



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 46 OF 2015

*(An appeal from the Judgment of the Senior Principal Magistrate, Embu
in SPMCR. Case No. 2028 of 2014 dated 28/4/2015)*

DANCUN MUTHINI MUGO.....APPELLANT

VERSUS

PROSECUTION.....RESPONDENT

J U D G M E N T

1. This is an appeal against the judgment of Senior Principal Magistrate Embu delivered on 28/4/2015. The appellant was convicted of the offence of robbery with violence contrary to Section 295 of the Penal Code as read with Section 296(1) and sentenced to serve five (5) years imprisonment. He lodged an appeal based on five grounds and are hereby summarized thus:-

i. That the conviction was based on the testimony of a single witness;

ii. That the appellant was detained in the police custody for more than 24 hours;

iii. That his defence was rejected on weak reasons;

iv. That the magistrate failed to consider that the appellant produced a receipt to confirm ownership of the stolen items; and

v. That there existed a grudge between the appellant and PW1 which the magistrate did not give due consideration.

2. The appellant in his written submissions restated the grounds of appeal and added that the magistrate relied on uncorroborated and inconsistent evidence and that the charge sheet was defective.

3. The state counsel Ms. Nandwa submitted orally that the evidence was consistent and was well corroborated. It was submitted further that the appellant was seen entering the house of PW1 and was positively identified as the incident took place in broad day light. The counsel argued that the defence of the appellant was considered and found to be unmerited.

4. It was further stated that the appellant admitted in his defence that he was found in possession of the aerial belonging to the complainant. The aerial was positively identified by the prosecution witnesses as the one that was removed by the appellant from PW1's house. The state further stated that the appellant was arrested on 29/12/2014 and was arraigned in court on 30/12/2014. The discrepancy of the date of

offence in the charge sheet does not render the charge sheet defective as the charge sheet contains all the necessary ingredients of the offence and that the evidence of the witnesses brings out the correct dates of the offence.

5. The duty of the 1st appellate court was explained in the case of *KIILU & ANOTHER VS REPUBLIC [2005] 1 KLR 174* where the Court of Appeal addressed itself thus:

“an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions.”

6. Section 295 of the Penal Code provides that;

“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 its being stolen or retained, is guilty of the felony termed robbery. ”

7. Section 296(1) of the penal code provides that;

“Any person who commits the felony of robbery is liable to imprisonment for fourteen years”

8. The record clearly indicates that both PW1 and PW3 witnessed the incident as the appellant took both the aerial and DVD from their house. Their evidence was clear, credible and straight forward as noted by the trial magistrate.

9. The allegation of the appellant that the court relied on the evidence of a single witness is not true. Even assuming that he did so, Section 143 of the Evidence Act has a saving provision. Section 143 of the Act provides:-

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

10. A perusal of the proceedings does not indicate that the appellant produced any receipt to prove ownership in defence but only mentioned it during cross-examination. The complainant PW4 however produced receipts proving that the DVD player and the aerial belonged to PW2.

11. The charge sheet indicates that the appellant was arrested on 29/12/2014 and was arraigned in court on 30/12/2014. The proceedings also confirm that the appellant was arraigned in court on 30/12/2014. This ground of appeal is therefore not merited.

12. In *OLUOCH VS REPUBLIC [1985] KLR 549* this Court set out the ingredients of robbery under Section 296(1) as follows:-

“The ingredients of the offence of robbery under section 296(1) of the Penal Code are:

(a.) stealing anything and

(b) at or immediately before or immediately after the time of stealing,

(c) using or threatening 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 its being stolen or retained.”

13. *The evidence of the complainant was that she was at her mother's home on the material day. The appellant came with another man and left him at the gate while he entered PW1's family home. PW1 tried to prevent the appellant from entering inside but he pushed her towards the inside and gained*

access before using his hands to choke her when she tried to scream.

14. Inside the house, the appellant took a DVD player and a TV aerial before leaving home. The matter was reported to the police who later recovered the aerial from the appellant's house.

15. The evidence of PW2 was supported by PW3 who was with her when the incident occurred. PW4 obtained receipts for both the DVD player and the aerial in the course of his investigations and produced them in evidence.

16. The appellant denied the offence alleging that he was framed for turning down a love affair request made to him by PW2. It is important to note that PW2 was not at her home when the appellant went there and took the two items from the house by force. The appellant did not satisfy the court as to the existence of any grudge between him and PW2. The fact that PW2 did not witness the incident exonerates her from the allegation that she framed the appellant. Even assuming that the appellant had turned down PW2's request for a love affair, this did not give the appellant the licence to steal her property.

17. Although the appellant called two witnesses who said he bought the stolen items, he was not able to produce receipts to prove ownership. The trial magistrate said that the issue of ownership by the appellant was not raised during the trial and neither did it come up during cross-examination of the key prosecution witnesses.

18. The issue ought to have been raised from the earliest opportunity during the trial to lay a basis for the appellant's defence. It was established that the appellant went to the home of the complainant but he did not explain in his defence what he went to do there. His defence dwelt on how he was arrested. I find that the magistrate dismissed the defence after giving it due consideration.

19. The ingredients of the offence of robbery with violence under Section 295 of the Penal Code involve stealing anything using violence or threats immediately before or immediately after the time of stealing.

20. PW1 testified that the appellant used force when he pushed her away and gained access. When she screamed the appellant choked her using his hands demonstrating his determination to enter the house and steal.

21. The pushing and the choking enabled the forced entry and taking of the two items from PW2. The sister of PW1 just watched it happen. The trial magistrate who had the opportunity of seeing the witnesses said that PW3 was a young girl and could not manage to help her elder sister when the appellant struck.

22. The trial magistrate was correct to find that the ingredients of the offence were proved. I have no reason to differ with the findings of the learned magistrate.

23. It is my finding that the appellant has not satisfied the court as to any of his grounds of appeal. The sentence of five (5) years imprisonment was within the law.

24. For this reason I find no merit in this appeal. The conviction and sentence are hereby upheld.

25. The appeal is hereby dismissed and it is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF APRIL, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Appellant present

Mr. Onjoro for respondent