



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO.154 OF 2010

ANTHONY MAINA KIOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against both conviction and sentence in the Senior Resident Magistrate's Court at Kigumo in Criminal Case No.1330 of 2009 by M.W. MUTUKU – SRM)

J U D G M E N T

The appellant, Anthony Maina Kioi was charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code.

The particulars of the offence were that on the 5th day of September 2009 at Rwathe Trading Centre in Maragua District within Central Province jointly with others not before court robbed **Peter Muiruri Ngari** of one mobile phone make 1202, 2 stool chairs and cash 10,000/= all valued at Kshs.14,200/= and at or immediately before or immediately after the time of such robbery beat the said **Peter Muiruri Ngari** using a piece of wood.

PW1, **Peter Muiruri Ng'ang'a** a teacher by profession recalled that on the 5th September 2009 at about 8.30pm he was inside his bar and wanted to close the same as there was no customer when one Josephat Waweru came in and sat but did not order for a drink. The appellant who was outside, called Josephat to get out and insulted Peter Muiruri Ng'ang'a by calling him a dog and a prostitute.

He closed the bar but heard a knock on the door before he could close it he heard a bang and retreated. The appellant entered with a big stick and hit him on the finger and on the right hand which got swollen. He was injured on the right hand and on the left hand. He retreated and the appellant threw the stick at him. At this point the appellant, Joseph and Kiarie got in and attacked him all over with fists. He kept threatening to kill PW1 for having sent him to prison. The finally took away Kshs.10,000/= and a mobile phone valued at Kshs.3,000/=.

The complainant remained in the bar for 30 minutes and proceeded to Gacharage Police Post who referred him to Githumu Police Station where he was issued with a P3 form. When the police visited the scene, they collected the rungu that had been thrown inside the bar by Maina during the incidence. He claims that the robbery took place for about one hour.

PW2 was Administration Police **Corporal James Ngathi** of Kaguthi A.P Post then. He recalled that on 6/9/2009 at 3.30 am he was at the police station when one person named Muiruri Ngari from Rwathe went to the post and reported that he had been attacked by three people and robbed of his property. He knew the people who attacked him.

PW3 was **Corporal Silvanus Nyangwana** of Githumu Police Station. He was the investigating officer in the case. He states that around 9.30am on 6/9/2009 Peter Muiruri Ngari reported that he was attacked by 3 people in his bar on 5/9/2009 at 9pm. He had visible injuries on his hand and was referred to Kandara Health Center with a P3 form. During the attack he was robbed of his cash and phone. On the 7/9/2009, he proceeded to the bar and recovered the stick allegedly used to attack the complainant. He took the stick and proceeded to the home of Anthony Kioi he did not find him at home. He went to Waweru's home but did not find him. On the 25/9/2009, he went back to the bar and found the appellant quarreling the complainant. He arrested and took him to Githumu Police Station and charged him with the offence of robbery with violence. Nothing was recovered but the stick used was produced in court.

PW4 was the maker of the P3 form which showed that the complainant was injured after the attack. The object used to cause the injury was both sharp and blunt.

The appellant chose to give unsworn statement. He is a carpenter. On 25/9/2009, he was arrested at about 7pm by 4 people and taken to Githumu Police Station as a result of a complainant by PW1 against him. He gave testimony that on 5/9/2009, he was at Gatega Division splitting timber and immediately he went back home he went to take a bath. He later learnt in court that he had allegedly committed the offence. Peter Muiruri framed him because the appellant refused to work for him hence the complainant had a grudge against him.

The learned trial court found the issue for determination as whether the prosecution had proved that there was a robbery with violence and whether the complainant identified the person who attacked him. The honourable court found that the appellant was armed with a stick and in company of another person and therefore concluded that the appellant was guilty of robbery with violence.

However, this court finds that the mobile phone allegedly stolen was not recovered. No evidence was adduced to show that the complainant had a mobile phone. The make, serial number were not disclosed and the receipts for the purchase was not produced. It is curious that the incidence happened for a whole hour when members of public were in the bar but they were asleep and non of them woke up to witness the robbery.

Moreover, PW2 stated that the complainant was attacked on the way and took sometime to Rwathe which is a distance. This was a contradiction as the complainant stated that he was attacked in the bar.

Mr. Macharia decided to abandon all grounds except ground No.8, 10, 12 and 13 which are:-

- 1. The learned trial magistrate erred in law and fact in finding that the circumstances for identification were conducive and favourable.**
- 2. The learned trial magistrate erred in law and fact in failing to make a finding on the proximate cause of the complainant's loss and injury.**
- 3. The learned trial magistrate erred in law and fact in failing to guard and protect the procedural and constitutional rights of the appellant during the trial rendering the trial a farce.**
- 4. The learned trial magistrate erred in law and fact in allowing herself to be influenced by unproved allegations of past conviction of the appellant.**

On ground 8 on the issue of identification of the appellant he submitted that the alleged offence occurred at night. The source of light was a pressure lamp but no evidence was given as to the location of the lamp. This court finds that the location of the lamp was immaterial as the pressure lamp was capable of lighting the whole room. On the evidence of PW2, the court finds that the complainant said that he was attacked by some people but he added that they were known to him. The evidence availed by the complainant had the import that he was attacked by people known to him. This court agrees with the trial magistrate that the circumstances for identification were favourable.

On the issue of the appellant being charged initially with assault and later the charge substituted with robbery with violence the court finds that it is a substantive issue to be dealt with later in this judgment.

Ground 12 of the appeal is based on the assertion that the magistrate never recorded the compliance of the appellants right but merely stated that the rights under section 211 CPC were complied with. However the Honourable Magistrate went further to state that the appellant elected to give unsworn statement and elected not to call any evidence as the person he was with could not be traced. This court finds that the fact that the appellant elected to give unsworn statement means that he was given the three options and therefore his rights were not violated as the procedure was explained to him.

This court finds that in sentencing, though the trial court was informed by the prosecution that the appellant was not a first offender, the same was not prejudicial to the appellant as the offence charged invited a mandatory death sentence whether as a first offender or not.

Going back on the issue of substitution of the charge of assault with a charge of robbery with violence this court finds that though the prosecution had the power to do so, the evidence adduced during trial did not support the charge of robbery with violence. The evidence adduced by the prosecution supported a charge of assault as it is evident that the appellant in the company of others assaulted the complainant causing him serious injury, however, there is no evidence of robbery as the mobile phone allegedly stolen was not recovered. Moreover, there was no evidence that the complainant had sold chicken and had Kshs.10,000/= before the assault.

The upshot of the above is that the appeal is allowed and the appellant is found guilty of the offence of assault causing actual bodily harm contrary to section 251 of the penal code and is found liable to imprisonment for five years. Since he was arrested on the 28/9/2009, this court finds that he has served a substantial part of the jail term and therefore orders his release from prison unless lawfully held. Orders accordingly.

Dated, signed and delivered at Nyeri this 30th day of January, 2014.

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE

Judgment is read in the presence of the appellant and Mr. Njue for the state.

J. WAKIAGA

JUDGE

A . OMBWAYO

JUDGE