REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 18 OF 2000

BONIFACE MUTINDA MWEMA …… APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 52 OF 2003

CHARLES N. KIMEU ……..APPLICANT

VERSUS

REPUBLIC ……RESPONDENT

J U D G E M E N T

The appellant in appeal file number 18 of 2000 Boniface Mutinda Mwema and appellant in appeal no. 52 of 2003 Charles Ndolo Kimeu were jointly charged in the lower court with the offence of Robbery with violence contrary to section 296(2) of the penal code in that on the 8th day of May, 1999 at about 8.00p.m. at Utangwa Location in Makueni District of the Eastern Province jointly robbed Stephen Mule Muoka of cash Kshs.1,400/= one wrist watch make QUARTS president one cap all valued at Kshs. 2,250.00 and at or immediately before or immediately after the time of such robbery wounded the said Stephen Mule Muoka.

The appellants who were in represented denied the charge. They were tried by the lower found guilty of the lesser charge of robbery c/s 296(1) of the penal code. The findings of the learned trial magistrate are that the evidence on the record does clearly prove that the complainant was accosted by the 2 accused persons and robbed.

2. It has also been proved that the item stolen from the complainant witness were indeed recovered from the two accused persons.

3. At the time of the arrest the two accused persons did not deny having robbed the complainant and went as far as explaining how 400/= which was not recovered which they had used to buy meal maize meal and beer.

4. On identification there was no possibility of mistaken identity as the complainant was able to identify the accused persons from their clothing and this is indeed corroborated by the assistant chief PW 2 when he asserts that he had seen the accused persons earlier in the day dressed as per

description. Though it may be argued that it was night this argument is defeated by the fact that the two accused persons had a torch. PW 2 testified that he did not need to identify the accused persons by their clothing. He had met them earlier on the material day and he also knew them prior to the incident.

5. The complainant says that the accused persons at the time of the attack had placed a knife at his stomach. She however found that the prosecution had not proved this and it cannot be said that the accused persons were armed with a dangerous weapon. This suffices to say that the accused persons did not use aggravated violence against the complainant. Though the ingredients envisaged by section 296(2) of the penal code have not been proved by the evidence adduced it was safe to conclude that the complainant was attacked and robbed.

6. She had considered the evidence as a whole and she was satisfied that the offence of robbery under section 296(1) had been established and that the guilt of the two accused persons for this offence has been proved beyond reasonable doubt. The accused persons were found guilty of robbery c/s 296(1) of the penal code and convicted.

The appellants were aggrieved by that decision Boniface Mutinda Muema put forward 3 grounds of appeal namely that the entire evidence relied upon by the learned trial Magistrate was not sufficiently trust worthy to have established that he the appellant participated into the commission of the offence charged, that the case for the prosecution was not proved beyond reasonable doubt as required in law, the defence was not properly considered.

Charles Ndolo Kimeu put forward 4 grounds of appeal namely that the learned trial magistrate erred and misdirected herself in both law and facts by holding that the evidence adduced during the trial was cogent while it is evident that there was no eye witness account to the incident the trial magistrate refused to entertain the existence of a grudge between his father and the sub chief (PW 2) emanating from a land dispute and thereby erred and misdirected herself relying on the same witnesses testimony, erred and misdirected herself in both law and on fact by holding that the exhibits before court i.e. the wrist watch had been recovered on my person that Kshs.1,000.00 forcibly removed from my pockets by the police arresting him was his property is not in dispute and should be returned to him. There is no evidence by the complainant to prove that the same belonged to him. The Magistrate erred and misdirected herself in both law and fact by failing to recognize the absence of an investigating officer in this case and the fact that in the absence of such an officer was fatal to the prosecution case. On the basis of the foregoing the appellants urged the court to allow the appeal and set them at liberty. The appeals were consolidated and heard together. In his oral submissions to the court the first appellant Boniface Mutinda Muema submitted that the complainant claimed that he was injured but there was no evidence from the Doctor to prove the same that he was injured, he claimed to have identified appellant because of a jacket. It is his contention that it is not possible to identify a person because of a jacket, it is not possible to identify one by torch light 2 kilometers away.

The second appellant submitted that the complainant said he identified him by the clothes he was wearing and yet he was not present when he appellant was arrested, that the complainant claimed that the money appellant had was his and yet he showed no mark or number on it to show that it was not appellants money, he told the court that they had a dispute over the land with the sub chief but he was not listened to.

