REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 50 OF 2018

ZACHARIA OKAI MAGAKI.....APPELLANT

=VRS=

THE STATE.....RESPONDENT

[Being an Appeal from the Conviction and Sentence of Hon. B. M. Kimtai (SRM) Keroka Law Courts dated 25th January 2019 in Keroka Principal Magistrate's Court Criminal Case No. 602 of 2017]

JUDGEMENT

The appellant was charged with Robbery contrary to Section 296 (1) of the Penal Code.

The particulars of the charge were that on 14th July 2017 at Nyabiosi village in Masaba North Sub-county, within Nyamira County he robbed Moseti Magaki of Kshs. 1,400/= and immediately before such robbery threatened to use actual violence to the said Moseti Magaki.

The appellant pleaded not guilty to the charge and the prosecution then called three witnesses in order to prove the charge. At the close of the prosecution's case the court found the appellant had a case to answer and put him on his defence. He testified on oath and maintaining his innocence stated that the charge was a fabrication because he had refused to sign a land transfer form. However, the trial Magistrate did not believe that defence. He found that the charge against the appellant was proved beyond reasonable doubt, found him guilty, convicted him and sentenced him to thirty years' imprisonment. Being aggrieved by the conviction and sentence the appellant preferred this appeal.

The appeal was canvassed by the appellant in person. He relied on written submissions to which Counsel for the respondent replied orally.

As the first appellate court I have considered the submissions by both sides carefully. I have also evaluated the evidence in the lower court so as to arrive at my own independent decision. I have in so doing made provision for the fact that I did not hear or see the witnesses give evidence and so did not observe their demeanour.

The complainant in the case against the appellant was his own father. He narrated how the day prior to the robbery went to Keroka to collect the Kshs. 4,000/= cash transfer given to the aged by the government and then went to a hotel where the accused demanded to know if he had received the money. On that day he gave the appellant's in-law Kshs. 1,400/= then went home. The next morning at about 6am the appellant went to his house and woke him up. He was armed with a panga. He demanded to be given money and sensing danger the complainant told him the money was not in his possession but at a shop. The appellant ordered him to get dressed and started frogmarching him to the shop but before they could get there the appellant frisked him and took Kshs. 2,000/= which was in his pocket. The complainant testified that the appellant slapped him and stepped on his chest. He then frogmarched him (the complainant) to the shop to get more money but the shop was closed. After the ordeal was over the complainant reported the matter and then sought treatment at Keroka Sub-county Hospital. He was treated for injuries classified as harm and discharged. The appellant was subsequently arrested and charged with this offence.

In his testimony the appellant stated that he was arrested for refusing to sign a sale agreement for sale of land. He stated that he had differences with his father and denied that he committed the offence.

I am however satisfied that the charge against him was proved beyond reasonable doubt. The complainant being his father knew him very well. It was early morning when the offence occurred and circumstances were very conducive for a positive identification. The issue of the land agreement was never put to the complainant during cross examination but was only raised during the defence. This despite the fact that the complainant was cross examined twice (on two different occasions because the appellant made an application for him to be recalled). The issue was also not put to the Assistant Chief (Pw2) and clearly it was an afterthought. My finding therefore is that the appeal on the conviction has no merit and it is dismissed.

The appeal on the sentence is conceded and correctly so. **Section 296 (1) of the Penal Code** which provides the penalty for simple robbery **(Section 295 of the Penal Code) imposes a sentence of 14 years' imprisonment**. That is not a minimum sentence which means that the court can impose any term of imprisonment provided it does not exceed fourteen years. The trial Magistrate therefore erred in imposing a sentence of thirty years' imprisonment and it is hereby set aside.

In his plea in mitigation the appellant stated that he had a family and was supporting his siblings. It was also noted that he was a first offender. To this I would also consider the value of the amount stolen and the amount of force used to rob the complainant. The injuries occasioned to him amounted to harm which is the least degree in the P3 Form. That is not to say that the offence committed by the appellant was not serious. It indeed was more especially because it was against his own father – an elderly man. Such an offence calls for a deterrent sentence and having taken everything into account I sentence him to serve four (4) years imprisonment. The sentence shall run from the date of the judgement in the lower court.

Signed, dated and delivered in Nyamira this 13th day of June 2019.

E. N. MAINA

JUDGE