



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
Criminal Appeal 186 of 2003

(From Original Conviction(s) and Sentence(s) in Criminal case No. 211 of 2002 of the Chief Magistrate's court at Makadara (Mrs. W. A. Juma – P.M.)

BENJAMIN WAMBUA MUNGUTI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

The Appellant **BENJAMIN WAMBUA MUNGUTI** was found guilty and convicted for the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2) of the Penal Code**. He was sentenced to death as mandatorily provided in the law. He was dissatisfied with the conviction and therefore lodged this appeal.

The facts of the prosecution case were that on 30th December 2001 at Mathare in Nairobi, the Complainant in this case, **FLORENCE PW1**, was at her kiosk selling. At 7.00 p.m. the Appellant with three others ran into his kiosk. **FLORENCE** was standing at the entrance to the kiosk. That the Appellant pushed a toy pistol onto her stomach and told her to either give her life or her money. **FLORENCE** said that she picked her cash box in which was Kshs.5,500/- and gave it to the Appellant. As the Appellant and his accomplices left his door, **FLORENCE** started screaming for help. That together with members of public who came, **FLORENCE** chased and apprehended the Appellant five metres from her kiosk. The Appellant was still holding the metal toy. He was arrested and taken to Pangani Police Station where he was charged.

The Appellant has raised grounds of appeal,

1. That the learned trial magistrate erred in law and fact in relying on the evidence of identification by PW1 made under 'hectic' circumstances and on evidence of arrest which left a lot to be desired.
2. That the conviction entered was based on flimsy prosecution case.
3. That the learned trial magistrate shifted the burden of proof to the defence.

In support of the first ground the Appellant submitted that the identification by the Complainant, **FLORENCE** was made under hectic circumstances and should not have been relied upon. In his oral submission he added that if indeed he had been the one who took the cash box from the Complainant, then since the Complainant claimed that she arrested him five metres from her kiosk, the cash box ought to have been recovered from him.

MRS. KAGIRI, learned counsel for the State opposed the Appeal. The Counsel submitted that the

evidence adduced by the prosecution was strong, clear and consistent. The counsel submitted that after the Complainant was robbed, she screamed and PW2 and PW3 went to her rescue. Both chased the Appellant and that PW3 physically apprehended him. That the two witnesses confirmed the Complainant's evidence that the Appellant was still holding the toy pistol used in the robbery.

We have carefully re-evaluated the evidence of the prosecution as we are, as an appellate court mandated to do. On identification the incident took place at 7.00 p.m. The Complainant said that it was not so dark but that her lights in the kiosk were on. The Complainant's evidence was that the Appellant is the one who confronted her first, putting a pistol like object on her stomach and then demanded either her life or money. The learned trial magistrate was satisfied from the witnesses' demeanour that they were telling the truth and that they had no reason to speak falsely against the Appellant.

We see no ground upon which to depart from the learned trial magistrate's finding as to the demeanour of the witnesses. In our view we find that the Complainant had ample opportunity to see and sufficiently identify the Appellant. The Appellant was apprehended at the locus in quo of the incident, 70 metres from the scene of crime according to PW3. The Complainant had said Appellant was arrested 5 metres from the scene of crime. Since the Complainant herself together with PW2 and PW3 said they chased the Appellant, it is unlikely that a chase was possible within 5 metres. The Appellant was still holding the weapon he had used to threaten the Complainant with at the time the offence was committed. The recovery of the toy pistol which was produced as exhibit one, served as corroboration of the Complainant's evidence of identification.

The Appellant challenges the failure of the Complainant, PW2 and PW3 to recover the cash box from him. We do not find that point of any material importance in light of the Complainant's evidence that the Appellant was in company with three others. We find no merit in the appeal on that ground and dismiss it accordingly. The Appellant submitted that the prosecution case was weak and could not sustain a conviction. **MRS. KAGIRI** submitted that the prosecution case was sufficient and therefore safe to sustain a conviction. Counsel submitted that PW5 did not lose sight of the Appellant from the point he saw him running away from the Complainant's shop to the place he apprehended him. On our part we find that the evidence by the prosecution was strong and safe to sustain a conviction. The Appellant was arrested at the scene of crime as he attempted unsuccessfully to escape. We find that the evidence of identification was positive and that the arrest of the Appellant at the scene all confirmed that he was one of those who robbed the Complainant of her money.

The Appellant challenges the learned trial magistrate's for shifting the burden of proof to the defence. While analyzing the evidence adduced before her, the learned trial magistrate observed thus at J3;

“The accused person has come up with a different line of thinking, trying to explain the presence of the pistol in the circumstances. The accused failed to challenge, PW1, PW2 and PW3 on the issue that it was them who had the pistol and thus new defence is an afterthought...”

That observation is what has earned the learned trial magistrate a challenge that she shifted the burden of proof against the Appellant. We do not find any shifting of burden of proof. The learned trial magistrate's observation was made as she analysed the evidence of prosecution case and that of the defence. The observation was the correct one that during the trial, especially in cross-examination, the Appellant did not put any questions to the Complainant, PW2 or PW3 that they planted the toy pistol on him. The learned trial magistrate was perfectly entitled to come to the conclusion she made that the Appellant's defence that the toy pistol was planted on him was in the circumstances of the case an afterthought. We are satisfied that the Appellant's defence was given due consideration as required before it was dismissed.

We wish to raise one final point even though it was not raised by either party to this appeal. The Appellant was charged of capital robbery. The ingredients of the offence was that he was armed with a 'toy pistol' and was in company with three other men. The prosecution did not lead any evidence to prove that the Appellant was armed with a 'toy pistol'. An object was produced and marked exhibit 1. However,

the prosecution needed to call expert evidence to certify the same object a 'toy pistol' as alleged in the charge sheet. The prosecution has however adduced sufficient evidence to prove that the Appellant was in company of three others at the time of the robbery. That ingredient is sufficient to support a charge of **ROBBERY WITH VIOLENCE** contrary to Section 296(2) of the Penal Code. See **OLUOCH vs. REPUBLIC 1985 EA 549**. Having considered this appeal we find that it has no merits and is therefore dismissed.

Dated at Nairobi this 26th day of July 2005.

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LESIT, J.

JUDGE

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M.S.A. MAKHANDIA,

JUDGE