



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 14 OF 2003

(Being an appeal against Conviction and Sentence in criminal case No. 681

KATANA KITSAO.....APPELLANT

- VERSUS -

REPUBLIC.....RESPONDENT

J U D G E M E N T

The Complainant JUDY WAMBUI MWENDA had on the 27.6.02 at around 7.45 a.m. alighted from a Public transport vehicle at a place known as Mtaani and started walking towards Kiriba Primary School where she works as a Teacher. She saw a young man appear in front of her and she continued walking faster and passed him. The young man however ran and held her felling her down. There were no other people on the road. The young man violently grabbed the red bag she carried and he produced a knife from his trouser pocket and threaten to stab her if she didn't release the bag. She let go the bag in which she carried food in a Hot Pot, her Mobile Phone and a purses containing 50/= and he ran away. When she arrived at school, she reported the incident to the Deputy Headmaster ERRICK NGUZA NGUA (NGUA) and on describing the young man he said he would know the young man as he NGUA hailed from that area. NGUA did proceed to a place known as Mavueni where he enquired from one Tamaa Karisa whether he had seen someone carrying a red bag and he Karisa said he had met one Katana Nzingo (the appellant) carrying a similar bag walking away in a hurry. Both went to majajani area and reported to the area chief as the appellant and NGUA hail from that area. The chief assigned them some elders and they went to the Appellant's home where they stormed into his house and recovered the Hot Pot, the Mobile Phone, a purse and 10 shilling coin. He also gave them a knife which he allegedly used in committing the crime. He also led them to a bush where he had hidden the red bag. After that they took him to Kilifi Police Station and handed him in. This was confirmed by TAMAA KARISA MISUGU who gave evidence as PW3.

PC. George Barisa an officer attached to Kilifi Police Station was on the material date at 11.30 a.m. on duty when the complainant reported the robbery. Later the appellant was taken to the station by members of the public together with a bag, hot pot, a Mobile phone, a knife, and purse. He then charged him with the offence after the complainant identified him. He gave an unsworn defence. He said on the morning in question he met PW3 on his way home at Mavueni and greeted him. He later was arrested by elders from the chief's office and taken to the police station and charged with the offence of Robbery with violence contrary to Section 296(2) of the Penal Code. He was convicted and sentenced to serve 7 years imprisonment and 5 strokes of the cane.

In his grounds of Appeal filed on 24.1.03 he was challenging both the conviction and Sentence but when he argued his appeal, he only dwelt on Sentence alone. He asked for mercy on the grounds that he is young and at the time of Conviction he was 17 year old and that this was his first offence and was remorseful. The State Counsel did support both conviction and Sentence. Before the Court could write it's judgement, the appellant was sent for an age assessment and Dr. Owiti a Dentist In-charge of the Dental unit at the Coast General Hospital, Mombasa assessed his age on 16th June, 2003 as approximately 18 years.

I have considered the evidence and Judgement of the Trial Court as appears on record. The trial magistrate in his judgement did find and rightly so that the appellant did use violence in the course of the robbery but he goes on to say that the violence was only meant to scare the victim. Consequently he proceeded to find the appellant guilty of stealing from a person Contrary to Section 279(a) of the Penal Code and Convicted him accordingly. Stealing is defined in Section 268(1) as follows:

”A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property is said to steal that thing or property.”

Underlining mine

The main ingredient for a charge of stealing is “taking anything capable of being stolen fraudulently or without claim of right”. No where is the use of violence of any degree or with an Intention of accomplishing the Mission incorporated. Section 279(a) Under which the appellant was convicted provides:

“If the theft is committed under any of the circumstances following, that is to say:

a) If the thing is stolen from the person or another; the offender is liable to imprisonment for fourteen years together with Corporal punishment.”

Again this Section does not incorporate the use of violence. The offence of stealing and incorporating the use of violence is addressed under Section 295 of the Penal Code which reads:

“Any person who steals anything and at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to it's being stolen or retained, is guilty of the felony termed robbery.”

The Trial Court found as of fact that violence was used in perpetrating the Crime and the appellant appealed against Sentence only. In the circumstances I do not consider the Sentencing under Section 279(a) as proper in this case and the same is illegal. The court is also aware that the state did not raise the issue. However Section 354 (3)(b) of the Criminal Procedure Code gives this Court discretionary powers to either increase or reduce the Sentence, or alter the nature of the Sentence. It provides Section 354:

(3) The Court may then, if it considers that there is no Sufficient ground for interfering, dismiss the appeal or may

(b) In an appeal against Sentence, increase or reduce the Sentence or alter the nature of the Sentence.”

The Sentence provided for the offence of Robbery with Violence is found in Section 296(2) of the Penal Code which is the Section under which he was charged under this section. One or all the ingredients constituting the offence under this Sub-Section must be fulfilled. The Sub-Section (2) reads:

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or

immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to Death”

In the current case, the Appellant faced a charge under Section 296(2) and the particulars therein read:

“KATANA KITSAO NZINO on the 27 th day of June, 2002 at about 7.45 a.m. at kwa Ngowa area in Kilifi District of the Coast Province, being armed with a dangerous weapon namely a knife, robbed JUDDY MWENDA of her handbag which contained one mobile telephone make ALCATEL (0722 -220661) one Hot Pot, two keys and cash 50/= all valued at Kshs.5,750/=”

The evidence by PW1 the Complainant was that the appellant held her and fell her down violently. He then grabbed the bag she was carrying and produced a knife wanting to stab her and at this point she released the bag.

The evidence therefore supports the charge and the ingredient of being armed with a dangerous weapon.

It is in the light of the foregoing that I am inclined to substitute the Sentence herein with the correct one as provided by law. The Appellant is therefore Sentenced to Death and therefore the Appeal is dismissed. He will have a right of Appeal within 14 days.

Dated and Delivered at Mombasa this 1st day of August, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE