REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 510 OF 2002

(From original conviction(s) and Sentence(s) in Criminal case No. 1872 of 2001 of the Chief Magistrate's Court at Nairobi (Injene Indeche (Ms) – S.P.M.)

ABDIRASHIM SORA……..…..APPELLANT

VERSUS

REPUBLIC……..…....RESPONDENT

J U D G M E N T

The Appellant **ABDIRASHID SORA** was faced with two offences. In the first count, he faced the charge of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2) of the Penal Code**. It is alleged that on 16th July 2001 at Eastleigh area, within Nairobi with another not in Court and while armed with a dangerous weapon namely a toy pistol, robbed the Complainant of Ksh.2,800/- and used personal violence on him. In the second count it is alleged that he was **UNLAWFULLY IN POSSESSION OF A FIREARM** contrary to **Section 34(3) of Firearms Act.** That on the same day he was unlawfully found in possession of an imitation of a firearm to wit a toy pistol. The Appellant was convicted in the first count and sentenced to death. He now appeals against the said conviction and by implication the sentence.

This appeal was conceded**. MISS NYAMOSI** learned counsel for the Respondent submitted that after perusing the evidence adduced before the trial court, she was not clear what offence the Appellant is alleged to have committed. She submitted that according to PW2, he arrested the Appellant and charged him for being in possession of chang'aa. He was even taken to Court where he pleaded guilty to the charge and was fined Kshs.200/-. On the other hand PW1 claimed that he arrested the Appellant the same day but charged him with the offence of capital robbery. That, on the other hand the evidence of PW3 and PW4 was that the Appellant refused to pay fare while traveling in their vehicle and that they pushed him out.

The Appellant relied on his written submission. In his grounds of Appeal, the Appellant challenged the conviction on the grounds that there lacked tangible evidence to sustain a conviction. He also challenged the learned trial magistrate for failing to give due consideration to his defence.

We have re-evaluated the evidence adduced before the trial court. We are perturbed by the disjointed value of the prosecution case. As was observed by the State counsel the evidence of the two arresting officers, PW1 and PW2 was totally contradictory. While PW1 said he rearrested the Appellant on 16th July 2001 from members of public. That he was also given a toy pistol identified as Exhibit 1 and informed that the Appellant had stolen Kshs.2000/- from the Complainant. He was at Pangani Police Station. PW2 on the other hand was on patrol duties on 18th August 2001 when he received certain information. Acting on it he stopped a vehicle in which the Appellant was traveling, he searched the Appellant but recovered nothing. He took him to Pangani Police Station where PW2 claims they confirmed he had been charged wrongly with being in possession of Chang'aa. The evidence of PW1 and PW2 was totally unrelated. The offences for which the two Police Officers arrested the Appellant were also different. The two Police Officers did not seem to have any relationship with PW4 the Complainant in the case and PW3 his witness.

We also considered the evidence of PW4 whereas he claims that he was a Public Service Vehicle conductor on duty in vehicle driven by PW3 and whereas he claims he quarreled with the Appellant when

he declined to pay for fare, PW4 does not come out clearly why they arrested the Appellant. PW4 said that he was robbed of Kshs.2,800/- as an afterthought but does not say who stole from him. He also said he pushed out the Appellant and that he fell down to the ground. He does not explain at what stage the Appellant was put back into the vehicle and taken to the Police.

PW3 was the driver of the vehicle. His evidence seems to be more detailed and clearer. It was his evidence that after PW4 quarreled with the Appellant and his colleague, there was a struggle which prompted him to alight from the vehicle to assist him. It appears that many people went to PW4's assistance. They were able to apprehend the Appellant. He had a toy pistol which they retrieved and took to the police together with the Appellant. It was later that PW4 said he lost Kshs.2,800/-.

We have re-evaluated this evidence. We find that PW3 and PW4 took the Complainant to PW1 at Pangani Police Station. There seems to have been a mix-up which led to the Appellant being charged with the offence of **BEING IN POSSESSION OF CHANG'AA**. After his release in court, PW2 re-arrested him on certain information and took him to Pangani Police Station instead of Kasarani Police station where he, PW2 was based. That is when he was charged with this offence. The basis of the action by PW2 was not properly explained. PW2 did not come out clearly why he arrested the Appellant on 18th August 2001 for an offence committed one month before, yet no one had complained to him. That issue remained a mystery even to this Court.

Turning to the charge appealed against, we find no evidence upon which the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** could be sustained. PW3's evidence comes out quite clearly that the Appellant was arrested, first for causing a breach of peace inside their 'matatu' on apprehending him, they discovered he had a toy pistol. PW4 who lost the money and who is the Complainant in this case did not implicate the Appellant at all with the loss. In fact PW4 is so clear that he quarreled with the Appellant and there was a scuffle. Many people formed the affray including PW3 in that scuffle. PW4 could not tell who stole his money.

We find that the evidence against the Appellant was contentious. In **WILLIAM KANDIE vs. REPUBLIC C.A. No. 21 of 1996, LAKHA, PALL JJA and BOSIRE Ag. JA.** held;

> ***"We hold that in view of the contentious nature of the evidence before her, the learned Judge of the superior court ought to have given the Appellant the benefit of doubt."***

We find that the evidence before the learned trial magistrate was contentious. In light of that, the learned magistrate ought to have given the Appellant the benefit of doubt and acquitted him.

We also find that the evidence adduced by the prosecution was disputed and further that there were various lapses which all created a reasonable doubt on the credibility of the prosecution case. In light of those lapses in the prosecution case, the learned trial magistrate ought to have given the Appellant benefit of doubt.

We have gone further and found that the learned trial magistrate failed to give due consideration to the Appellant's defence. It was his defence that he paid fare when asked but was nevertheless beaten and taken to the Police. That he was charged in court and fined Kshs.200/- which he paid. That defence in our view, should have crated doubt to the prosecution case, had the learned trial magistrate considered it. Failure to consider the Appellant's defence led to a serious miscarriage of justice.

We find that the conviction entered herein cannot be allowed to stand. We find the Appeal has merit and allow it accordingly. The Appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 12th day of May 2005.

LESIIT, J **. O. K. MUTUNGI**

JUDGE **JUDGE**

Read, signed and delivered in the presence of;

LESIIT, J. **O. K. MUTUNGI**

JUDGE **JUDGE**