



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 11 of 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 3443 of 2003 of the Chief Magistrate's Court at Thika (Alex Anambo – PM))

ELIJAH MWANGI KAME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

ELIJAH MWANGI KAME was convicted for the offence of the **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. It is alleged that on 17th May 2003 at Nguthuru village in Maragwa District jointly with others, robbed the Complainant of Kshs.100/- and used actual violence on her. The Appellant was sentenced to death as mandatorily prescribed in the law. It is against the conviction and sentence that he now appeals to this court.

The Appellant was represented by **Mr. Mwendwa** Advocate, while **Miss Gateru**, learned State Counsel appeared for the Respondent and opposed the appeal.

There are four grounds of appeal cited in the filed petition in which the Appellant challenges his conviction on grounds that the evidence of visual identification by recognition given by the Complainant and PW2 should not have been believed having been made by the same family members; secondly, nothing was recovered from the Appellant that could have connected him to the offence; thirdly the Appellant's defence was not considered and lastly that that the learned trial magistrate shifted the burden of proof.

The facts of the prosecution case are that the Complainant who is the grandmother of the Appellant was going to the Posho mill with 2kg of maize and 100 shillings when the Appellant and his brother ordered her to stop. She said that she stopped and then she was cut with a 'panga' on her left shoulder before the Appellant kicked her causing her to fall. The Complainant said that the maize she was carrying together with the Kshs.100/- fell down. She said that her brother, PW2 went to her rescue and took her to hospital. The Complainant said that she did not know where the money went.

In the Appellant's defence, he denied any involvement in the attack.

Mr. Mwendwa submitted that the evidence of PW1 lacked corroboration on the issue of the Complainant having Kshs.100/-. Counsel also submitted that the evidence adduced did not prove that a

theft of money was committed. **Miss Gateru** urged the court to find that the Complainant's evidence was that her money fell down after she was hit by the Appellant and that she did not see it again. The issue of "taking" is very crucial in any charge of stealing or robbery.

The prosecution must prove that there was 'taking' of the thing stolen, by the accused person. In the case before the court, the Complainant's evidence was clear that the Appellant hit the Complainant who fell down together with her maize and money. The Complainant did not see the Appellant or his accomplice take the money. PW2, who said he witnessed the Appellant and his accomplice hit the Complainant said that he saw them run away immediately after accomplishing that mission. PW2 said that he immediately went where the Complainant, who is his sister, had fallen down helped her to stand up and then took her to hospital.

Since neither the Complainant nor PW2 saw the money being taken by either the Appellant or his accomplice that important ingredient of the charge was not proved.

On the submission by **Mr. Mwendwa** that the Complainant's evidence that she had Kshs.100/- needed corroboration, it has no relevance to the case in view of our finding in regard to issue of the lack of evidence of theft. However, I must mention that in law there is no requirement that the evidence of fact needs corroboration before it can be believed.

Mr. Mwendwa submitted further that the Complainant's evidence that she was injured by the Appellant was not proved. Counsel observed that there was no medical evidence adduced or P3 form produced to support the evidence that any injury or harm was suffered by the Complainant in this incident. **Miss Gateru** on the other hand submitted that there was contradiction as to the nature of the injury suffered by the Complainant in the attack. That while the Complainant said she was injured on her shoulder, PW2 said that the injury was on the hand. Further that while the Complainant said PW2 took her to hospital immediately, PW2 said he took her home.

The evidence of the injury suffered by the Complainant was inconsistent. While the Complainant specifically said she suffered an injury on her left shoulder, PW2, who saw the Appellant hit the Complainant said she was cut on the hand. It is difficult to tell whether or not the injury was attended to by a doctor in light of the inconsistency in the prosecution case on that issue. The inconsistency in the prosecution case is irreconcilable. The trial court failed to resolve these inconsistencies in its judgment, a matter it was best placed to do having heard the case. Unfortunately the learned trial magistrate failed to note any inconsistency in the evidence adduced by the prosecution in this case.

This case has caused us a degree of anxiety and uneasiness. The Complainant is the grandmother of the Appellant. There is no evidence that any grudge existed between the Complainant, the Appellant or any of the family members. There was no evidence adduced that could assist in determining the motive for the attack. We are also disturbed by the scanty manner in which the evidence was recorded. There were many questions left unanswered and this was disturbing. Why for instance, would a grandchild suddenly attack his own grandmother without any provocation or motive? Why also did the grandmother take such a drastic action of causing her grandson's arrest? Why not deal with the matter in a different way for example through counseling and disciplining at home? All these questions were very disturbing to us. We find in addition that there was a deliberate exaggeration of the facts of this case. The Complainant's evidence clearly shows that she was clear in her mind that neither the Appellant nor his accomplice stole any money from her. The Complainant was therefore clear that there was no motive to rob her in this attack. The court should have treated the evidence with circumspection and had it done so we are convinced that it would not have put the Appellant to his defence.

We find that no theft or 'taking' was proved against the Appellant in this case nor was there any evidence that the Complainant was assaulted or even injured. We find that the evidence adduced in this case fell far short of proving the charge preferred against the Appellant. The conviction was clearly unsafe. We quash the conviction, set aside the sentence and order for the immediate release of the Appellant unless he is otherwise lawfully withheld.

Dated at Nairobi this 28th day of November 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mr. Mwendwa for the Appellant

Miss Gateru for the Respondent

CC: Wambui

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE