REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Criminal Appeal 5 of 2006

JACKSON MURIUKI ROBERT …….....…….
APPELLANT

AND

THE REPUBLIC …….....……..
RESPONDENT

(Being an appeal from original conviction and sentence in Criminal Case No. 1138

of 2005 of the Senior Resident Magistrate's court at Chuka, dated 11.8.2005)

JUDGMENT OF THE COURT

The appellant, JACKSON MURIUKI ROBERT faced one count of robbery contrary to section 296(1) of the Penal Code in criminal case No. 1138 of 2005. The particulars of the offence are that:-

"***On the 11th day of August 2005 at Chuka Law Courts, Chuka Township in Meru South District of the Eastern Province, robbed ABDIKADIR ABDI HASH of Kshs. 7,000/= and immediately before or immediately after such robbery threatened to beat him."***

The facts of this case are that the appellant and the complainant were both suspects awaiting trial of their respective cases at the Chuka Law Courts cells. The complainant was facing a traffic offence. He had on him Kshs. 7,000/= and a Nokia mobile phone. As the complainant arranged his money, the appellant grabbed it. A struggle between the appellant and the complainant ensued. The complainant was attacked by other suspects in the cells. The complainant made a report to the police officers on duty. A search on the suspects led to the discovery of the complainant's money hidden in the appellant's anus. Even the mobile phone was recovered but it is not clear from whom the recovery was made. The complainant identified his money and the phone. The appellant was then arrested and charged. He was tried on the same day, found guilty, convicted and sentenced to serve five (5) years imprisonment.

The appellant appealed against both conviction and sentence. He set out ten (10) grounds of appeal in his Petition of Appeal filed in court on 26.1.2006. At the hearing of the appeal, Mr. B.G. Kariuki advocate for the appellant argued grounds 6, 1 and 3 separately, abandoned ground 2, argued grounds 4 and 5 together then finally grounds 7, 8, 9 and 10 together.

It was contended on behalf of the appellant that there was not enough time for the appellant to prepare for this trial, since the case proceeded immediately after his arrest and judgment was delivered on the same day. It was also contended on behalf of the appellant that the complainant's evidence does not

show whether it was the appellant who actually attacked the complainant after the money had been snatched. It was further contended that the evidence adduced by the prosecution in support of the charge against the appellant lacked quality, and that apart from the allegation that the complainant's Kshs. 7,000/= was recovered from the body of the appellant after a search, there was no evidence to show that the complainant's Nokia phone was also recovered on the appellant. That because the complainant is said to have been attacked by a mob, it was not clear that it was the appellant who attacked the complainant.

Finally, Mr. Kariuki submitted that the trial court completely ignored the appellant's defence in which he denied committing the offence.

The learned state counsel, Mr. Muteti conceded to the appeal on the ground that though the appellant had indicated that he would give sworn evidence and call witnesses, the record does not show what happened to the appellant's intention when the hearing resumed at 2.00pm. He also conceded to the appeal on the ground that the appellant was not given an opportunity to close his case. Indeed page 4 of the typed proceedings does not show that the appellant ever closed his case before the trial court. It was also the view of the learned state counsel that the case was conducted with so much haste that not even a proper investigation into the complainant's complaint was made. Mr. Muteti did not ask for a retrial on the ground that the exhibits in the case were released to the complainant.

The duty of this court is to reconsider and re-evaluate the evidence on record with a view to reaching its own conclusion as to the guilt or otherwise of the appellant, regardless of the findings of the learned trial magistrate and regardless of the fact that the respondent's counsel concedes the appeal.

At this stage, it is necessary to set out briefly the evidence. The complainant, PWI was ABDIKADIR ABDI HASH. His evidence is what has been given as the facts of this case. He said that after the appellant snatched the money, he was attacked by other cellmates, although he was certain that it was the appellant who snatched the money from him.

PW2 was JOHN MARK NTABO, a clerk at the Chuka Law Courts. He did not witness the commission of the offence but he stated that he witnessed some money being recovered from the appellant's anus. He denied a suggestion by the appellant that the money had been planted onto him.

PW3 was PC JOSEPH KIPSANG. He conducted a search on the suspects in the cells and recovered Kshs. 7,000/= from the appellant's anus. He produced the money as P exhibit 1.

PW5 PC JAMLICK GITHINJI also testified that he participated in searching the suspects after PWI raised the alarm. He confirmed that the money was recovered from the appellant's anus.

At the close of the prosecution case, the appellant was put on his defence. He informed the court that he would give sworn evidence and call two witnesses. The case was stood over for further hearing at 2.00pm on the same day.

When the court resumed at 2.00pm, the appellant gave unsworn evidence. The record does not show whether or not the appellant had given up his earlier intention to give sworn evidence and to call witnesses.

After carefully re-considering the evidence on record, I do concur with learned counsels that the appellant's trial in the lower court was not properly conducted. Let it not be implied that I have anything against the learned trial magistrate for speedily disposing of the appellant's case. The major fault lies with the trial court's inability to give the appellant an opportunity to call his witnesses as earlier indicated. Nor did the trial court indicate that the appellant had abandoned his intention of giving sworn evidence. On these technical grounds, I would allow the appeal. If it were not for these, I would have no reason to interfere with the finding of the learned trial magistrate in view of the overwhelming evidence that the money in question was recovered from the body of the appellant. The appellant denied that the money was found on him, but I do not accept that what he told the court was true.

Another point that was raised by neither the appellant's nor the respondent's counsel has to do with the recording of the coram when the case resumed at 2.00pm. The court simply recorded:-

"***Coram as before;***

Accused present."

It is now trite law that the coram must be fully recorded when a hearing resumes at a later date/time lest in simply saying "Coram as before", the provisions of section 85(1) of the Criminal procedure Code are flouted. This court cannot assume that it was Inspector Kunga who conducted the prosecution when the case resumed at 2.00pm. For that reason too, this appeal succeeds.

As to whether or not an order for retrial is appropriate in this case, I think that such an order would not serve a useful purpose basically because the Kshs. 7,000/= which was the exhibit in this case was released to the complainant on the same day the appellant was convicted.

In the result, this appeal is allowed. The conviction is quashed and the sentence of five (5) years imprisonment imposed upon the appellant is set aside. Unless otherwise lawfully held, the appellant is to be released from prison custody forthwith.

Orders accordingly.

Dated and delivered at Meru this 26th day of July, 2006.

RUTH N. SITATI

J U D G E