



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 159 OF 2012

(From the original Conviction and Sentence in the Criminal Case No.

709/2011 of the Senior Principal Magistrate's Court at Mombasa:

J. Gandani – SPM)

HASSAN JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant **HASSAN JUMA** has filed this appeal challenging his conviction and sentence by the learned Senior Principal Magistrate sitting at the Mombasa Law Courts. The appellant was initially arraigned in the lower court on 28th February, 2011 facing a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(1) OF THE PENAL CODE**. The particulars of the charge were as follows:

“On the 3rd day of February, 2011 at Ferry area in Likoni District within Coast Province, jointly with others not before court, while armed with dangerous weapons namely knives robbed Maurice Mwamboje of a Roledo mobile phone valued at Kshs. 3,300/= and cash Kshs. 5,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Maurice Mwamboje.”

The appellant entered a plea of ‘*Not Guilty*’ to the charge and his trial commenced on 21st July, 2011. The prosecution led by **CHIEF INSPECTOR WAITHAKA** called a total of four (4) witnesses in support of their case. The appellant was not represented by counsel during the trial.

The complainant **MAURICE MWAMBOJE** told the court that he hawks coffee in the Likoni area. On 4th February, 2011 at around 11.00 p.m. he boarded a matatu on his way home. Whilst in the matatu he received a message on his mobile phone and so he started to read the text message. As he was doing so a man grabbed his phone and jumped out of the matatu. The complainant also jumped out of the vehicle and gave chase. The man who had stolen the phone slipped and fell as he ran. Thus the complainant caught up with him and held him. Suddenly four (4) other men armed with knives surrounded the complainant. One man held the neck to prevent him from screaming. The men took the 5,000/= cash which the complainant had and the appellant escaped with his mobile phone. The complainant reported

the matter at Likoni police station.

Later on 25th February, 2011 the complainant spotted the appellant near the Likoni Approved School holding his stolen phone. The complainant asked for his phone back. The appellant retorted that he would only return the phone if he was paid Kshs. 3,000/=. The agreed to meet the next day so that the complainant would pay this money to get his phone back. The following day the complainant went with police officers. Suddenly the appellant called out and a mob surrounded the police. The police had to fire into the air and had to call for reinforcements. Eventually they apprehended the appellant. The stolen phone was later taken to the police station by one Mwanasha who claimed to be a cousin to the appellant and who stated that he had given her the said phone to charge.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave an unsworn statement in which he denied having robbed the complainant at all. On 25th July, 2012 the learned trial magistrate delivered her judgment in which she convicted the appellant on the charge of Robbery with Violence and thereafter sentenced him to life imprisonment. Being dissatisfied with both his conviction and sentence the appellant filed this appeal.

As a court of first appeal we have an obligation to reconsider and re-evaluate the prosecution's evidence and to draw our own conclusions on the same. We have given careful consideration to the evidence adduced in the trial court. The complainant told the court that he was robbed of a mobile phone make Roledo. The complainant gives a clear description of his phone at page 5 line 3.

“My phone is make Roledo T57070 which had a white casing.”

The complainant positively identifies the mobile phone recovered by police as his phone **Pexb1**. He produces a receipt dated 15th August, 2010 for Kshs. 3,400/= being the purchase price of the phone **Pexb1**. The receipt bears the serial number of the phone which the trial court found to be the same as the serial number on the phone. The appellant makes no claim that the phone in question is his. There can be no doubt that the phone exhibited in court **Pexb1** belonged to the complainant.

The complainant testified that the said phone was grabbed out of his hand whilst he was using it in a matatu. He identifies the appellant as the man who stole his phone. The complainant states at page 4 line 20

“I quickly came out of the matatu and ran after the man. The street lights were on and the man was wearing a striped T-shirt so I could easily see and follow him. There was sand on the ground. The man slipped and fell so I caught up with him. He is the accused here.....”

The complainant gave chase immediately and at no time did he ever lose sight of the appellant. He was able to catch hold of the appellant when the later slipped on the sandy ground and fell. In as much as this is evidence of a single identifying witness we are in agreement with the learned trial magistrate that this evidence on identification is extremely persuasive. The complainant gave his evidence in a clear and concise manner and he remained unshaken under cross-examination. He states that the street lights enabled him to see the appellant well and the striped shirt which the appellant wore on that day confirmed that he was not chasing the wrong person. The complainant was able to recognize the appellant several days later when he spotted him near the Likoni Approved School still having in his hand the stolen phone. On this occasion the two held a conversation in which the appellant brazenly demanded from the complainant Kshs. 3,000/= in order to have his stolen phone returned to him. We are satisfied that there has been a clear and positive identification of the appellant as the man who stole the complainant's phone.

The next question that arises is whether the incident complained of amounted to a Robbery with Violence. The complainant stated that initially the appellant snatched the phone from him in a matatu. At this point the incident would have only amounted to a simple robbery. However when the complainant chased and caught the appellant a group of four men armed with knives joined in. They held and strangled the complainant and enabled the appellant to get away with the phone. The question would

be whether these found (4) men were acting in concert with the appellant. In his defence the appellant claims that these men were just masons from a nearby construction site who came to his rescue. This defence is not convincing. Why did the men grab hold of and threaten the complainant yet allow the appellant to escape. If they were just workers trying to resolve a dispute they would have detained both men until police came. These men were clearly fellow gang members who jumped to the rescue of the appellant once they realized that he had been apprehended. Their action aided or enabled the appellant to escape with the stolen phone. The elements of Robbery with Violence clearly exist. The appellant stole the phone with others who were armed with dangerous weapons. We find that the conviction of the appellant was merited and we do confirm the same.

After hearing mitigation the learned trial magistrate proceeded to sentence the appellant to life imprisonment. Given the circumstances we find the sentence to have been appropriate and we confirm the same. The upshot is that this appeal fails in its entirety and the same is hereby dismissed.

Dated and Delivered in Mombasa this 13th day of November, 2014.

M. ODERO

M. MUYA

JUDGE

JUDGE