REPUBLIC OF KENYA

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

Criminal Appeal 63 of 2005

REMCHUS ACHYENZA MUHANDA……..……APPELLANT

VERSUS

REPUBLIC……....….RESPONDENT

(From original conviction and sentence in CriminalCase No. 6242 of 2003 of the Chief Magistrate's Court at Kibera – Ms. Muchira SRM)

JUDGMENT

REMCHUS ACHYENZA MUHANDA was charged before the subordinate court with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that –

On the 16th day of August 2003 at Kangemi Embassy in Nairobi within the Nairobi area being armed with an offensive weapon namely iron bar robbed SAMMY MURAYA of his cash Kshs.15,000/= and at or immediately before or immediately after the time of such robbery used actual violence on the said SAMMY MURAYA.

After a full trial he was convicted and sentenced to suffer death as prescribed by the law. Being aggrieved by the decision of the learned trial magistrate he filed this appeal.

His grounds of appeal can be summarized as follows –

1. That the learned trial magistrate erred in convicting him on the evidence of recognition.

2. That the offence was not proved beyond reasonable doubt, as no proper investigations were conducted.

3. That the learned trial magistrate did not consider that there was an existing grudge.

The appellant also filed written submissions.

Learned State Counsel, Mrs. Kagiri, opposed the appeal and supported both the conviction and sentence. Counsel also submitted that the case against the appellant was based on evidence of recognition. The complainant PW1 knew the appellant before. She submitted that there was electricity light at the scene and PW1 clearly saw and recognized the appellant. Counsel contended that the evidence of PW1 was corroborated by the evidence of PW4 who witnessed the incident and even described the distance of the source of the electric light from the scene of attack. She contended that it

was not true that the evidence of prosecution witnesses was inconsistent and had contradictions. It was also counsel's submission that PW5 Dr. Kamau confirmed the injuries suffered, and classified them as harm. Therefore, the offence had been proved to the required standards.

In a short reply, the appellant submitted that the complainant did not recognize him. He contended that PW4 was a relative of the complainant, and therefore had to support the story of the complainant.

The facts of the case of the prosecution case are as follows. On 16.8.2003 at 7.30 p.m. the complainant SAMMY MURAYA (PW1) was walking from his place of work in Kangemi. He had Kshs.15,000/= in his pocket from sale of cakes, which he was taking to his employer. On the way, he met someone with an iron bar who hit him and he fell down and lost consciousness. When he came back to his senses he found that the Kshs.15,000/= was missing. PW4 MARY WANJIRU KIMANI (a 20 year old girl) testified that she was going to the shop when she found the complainant lying on the ground. She saw the appellant sitting on PW1. There was security light. The appellant was holding a metal bar. The complainant was injured. He and his employer GEORGE MWANGI (PW2) went and reported to Kabete police station. The appellant was arrested the same night at 11.30 a.m. by PW3 PC SAMUEL MAINA and other police officers. The complainant was examined on 19.8.2003 by PW5 DR. Z. KAMAU. The doctor classified the injuries as "*harm*" and produced the P3 form on the injuries suffered as an exhibit. The appellant was charged with the offence.

In his defence the appellant gave an unsworn statement. It was his defence that on the material day he came back home at Kangemi at 6.00 p.m. As he was entering the plot, he met his girlfriend MARY WANJIKU who called him. As they walked together 4 men approached, and one called Mary Wanjiku and asked her whom she was walking with, and also asked the appellant to introduce himself and say why he was speaking with Mary Wanjiku. Then those people attacked him, but when they let him go he ran away to his house to cool down. As he was preparing to go and report to the police station, he heard a knock at 9.00 p.m. and opened. He was arrested and kept in custody. He was, after some 4 days, charged with the offence of robbery with violence. He denied committing the offence.

