REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NYERI

Criminal Appeal 122 of 2006

ATANASIO MWENDA ……..…… APPELLANT

AND

REPUBLIC …… RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Meru (Lenaola & Sitati, JJ) dated 26th January, 2006

In

H.C. CR. A. No. 38 of 2003)

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JUDGMENT OF THE COURT

The appellant, ATANASIO MWENDA, was convicted in the court of the Senior Resident Magistrate at Meru of robbery with violence contrary to *section 296 (2)* of the Penal Code and sentenced to suffer death as by law provided. His first appeal to the High Court of Kenya at Meru (Lenaola and Sitati, JJ) was dismissed on 26th January, 2006 and hence this second and final appeal.

The facts leading to the appellant's conviction can be briefly stated. The complainant John Mwiti (PW1) was on 1st June, 2002, at about 11.00 a.m. walking from Meru town towards the local hospital when he was accosted by two people who were walking from the opposite direction. Soon after they greeted him one of them without uttering a word stabbed him (PW1) on the face and also hit him with a plank of timber. He alleged that he also lost Kshs.700/- to a man who was not in court. He identified one of the two assailants as the appellant whom he used to see in town.

PW1 screamed and attracted the attention of the public who arrested the appellant as he tried to run away.

PW1 was examined by Wilson Nyamu (PW5), a Clinical Officer, and found to have a cut wound on the frontal head, tenderness on the left thoracic region and bruises on the knee. The injuries were classified as harm.

The appellant in his defence claimed that on the material day he went to PW1 to buy a thread to repair shoes but instead PW1 shouted and claimed that the appellant had stolen his money. PW1 and his friends followed the appellant to his house where PW1 insisted that he be paid the money that had been stolen.

When the appellant failed to produce the money the police were called.

After a short trial the Magistrate found that the offence of robbery with violence had been proved against the appellant. He held that the appellant had admitted an encounter between himself and PW1 and that as the offence was committed in daytime there was no mistaken identity of the appellant as the assailant. The first appellate court confirmed the conviction and dismissed the appellant's appeal.

The appellant has rehashed the same grounds of appeal as he had canvassed before the first appellate court. These were in the main that:-

1. The evidence adduced by all the prosecution witnesses was inadequate, insufficient and unsatisfactory to sustain a conviction.

2. The learned trial Magistrate erred in law and facts in failing to find that the prosecution case was not proved beyond any reasonable doubt because the prosecution failed to call any independent witness.

3. The learned trial Magistrate erred in law and facts when he failed to consider that the charge was defective. The report indicated in the OB was assault and not robbery with violence.

4. The learned trial Magistrate erred in law and facts when he failed to direct his judicial mind to the standing order of the law as provided in Section 9 of the Judges' Rules where the law state (sic) that no magistrate should form his own opinion rather (sic) the evidence adduced before the court.

5. The learned trial Magistrate failed to give the appellant a chance to call any defence witness.

6. The learned trial Magistrate erred in law in dismissing the appellant's defence without giving the appellant any cogent reason to do so.

Though the first appellate court was quite aware of the directions stated in Okeno v. R [1972] EA 32 and the subsequent decisions of this Court based on the said authority, it did not make its own evaluation of the evidence. It is apparent that it merely scrutinized the evidence to see if there was some evidence to support the trial court's findings and conclusions. This was obviously a misdirection and had in the circumstances occasioned the appellant a failure of justice.

On our own evaluation of the entire evidence on record we find that the facts which were presented before the trial court did not support the offence upon which the appellant was convicted. There is doubt as to the propriety of the appellant's conviction on the charge of robbery with violence contrary to *section 296 (2)* of the Penal Code.

We think that, in all the circumstances of the case, the appellant should have been convicted of assault causing actual bodily harm contrary to *section 251* of the Penal Code which is clearly both minor and cognate offence to robbery. We so find.

In the result, we allow this appeal, quash the conviction for robbery with violence contrary to *section 296 (2)* of the Penal Code and set aside the sentence of death.

We substitute therefor a conviction under *section 251* of the Penal Code and sentence the appellant to five (5) years imprisonment from 3rd January, 2003, the date of conviction before the trial court. These are our orders.

Dated and delivered at Nyeri this 18th day of May, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.