The state opposed the appeal because 3 witnesses gave evidence which was consistent and it shows that the appellants were involved in the commission of the offence, items were robbed from PW 1 namely money, watch, and cape, PW1 met with PW 2 immediately after the robbery and he gave a description of the robbers whom PW 2 had seen during the day wearing the same clothes described and a search was mounted for the two appellants and they were found drinking in a certain house and when confronted they surrendered and said they bought flour and drink with what they had spent, a watch was found on Ndolo while a cape was found with a younger brother of Charles Kimeu, all the items were properly identified and the complainant gave a fitting description as there was torch light, that the arrest is not in issue and the appellants were found drinking part of the proceeds of theft, admission to PW 2 was corroborated by

PW 1 and 3, there is no reason for PW 1 and 2 to frame the appellants, the conviction is safe, the two had a knife and the offence of robbery does not require medical evidence in order for it to be proved and failure to bring medical evidence is not fatal to the case and the sentence was well merited.

In reply the first appellant still maintained that there was no medical evidence while the second appellant said that his life is in danger as he has contracted tuberculosis while in prison and he has a swollen neck.

This being an appeal the duty of this court is to re-evaluate the evidence on the record and determine whether the conclusions reached by the lower court are to stand or not. I have re-evaluate the evidence on the record and I find that PW 1 the victim did not identify the attackers by face. He described one had a white shirt and black trouser while another had a beidge trouser. A light from a sport light appeared from the direction of Ntangwani and then the attackers ran away. On the way as he was going PW 1 met the sub chief who when explained what had happened he said he knew the people since he suspected they were the ones who walked a head of him from Utangwa. The chief went in search of the people and then came back with the accused persons with cash 1,000/= in 100/= denominations a cape and a watch which he identified.No specific mark was pointed out when cross examined PW 1 stated that he identified the persons by voice and the clothes they were wearing after the chief had arrested them and brought them to the complainant.

PW 2 met the complainant who had been robbed and he gave a description of the clothing of the people who had robbed him. The description answered the clothing of people PW 2 knew and whom he had met earlier on. He PW 2 mobilized villagers and mounted a search and the appellants were arrested. They were found with the clothing described to PW 2 by PW 1 and the items PW 1 enumerated to have been stolen from him are the same ones recovered from the appellants. PW 3 confirmed the evidence of PW 2 as he was in the search party with PW 2. PW 4 was the police officer who received the suspects and the exhibits. In his evidence in court the first accused Charles Ndolo who is appellant in HCCRA 52/03 said that he had a grudge with the complainant which he never put to the complainant in cross examination. It must have been an after thought. The second accused who is appellant in criminal appeal no. 18/00 stated that he does not know why he had been arrested.

Weighting the version of the prosecution against that of the defence I find that indeed the items had no specific marks but the coincidence was too real so as to rule out the suggestion of there having been a mistake.Indeed no identification parade was held for either voice or clothes but the arrest was a few hours after the commission of the offence. The items described by appellant to have been stolen from him are the same ones recovered. The court appreciates that they were items of common usage but in the circumstances of this case the sequence of events shows that there is sufficient link of these items recovered from appellants to those stolen from the complainant. The issue of a grudge has been displaced by this court as being an after thought as it was not in cross examinations.

Even if PW 1 had a grudge no explanation exists as to why PW 2 and 3 should frame the appellants. This court has no doubt that the appellants were the perpetrators of the offence.

As to the nature of the offence committed the learned trial magistrate rigntly doubted the presence of a knife. Although there was allegations of injuries having been sustained no medical evidence to that effect was produced. This court cannot understand how the co plainant could have gone to a herbalist for treatment. It is the courts view that the offence disclosed is one of stealing from person contrary to section 279(g) of the penal code. I invoke section 179 of the CPC and substitute conviction for the offence of stealing from person c/s 279(g) of the penal code in the place of conviction for simple robbery c/s 296(1) of the penal code. The reason is that there were no aggravating circumstances. The penality for an offence under section 279(g) of the penal code is imprisonment for 14 years together with corporal punishment. I note that no injuries were sustained and most of the stolen properties were recovered. It follows that the appellants did not benefit much from the offence. A sentence of seven years imprisonment and seven strokes of the cane is on the high side. The same is reduced to one of 4 years imprisonment and 4 strokes of the cane.

The appeal against conviction only succeeds to the extent that there is substitution for conviction for the

lesser offence and sentence reduced accordingly as above.

Order accordingly.

Dated, read and delivered at Machakos this ……day of ……..,2003.

R. NAMBUYE

JUDGE