We have evaluated the evidence as is required of us in a first appeal – see **OKENO – vs – REPUBLIC [1972] EA 32.**

This is a case based on visual identification. In **RORIA – vs – REPUBLIC 1967 EA 583**, at page 584, Sir Clement De Lestang V.P. stated –

"**A conviction resting entirely on identity invariably causes a degree of uneasiness and as Lord Gardner, L.C. said recently in the House of Lords in the course of a United Kingdom which is designed to widen the power of the court to interfere with verdicts: There may be a case in which identity is in question and if innocent people are convicted today I should think that in nine out of ten – if there are as many as ten – it is in a question of identify".**

In the more recent case of **ODHIAMBO – vs – REPUBLIC [2002] 1 KLR 241** Chung CJ, Lakha and Ole Keiwua JJA held –

"**1. Courts should receive evidence on identification with great circumspection particularly where circumstances are difficult and do not favour accurate identification".**

Both the complainant PW1, and PW4 gave evidence that they knew the appellant before. It was their evidence that they used to see him in that area. It was also their evidence that there was security light at the scene. They claim that he was armed with a metal bar, which according to the complainant he used to hit him. The accused himself does not deny being at the scene. His defence was that he was attacked by four people when he was talking to his girlfriend PW4. We observed that the alleged stolen money Kshs.15,000/= was not recovered. The weapon described as an iron bar was not recovered. The arresting officer PC SAMUEL MAINA (PW3) testified that they searched the appellant's house but neither found the money nor the iron bar.

In considering the evidence for both the prosecution and the defence, the learned trial magistrate at page J3 of the judgment stated –

"**I believe with PW2 that truly PW1 had the money in his pockets. It makes sense he was delivering the same to his boss after closing the bakery. The accused in defence and while cross examining PW4 tried to indicate that she was his girlfriend. PW4 20 years did not in demeanor strike the court to have been lying when she said no such relationship existed. Accused further said he was beaten when attacked by four people for talking with PW4. He had no evidence of the injuries. On the contrary PW1 had glaring scarring from what he said his injuries implicated (sic) by accused with a metal bar. I find the prosecution case more credible, consistent and corroborated".**

We are in agreement with the findings of the learned trial magistrate that the appellant was at the scene where the complainant (PW1) was injured. However, we are not certain whether there was a robbery. We say so because the investigating officer did not give any detailed explanation of what efforts he made in trying to recover the amount of Kshs.15,000/=. Merely saying that they searched in the house generally, in our view, was not enough. Additionally the complainant himself was not conscious when he lost the money. PW4 did not testify that she saw the appellant put his hands into the complainant's pockets. It is possible that the complainant did not have the money. Even if the complainant had the money, it is possible that the money was taken by someone else. In our view, the offence of robbery with violence was not established

We are however, satisfied from the evidence on record, that the appellant assaulted the complainant causing him actual bodily harm. We say so because the complainant stated in evidence that he knew the appellant before. The appellant attacked him with a metal bar. He also testified that there was security light nearby. This evidence was corroborated by the evidence of PW4 who stated that she came to the scene and recognized the appellant through the security light sitting on the complainant. The appellant himself stated in evidence that he had a scuffle with some people. He also stated that PW4 was present during the scuffle the totality of the evidence puts the appellant at the scene of the incident and also establishes that, indeed, he assaulted the appellant causing him the injury, which the doctor PW5 classified as harm. In our view, that amounts to the commission of the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. That disposes of ground 1 and 2 of appeal.

The appellant complains that the learned trial magistrate did not consider that there was a grudge. In our view the allegation of a grudge by the appellant is not sustainable. The evidence on record does not show any reason for the existence of a grudge. Even if there was a grudge, that would not be a reason for the appellant to assault the complainant.

Consequently, we quash the conviction and sentence of the learned magistrate for the offence of robbery with violence. We substitute therefore a conviction for assault causing actual bodily harm contrary to section 251 of the Penal Code. The appellant being a first offender, and having been sentenced in February 2005, we order that the sentence be the term already served.

It is so ordered.

Dated at Nairobi this 7th June 2007.

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LESIIT

JUDGE

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DULU

JUDGE

Read, Delivered and Signed in the presence of –

Appellant

Mrs. Kagiri for State

Tabitha/Eric – Court Clerks

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LESIIT

JUDGE

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DULU

JUDGE