REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 112 OF 2015

KAMALDIN ABDI ABDIRAHMAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa CM Criminal Case No. 1343 of 2014 – M. Wachira CM)

JUDGMENT

The appellant was charged in the magistrate's court at Garissa with robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that on the 5th August 2014 at around 10pm at Ifo Refugee Camp in Dadaab District within Garissa County with another not before court robbed Mohamed Hassan Ali of his mobile phone make Samsung valued at Kshs. 12,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the said Mohamed Hassan Ali. He was also charged with a second count of robbery with violence. The particulars of the offence were that on the same day and place and time with another not before court while armed with a dangerous weapon namely a knife robbed Mohamed Guthu Hassan of his mobile phone make Nokia 1208 valued at Kshs. 2,200/= and at or immediately before or immediately after time of such robbery threatened to use actual violence against the said Mohamed Guthu Hassan.

He pleaded not guilty to both counts. After a full trial he was acquitted of both counts of robbery with violence. He was found guilty of the offence of stealing from a person and convicted accordingly. He was sentenced to serve 6 years imprisonment.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal in March 2015. Before the hearing of the appeal the appellant filed amended petition of appeal and written submissions. The grounds of appeal are challenging conviction and sentence. His complaint is that prosecution did not prove its case beyond reasonable doubt. That the evidence of identification was inadequate. That he was not arrested with anything therefore the offence of stealing from the person was not proved. That the trial court wrongly relied on the evidence of the two complainants alone. Also that crucial witnesses were not called to testify.

During the hearing of the appeal the appellant also highlighted his written submissions. I have perused and considered the written submissions of the appellant. He added orally in court that he was ambushed by people who informed his mother that he had done something wrong and the mother advised him to go to the police station only to be arrested. He said that the person who implicated him had a grudge against him because of a girl.

Learned Prosecuting Counsel Mr. Okemwa opposed the appeal. Counsel submitted that after the closure of the evidence of the prosecution and defence the court found that the prosecution had proved an offence of stealing from the person. According to counsel, that offence which was a lesser offence to robbery had been proved. Counsel urged this court to uphold the findings of the trial court. Counsel added that identification was not an important issue in cases of theft from a person.

In response to the prosecuting counsels' submissions, the appellant stated that the prosecuting counsel was not saying what was on record since he was not found with anything.

In summary the evidence of the prosecution is that Pw1 Mohamed Hassan Ali and Pw2 Mohamed Guthu Hassan went to fetch water on 5th August 2014. It was at around 10pm. On the way the appellant and another called Mohamed Meri Guro attacked them. The appellant had a knife while the other had a pistol and a panga. They forcefully took the mobile phones from the complainants that is Pw1 and Pw2. They saw them in torch light's as they knew them before.

A report was made to the police, and the appellant was arrested but the other person was not traced.

In his defence, the appellant gave unsworn testimony and denied committing the offence. He said that there was a grudge between him and the complainant because of a girl. He called one witness his mother Khadija Mohamed Adan Dw1 who stated that she did not know why the police arrested his son.

This is a first appeal. As a first appellate court I am required to re-evaluate all the evidence on record and come into my own conclusions and inferences. See the case of ***Okeno Vs Republic [1972] EA 32***.

I have re-evaluated the evidence on record. The appellant was charged with two counts of robbery with violence. He was however acquitted on both counts and convicted of the minor offence of stealing from the person and sentenced to serve 6 years imprisonment. Such action by the trial court was permissible under section 179 (2) of the Criminal Procedure Code (Cap. 75).

The appellant has complained that identification was not positive. I have perused the evidence of Pw1 and Pw2 the complainants. They all are clear that the appellant and another took their mobile phones that night. They stated that one of them who was Pw1 had a torch and flashed at the appellant and the other person, whose name they mentioned but was not traced. They knew1 both the assailants before.

The appellant admits that he knew the complainants but complains about a grudge. The issue of the grudge was not raised during cross examination but was raised during the unsworn defence. In my view it was an afterthought. I agree with the learned magistrate that the identification of the appellant was positive. I observe that the learned magistrate did warn herself of the dangers of mistaken identity in cases of visual identification. The magistrate relied on a case of ***Waithaka Chege Vs. Republic 1979 KLR 271***. I find that the magistrate approached the issue of visual identification in a proper way.

The appellant stated that he was not found in possession of anything. Indeed both mobile phones were not recovered. He was thus not found with any stolen item. That fact alone did not exonerate him, since he was not arrested at the scene of the incident. As such unless he himself produced the mobile phone, it would be difficult to know where he kept it. I dismiss that complaint.

The appellant also complains that the magistrate was wrong in relying on two identifying witnesses only, and that some important witnesses were not called to testify. I am not able to identify any crucial witness who was not called by the prosecution to testify. As for identification by two witnesses, in my view the evidence of a single indentifying witness can be sufficient to sustain a conviction in a criminal case. Provided the circumstances and conditions are conducive to positive identification, the evidence of two witnesses can sustain a conviction. I dismiss that complaint of the appellant.

The learned magistrate convicted for a lesser offence of stealing from a person after acquitting the accused on two counts of robbery with violence. The magistrate does not say that the conviction of stealing from a person was on both counts or one of the counts. In my view this was a mistake of

procedure which I have to correct. I am of the view that from the finding of the trial court the magistrate convicted the appellant on theft from a person as an alternative to count 1. I thus hold that the conviction of the appellant is in respect of theft from a person of Mohamed Hassan Ali which relates to count 1 herein.

The sentence of 6 years imprisonment in my view is reasonable sentence for the offence from theft from a person contrary to section 279 of the Penal Code, as the maximum sentence is 14 years imprisonment.

To conclude I dismiss the appeal and uphold both the conviction and the sentence of the trial court.

Dated and delivered at Garissa this 2nd day of September 2016

GEORGE DULU

JUDGE