



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 215 OF 2011

JAMES MUCHIRI MAZITOAPPELLANT

VERSUS

REPUBLIC RESPONDENT

((From original conviction and sentencing in Criminal Case No. 4475 of 2010 at the Chief Magistrate's Court at Kibera by F.M. Nyakundi - Principal Magistrate on 25th August, 2011))

JUDGMENT

The appellant James Muchiri Mazito was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. It was alleged in the particulars of the charge that on 1st October, 2010 at Runda, Nairobi County, jointly with others not before the court while armed with offensive weapons namely pistols they robbed Robert Wambua of a motor cycle registration No. KMCJ 004N valued at Kshs. 79,500/= and at or immediately before or immediately after the time of such robbery threatened to use violence to the said Robert Wambua. He denied the offence but after a full trial he was convicted and sentenced to death. This appeal arises from the said conviction.

On the date of the alleged offence at about 7 p.m., P.W. 1 who was a motor cycle rider employed by P.W. 2 was waiting for customers at a place called Githogoro. A customer by the name Muchiri then came and asked to be taken to Thindigwa. The customer was someone known to him. They agreed to a charge of Kshs. 70/=. This customer got onto the motor cycle and somewhere along the way asked P.W. 1 to stop so that he could answer a call of nature.

The customer went for a short call and when he was through he asked P.W. 1 if he had charge for Kshs. 1,000/= which P.W. 1 did not have. The customer then started looking for money in his pocket. In the process, two people approached from the back while P.W. 1 was still on the motor cycle and asked what they were doing there.

One of those two people hit him with a pistol on the head as he turned to look at them. The same person pulled him off the motor cycle causing him to fall down alongside the Motor cycle. He started to struggle with this man because he was trying to remove his jacket with one hand as he held onto the pistol with the other.

In the meantime, the appellant was busy trying to lift the motor cycle and start it as it had gone off when it fell. The ignition key was still in place and when the motor cycle was ignited the person who was struggling with P.W. 1 left him and all got onto the motor cycle riding off. It was the appellant who was

riding the motor cycle. P.W. 1 did not know the two people who joined them at that point.

After this incident, he went to Thindigwa Police Station where he was referred to Runda Police Station and made a report. Ten days later the appellant was arrested. It was his (P.W. 1) evidence that he knew the appellant well, he was his friend and they lived in the same village. P.W. 2 confirmed the ownership of the motor cycle and that P.W. 1 was her employee.

The appellant was arrested with the assistance of P.W. 4 who handed over the matter to P.W. 5 for further investigations. It is the evidence of P.W. 5 that, when he took over the investigations, the appellant took them to Roisyambu where he said the motor cycle was. However, it was not found.

Upon being put on his defence the appellant denied the offence and said that he was at his home at Thindigwa and left to go to the shops. He met police officers who arrested him and took him to Runda Police Station. After four days he was brought to court where he learnt of the charges. On the alleged date of the offence he was at work and never met the complainant at all.

The learned trial magistrate believed the prosecution witnesses and convicted the appellant. In this appeal he has challenged his conviction and going by his amended petition of appeal, he has faulted the learned trial magistrate for relying on the evidence of a single witness without corroboration. It is also his case that his identification was defective and faulty due to difficult circumstances, and the learned trial magistrate relied on circumstantial evidence which amounted to mere suspicion. Finally, his defence was not considered and no reason was given for disregarding it.

As the first appellate court, it is our duty to evaluate the evidence adduced before the learned trial magistrate and arrive at independent conclusions. The appeal was argued by way of written submissions which we have on record. The learned counsel for the appellant has also cited several authorities which we have read.

The offence took place at about 7 p.m. The appellant was known to the complainant P.W. 1 by the name Muchiri. It was not necessary in our view that the complainant ought to have known all his three names. They lived together in the same village. It is true that the learned trial magistrate relied on the evidence of P.W. 1 substantially to arrive at the conviction.

The conduct of the appellant however before and after his arrest was incriminating. In the first place, after answering a call of nature he asked the complainant if he had change for Ksh. 1000/= and when the complainant said he did not have it, he started looking for money in his pockets. From the evidence he had not reached Thindigwa where he was supposed to be dropped. It is reasonable to conclude that he was buying time to await his accomplices.

After the complainant was pulled off and fell alongside the motor cycle, it is the appellant who lifted the motor cycle and started it. After he started it he rode off with the two people who had joined him. Again that is incriminating. After his arrest he led P.W. 5 to Roisyambu where he said the motor cycle was. This is also incriminating.

The collective impact of his conduct points to his involvement in this offence. The defence he offered could not withstand the weight of the prosecution case. The learned trial magistrate was alive to the fact that she was relying on the evidence of a single witness. That notwithstanding, she was persuaded that the appellant committed this offence. She warned herself of the danger of convicting on the evidence of a sole witness and cannot therefore be faulted on that basis.

The appellant was with two other people one of whom was armed with a pistol. Some degree of violence was applied to dispossess P.W. 1 of the motor cycle. The ingredients of Section 296 (2) of the Penal Code were met. We are satisfied that the offence was proved beyond any reasonable doubt and the conviction was well founded. The record shows that the appellant was sentenced to life imprisonment which is departure from the penalty provided by law for such an offence.

From our records no notice to enhance sentence was filed before the hearing of this appeal although one was annexed to the submissions. It would be prejudicial to the appellant to enhance the sentence without hearing him and it is not enough to annex the notice of enhancement as has been done in this case. We have therefore opted not to disturb the order on sentence imposed by the learned trial magistrate. This appeal is dismissed in its entirety.

Dated and delivered at Nairobi this 12th day of May 2014

A.MBOGHOLI MSAGHA

L.A. ACHODE

JUDGE

JUDGE