



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 335 OF 2011

JAMES GIKONYO MAINA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 95 of 2011 in the Chief Magistrate's Court at Kiambu – C. Oluoch (PM) on 09/12/2011)

JUDGMENT

1. The appellant, James Gikonyo Maina, was convicted of the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** by Hon. C. Oluoch (Mrs.) Principal Magistrate in a judgment delivered on 9th December, 2011 in Kiambu Cr. Case No. 95 of 2011. Consequently, he was sentenced to death as by law prescribed. Being aggrieved by the said decision the appellant lodged the appeal herein based on seventeen grounds.
2. In the 17 grounds set out in the amended petition of appeal, the appellant mainly complains that the learned trial magistrate did not evaluate the evidence adduced properly and convicted him against the weight of the evidence.
3. Learned counsel Mr. Ngigi appeared for the appellant and submitted that there was no evidence that the appellant took the mobile phone which is the subject matter of this case from **PW1**, with the intent of stealing it or depriving her of it permanently. The evidence indicates that **PW1** and the appellant are siblings and that the appellant asked **PW1** for the phone to enable him to call their mother. When **PW1** refused to give him the phone, the appellant produced a knife, threatened her with it and took the phone from her. He disappeared and was arrested the next day when he returned home.
4. The appellant denied the offence in his defence and told the court that he visited his father on the fateful morning and found him in a pair of shorts and also saw his sister emerge from the bedroom. He threatened to report the matter to his mother who lived in Kinangop and that was when **PW1** alleged that he had robbed her.

5. Learned state counsel Mrs. Ngetich conceded the appeal for reasons that the learned trial magistrate did not warn herself of the dangers of convicting on the evidence of a single identifying witness. We observe that this ground on its own would not be fatal to the prosecution's case. The High Court held in **ANTHONY KANGETHE MWANGI VS. REPUBLIC CR. APP. 81 of 2008** that failure of the trial magistrate to warn herself of the dangers of convicting an accused person on the evidence of a single identifying witness is not fatal if that accused person is convicted on sound evidence.
6. Mrs. Ngetich also argued that the knife used in the evidence was not produced and that therefore it would be difficult to prove that it was actually used. In her view the appellant should have been convicted of robbery contrary to **Section 296(1)** of the **Penal Code**. In our view the prosecution's case could still be proved where there is no recovery of the weapon or weapons used in the robbery, if the court believes the prosecution witnesses that there were such weapons, or there is evidence of such weapons such as the result of their use.
7. Having carefully evaluated the evidence on record afresh to reach our own conclusion, and having considered the grounds of appeal and the submissions before us, we find that the case before us boils down to the word of the complaint against that of the appellant. The case for the defence is just as strong as that for the prosecution. Either side could just as easily be stating the truth. In those circumstances we give benefit of the doubt to the appellant.
8. For those reasons the appeal succeeds. We quash the conviction and set aside the attendant sentence. We order that the appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this 15th day of July 2014.

.....

A.MBOGHOLI MSAGHA

JUDGE

.....

L. A. ACHODE

JUDGE