REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang, J.)

CRIMINAL APPEAL NO. 37 OF 2005

BETWEEN

EMMANNUEL NJUGUNA MAINA…….APPELLANT

AND

REPUBLIC……..……..……RESPONDENT

(Appeal from the judgement of Senior Resident Magistrate S.M. Mokua in Thika Law Courts Criminal Case No. 4087 of 2004, dated 19th January, 2005)

JUDGEMENT

The appellant herein was charged with the offence of robbery, contrary to s.296(1) of the Penal Code (Cap.63). The particulars were that on 9th may, 2004 at Githurai Kimbo Village in Thika District, the appellant robbed one ***Kennedy Omenta Kesato*** of a grey coat valued at Kshs.1,500/=, cash in the sum of Kshs.1,000/=, and medications, valued at Kshs.200/=. The complainant (PW1) testified that he was on his way from the market, on 9th May, 2004 at about 7.00 pm, in the company of his son, one ***Titus Omore*** (PW2), when he met the appellant. The appellant was not, at that time, a stranger to PW1, and indeed, he greeted PW1 by uttering his name.

It was PW1's testimony, that the appellant demanded money with menaces from him, and caught him for the purpose of robbing him of his effects; and that the appellant busied himself with stripping PW1's coat from PW1's body, and in the attendant struggle PW1 was injured. PW1 extricated himself and ran away to secure assistance; but on return he did not find the appellant.

It was on the following day that PW1 reported the incident at Githurai Kimbo Police Station. PW1's coat which had been taken away during the incident was found, restored to PW1, and PW1 himself handed it over to the Police.

Then later, after the appellant had been arrested in connection with a different offence, the appellant caught up with him. It was PW1's testimony that the appellant looked familiar when he now caught up with the appellant.

PW2, who is PW1's (minor) son, testified hat he had been in the company of his father when someone got hold of his father and demanded money from his father. The attacker took PW1's money and his coat; the

coat had two Kshs.500/= notes in its pocket. PW2 was clear that it was only on the occasion of attack, that he ever set his eyes on the appellant. Both PW1 and PW2 had gone to a neighbour's house to seek help, when they were attacked.

PW3, **George Wagana Kimotho** testified that on 9th May, 2004 at about 8.00p.m., the appellant herein called him and informed him that a struggle had taken place between himself and PW1 – in respect of a debt existing between the two. Apparently, this debt related to the coat which PW1 was wearing, and which the appellant wanted returned to its owner. On cross-examination, PW3 confirmed that he knew the appellant, and he is the one who restored the coat to PW1, together with the contents of its pockets.

PW4, ***Police Constable Christopher Choi***, of Githurai Kimbo Police Station, testified that he was at the station on 25th February, 2004 when the accused was brought there, on the allegation that he had stolen two chickens, and that earlier on he had robbed PW1.

On the foregoing facts, the learned trial Magistrate set out his findings as follows:

> ***"The Court is to establish whether: (i) the [appellant] stole something; (ii) whether he used violence on any person. The evidence of PW1 and PW2 is very consistent: that the accused met PW1; he got hold of him and asked him to pay the [appellant's] money. The accused, forcefully took the complainant's coat. Actual violence was used; the [appellant] [appears] to have struggled with PW1 before taking PW1's coat.***
>
> ***"The complainant's coat was found with the [appellant]. The [appellant] voluntarily told PW3 about the coat, and requested PW3 to return the same to the complainant…***
>
> ***"The evidence of PW1, 2 and 3 is well corroborated about the events and what was stolen. The evidence is very credible. The complainant (PW1), PW2 and PW3 and the [appellant] mentioned...money which was due and payable to the [appellant].***
>
> ***"The [appellant] alleges [having] been framed up, but the evidence before the …Court is water-tight…"***

The learned Magistrate convicted the appellant and sentenced him to fourteen years' imprisonment.

