who received the Appellant from an Administration Police Officer from Ngarariga on the 13th March 2004.

The Appellant's defence was that he did not meet the Complainant on 31st December 2003 as alleged but on 26th December 2003. He had then demanded Kshs.5500/- he had given her much earlier. That the Complainant said she did not have it. The Appellant denied beating her or taking any money or shoes from her. He stated that he was arrested at home on 12th March 2004 yet he had been at home all along. He said that the charge was a frame up.

I will now deal with the issue raised by the learned State Counsel. Did the Appellant rob the Complainant as alleged? The Complainant's evidence clearly shows that she owed Kshs.200/- to the Appellant. Even if her evidence alone were to be believed, then the Appellant owned part of the money in the Kshs.1000/- note he took from her.

The issue of motive to steal comes into play. What the Complainant said was that after the Appellant took the money, he headed towards the shops. That changed however, when she demanded the money back and a brawl ensued.

Part IV of the **Penal Code** deals with general rules as to criminal responsibility. Under **Section 8** with marginal notes "bona fide claim of right" The section provides: -

"8 A person is not criminally responsible in respect of an offence relating to property, if the act done or omitted to be done by him with respect to the property was done in the exercise of an honest claim of right and without intention to defraud."

I find that even if I was to believe that the Appellant took Kshs.1000/- from the Complainant, the fact that he owned Kshs.200/- out of it going by the Complainant's own evidence then the Appellant had a claim of right over the money. He could not have stolen or robbed what belonged to him. In any event, the Complainant's evidence clearly demonstrated that the Appellant walked towards the shops. In the circumstances there is a possibility he was going for change and therefore creating a doubt that he had any intention to keep the entire Kshs.1000/- he had taken.

The other issue I wish to deal with involves inconsistencies in the Complainant's own evidence. The two Counsels did not elaborate much on these but I did note some inconsistencies after evaluating the entire evidence afresh. The time of the alleged assault was in issue. While the Complainant stated that she was beaten up at 9.00 a.m. and that her mother took her to the police immediately, the P3 form, details filled by the Police Officer indicates that she reported to the Police on 1st January 2004 at 11.00 p.m. The Doctor who examined her stated that on 2nd January 20034 when he completed and signed the P3 form, he found the Complainant with injuries which were 2 hours old. That evidence not only contradicted the information on the P3 form itself but also directly contradicted the Complainant's evidence. Bearing in mind that PW3, **Dr. Wachira**, is an expert in the field of medicine, his findings that the injuries he saw on the Complainant on 2nd January 2004 were 2 hours old could only be faulted by another doctor or person of equal standing. There was none in court. That therefore means that if injuries

the Complainant had were 2 hours old on 2nd January 2004, then they are not the same ones complained of in this case.

The other issue which arises in this case is the unexplained delay in arresting the Appellant. The offence allegedly took place on 31st December 2003 yet the Appellant was not arrested until the 12th March 2004, some almost 3 months after the offence. That lapse of time does raise serious questions of propriety in this offence especially bearing in mind the various inconsistencies in this case.

The final issue I wish to deal with is that of the taking of evidence from PW2. The learned trial magistrate noted that PW2 was a child of tender age, being 8 years old, which was a correct finding. However, the learned trial magistrate went about taking the child's evidence in a way foreign to the law. Section 19(1) Oaths and Statutory Declarations Act provides: -

“Section 19(1) Where, in any proceedings before any Court or person having by law or consent or parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the Court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with Section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section.”

In the leading case of **KIBANGENY V. REPUBLIC [1959] EA 92** at page 94, **FORBES V-P, GOULD and WINDHAM JJA** held_

“There is no definition in the Oaths and Statutory Declaration Ordinance of the expression “child of tender years” for the purpose of Section 19. But we take it to mean in the absence of special circumstances, any child of an age, or apparent age, of under fourteen years; although, as was said by LORD GODDARD CJ, in R-V. Campbell (1) (1156) 2 ALL ER 272.

“Whether a child is of tender years is a matter of the good sense of the court”...

where there is no Statutory definition of the phrase. The two boys in this case, both of whom were estimated to be under fourteen years old, must therefore be considered as children of tender age.”

The law as stated in the **Kibangeny** case, Supra has since changed. The **Children Act** defines ‘child of tender years’ as meaning “child of under the age of ten years”. However, the **Kibangeny** case is still good law that a child of 8 years old must be considered to be child of tender age in terms of **S.19(1)** of the Oaths and Statutory Declaration Act. In the same case, the learned Judges of Appeal made it very clear that a presiding Judge, and in our purposes, a magistrate for that matter, must make an inquiry for himself as a duty he owes, to satisfy himself concerning two issues. Before I mention the nature of the investigation I must also state that the learned Judge of Appeal made it clear that this investigation must firstly, precede the swearing and the evidence and; secondly need not be a lengthy one and must be recorded. The learned Judges of Appeal in **Kibangeny's** case referred to an earlier decision of the same Court in which the Court interpreted **Section 19** of the Oaths and Statutory Declaration Act and expounded on the nature of investigation a Court should carry out. That was the case of **NYASANI S/O BICHANA –V- REPUBLIC [1958] EA. 190.** Upon quoting **Section 19(1)** and its proviso, **SIR, O’CONNOR P, BRIGGS V-P AND FORBES JA** held: -

“It is clearly the duty of the Court under that Section to ascertain first, whether a child tendered as a witness understands the nature of an oath, and, if any finding on this question is in the negative to satisfy itself that the child:

“is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.”

The position is therefore very clear that the presiding magistrate has a duty to conduct an inquiry called *voire dire* with the aim of determining whether the child before Court first and foremost understands the nature of an oath. Whether the answer to this question is positive or not, the Court must then satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and that he also understands the duty of speaking the truth.

Considering the records of the lower court, the learned trial magistrate grossly misdirected himself and made a finding before carrying out a *voire dire* examination as required. It was a serious misdirection, after “deciding” to take an unsworn statement from the child, to again subject her to cross-examination. The evidence of PW2 should therefore be ignored due to the error. That leaves the evidence of the Complainant standing on its own.

I find that there were serious unresolved inconsistencies and several unanswered questions all which are fundamental and go to the very root of the prosecution case. These inconsistencies are difficult to resolve given the nature of the evidence before the court.

That leaves the Appellant’s defence unchallenged that one, he never met the Complainant on the 31st December 2003. If she reported the incident on 1st January 2004 at 11.00 p.m., and the inconsistency as to the time the injuries could have been caused, then the Appellant’s defence that it never happened is both plausible and probable. This appeal has merit.

I find the conviction entered herein was unsafe and quash it accordingly. The Appellant has already served sentence.

Dated at Nairobi this 14th day of March 2007.

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LESIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant present

Mr. Wachira for the Appellant

Miss Gateru for the Respondent

Tabitha: CC

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LESIT, J.

JUDGE