REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Criminal Appeal 48 of 2007

ALFRED MUCHIRA……APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

(Being appeals against the conviction and sentence of L.W. Gitari Senior Principal Magistrate, in the Resident Magistrate's court Criminal Case No. 431 of 2005 at Runyenjes.)

JUDGMENT

The appellant was charged tried and convicted of the offence of robbery with violence contrary to Section 296(2). He was sentenced to death hence this appeal.

The prosecution evidence is that the complainant his friends Gitonga and Njeru were drinking at a bar called Kirere Bar & Restaurant in Runyenjes Division. They were founding the bar by the appellant who owned a motorbike and was using the services of complainant to service and repair the same. The appellant wanted a list of spares to be purchased to facilitate repair. The appellant exchanged words regarding these repairs and the complainant gave another list of things required. Later the appellant and complainant deicided to walk to their respective houses with the appellant pushing his motor bike. They reached a forested area. There is evidence that it was a rainy evening. At the forested area the complainant states that the appellant asked the complainant to hold the bike while the appellant attended a call of nature nearby. The complainant was alone holding on the bike when the appellant approached him and hit him with a heavy object. The complainant said he fell down he must have become unconscious as he was not able to tell how his jacket came off his body and who removed the money he had put in pocket of the jacket. However he managed to recover and to return to the Karerei Bar where he found his friends Gitonga and Njeru still resting. He narrated how the appellant had hit him by the roadside and had left him. Later his friends decided to escort him to home from the bar and got some person with a vehicle who transported complainant. On the way they found the complainant's jacket and took it up. It was when complainant was told to check his pocket that he discovered he had lost shs.3050/= he had put in the jacket pocket earlier.

It is not disputed that this incident took place at night. It is not disputed that complainant was well known to the Appellant. Of the 3050/= stolen there we have only the word of complainant. But Shs.1000/= which P3 said he had given the complaint is confirmed. Only complainant knows if he had the balance. No doubt there was evidence of PW4 Dr. Stephen Maina who examined the complainant and completed P3 form which was an exhibit.

PW7 was the officer who received the report on 8/12/2005 from the complainant. He is the one who

investigated the case. He recorded the evidence of the witnesses. He was looking for Appellant to arrest him. Appellant had a home in Kianjokoma. It was on 6/2/2005 that he was informed that the appellant had been seen at his home. The Appellant was arrested but left in the police car he escaped. He was later arrested on 8/2/2005. The PW7 investigation officer said he charged present offence because there was robbery and use of violence.

On perusing the record it appears the decision turns on which of the two side of story to be believed against that of the appellant and complainant.

The appellant gave sworn evidence he said that on 4/12/2004 he got an order to make some furniture. On 7/12/2004 he was in his factory in Kianjokoma and he stayed there until 10th when the work was finished. He closed the factory and went home at Gitare. On 8/2/2005 he went to police station. He said on 11/12/2004 he had been attacked by people known to him. He produced a hospital card as D Exhibit 1 dated 11/12/2004. He also said he met an officer called Ayuka who arrested him and put him in cells. This confirms that the appellant was arrested on 8/2/2005 and his finger prints were taken on 9/2/2005 and on 11/2/2005 he was charged with this offence which he denied. However he made allegation that there was a grudge between him and the complainant because in another case he gave evidence against complainant (stock theft) and he was jailed for 7 years in 1996. The fact that complainant was jailed for 7 years was admitted by the complainant when he was cross-examined by the appellant. On cross-examination the appellant denied having met Phares Gitonga and Michael Njeru, PW2 and PW3, on 7/12/2004. He said on that day he was at place of work. He said he does not own a motorbike. Appellant called witness to prove that he was elsewhere on 7/12/2004. DW2 gave sworn evidence which was a repeat of Appellants evidence and added he was in remand charged with robbery with offence violence. He met Appellant in remand prison on 23/3/2005. He disclosed that the distance from workshop to the bar is about half kilometer. He concluded by saying he has never seen the motor bike. In addition appellant called DW3. This witness alleged that there was a grudge between him and complainant because he gave evidence in the stock theft case. The appellant also alleged that police officer demanded bribe from him.

We have examined the evidence of appellant and his witnesses. The allegations of grudge existing between them and the complainant can not be true. The issue of stock theft case occurred in 1996. The parties reside in the same area and they were unable to produce any records of cases they allege to have been commenced by the complainant. They just made empty allegations. Furthermore they seem to be jail birds they are frequently in remand prison from what they say. The defence allegation that he was elsewhere on the material time is false it appears that his workshop is only half a kilometer away from the bar. He could easily have found time to get in and out of his workshop from time to time just as the complainant and his witnesses said the appellant kept on going in and out of the bar to speak with him about repairs to his motorbike.

We find that the Appellants evidence was organized while he was in remand and it is unbelievable. On the part of the complainant his evidence and that of his witnesses is firm and consistent. PW3 is a Veterinary Officer a professional man and there is no reason to doubt what he said.

On the issue of the attack of complainant by the appellant there is only evidence of the complainant whereas the court must be cautioned in convicting on a single witness. We find in this case the circumstances that the Appellant was walking with the complainant, who had no reason to imagine he would attack him being his friend and customer and there being no other person at the scene and also the disappearance of Appellant who could have helped his friend if he was not the doer of the act. All these are circumstances that point to the conclusion that it was appellant who attacked and robbed the complainant. The ingredients of the offence of robbery with violence are clearly stated under Section 296 (2) in this case the offender hit the complainant with a metal bar (heavy instrument) which blow made the complainant unconscious. The requirements of Section 296 (2) were complied with. As a first appellate court we are entitled to evaluate all evidence and reach our conclusion.

We have carefully considered the appellants grounds of appeal and have to comment that ground No. 1 it is for the prosecution to decide what offence to be charged according to report made by complaint. The

investigation officer said that he decided to prefer the charge because there was violence and robbery.

On ground 2 the complainant become unconscious upon receiving the blow from a heavy instrument he was not able to know what was going on. However the circumstances show that it was appellant who hit him and robbed him. He later discovered that the money was taken.

On ground 3, 4, 5 we find no merits. There was no evidence that there were other persons other than Appellants. There were no material contradictions to create doubt in prosecution evidence.

On ground 7 and 8 the issue of DNA and blood test does not arise the offence requires only that violence is applied to any person and in this case there was evidence of violence.

On ground 9 the evidence of arrest was clearly proved. The appellant said he went to police station to present his exhibit DE 1 and then he was arrested and placed on cells. That is the date of arrest recorded in the charge sheet.

Ground 10 was considered and rejected.

Ground 11 it is clear the Appellant decided on the defence while he was in remand where he was joined by his witness DW2. He carefully organized the statement to avoid the date 7/12/2004 on which the incident occurred. The evidence from his own witness that his workshop was ½ kilometer away from the bar supports prosecution case The evidence of appellant is not true.

We have made a finding that the prosecution did prove the offence beyond reasonable doubt. In addition we have considered the written submissions file by the Appellant and we reach the same conclusion.

We find in this case the Trial Magistrate based her decision on sound evidence and we have reached conclusion that the prosecution evidence proved the case beyond reasonable doubt. The upshot is that the appeal is dismissed.

Dated this 21st day of Nov 2007

J.N. KHAMINWA

JUDGE

MARY KASANGO

JUDGE