The appellant's grounds of appeal were, firstly, that the sentence was harsh and excessive; secondly, that the trial Court erred in law and fact by relying on the evidence of PW3 (***George Wagana Kimotho)*** which was not supported by any other circumstantial evidence; thirdly, that the Court held that he had robbed the complainant of certain effects, and also that the appellant had returned those very effects to the complainant.

Learned State counsel, ***Mrs. Kagiri*** entered upon her submissions by remarking a technical defect in the trial Court proceedings: the language used by witnesses had not been recorded throughout. Counsel urged that this contravened s.77(1)(b) of the Constitution, and s.198 of the Criminal Procedure Code (Cap.75). This defect, learned counsel noted, had been held to be fatal by the Court of Appeal, in several instances. She asked that the trial Court proceedings be declared defective and a nullity.

The State would, moreover, not ask for a retrial; because the evidence set out on record did not support a charge of robbery.

Counsel urged that the concept in s.296 of the Penal Code (which relates to robbery) was founded on the definition of ***stealing,*** as set out in s.268 of the same Code:

> ***"268.(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.***

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say –

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) an intent to use the thing as a pledge or security…"

Learned counsel submitted:

> "[A charge under] s.296(1) of the Penal Code gets its basis in s.268 of that Code – especially in relation to whether the appellant had the intention to steal from the complainant. There was no proof of the intention to permanently deprive the complainant of the property in question."

The appellant had only demanded, even by the complainant's own admission, moneys belonging to the appellant; and this gives the definite impression that an ***indebtedness*** had existed between the complainant and the appellant; and so, in the words of learned counsel, "the appellant could not be said to have had no claim of right in relation to the property the subject of the charge." Besides, the appellant, through PW3, returned all the property he had taken

from the complainant. Such conduct, ***Mrs. Kagiri*** submitted, was not

consistent with the offence of ***stealing.***

Learned counsel also noted that while the trial Court had relied on the evidence of a ten-year old boy (PW2), the record does not show that the taking of such evidence had been preceded and validated by the process of *voire dire*, conducted by the Court to show that the witness understood the nature of an oath, or appreciated the importance of speaking the truth. In this regard, counsel noted – and correctly, in my view – the trial Court had overlooked the essential precautions that must be taken, before receiving evidence from a child of tender years.

Mrs. Kagiri noted that certain gaps marked the prosecution evidence, and it would not be right, in procedural law, to create a fresh opportunity, by retrial, for the prosecution to go and fill those gaps; and indeed, giving the prosecution such *locus poenitentiae* would contravene the appellant's constitutional rights as enshrined in s.77 of the Constitution, which guarantees an accused person a fair trial.

Learned counsel noted that the appellant had been in custody since 2004, and he has already served three years in confinement for an offence which it isn't certain he committed.

The procedural shortcomings of the trial are remarkable, in my view; they certainly would have the effect of nullifying the trial-Court proceedings; and with those defects, there was no basis upon which the trial could validly progress upto the stage of conviction and sentence.

Moreover, it is not clear to me from the evidence, that what had taken place between the appellant and the complainant, even if scuffle it was, did amount to ***robbery*** in the terms of s.296 of the Penal Code which, as already noted, rests in its design on the definition of ***theft*** in s.268 of the Penal Code (Cap. 63). There isn't any clear evidence that at the meeting place between the complainant and the appellant, any violence at all was shown; and still less evidence that the appellant robbed the complainant of his property. The appellant returned all the effects of the complainant; therefore he had not been a robber.

I hold that the trial Court, in convicting the appellant of robbery, misdirected itself, and the sentence then awarded after conviction was utterly extreme – in the light of the feeble evidentiary foundations that led to such a verdict. Accordingly I hereby quash the entire proceedings for fatal defectiveness, acquit the appellant, and order that he shall forthwith be set at liberty, unless lawfully held in a different cause.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 28th day of May, 2007.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mrs. Kagiri

Appellant in person