



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 293 of 2006

PETER MALOMBE MISANGOAPPELLANT

VERSUS

REPUBLIC RESPONDENT

[Arising from criminal Case No. 3146 of 2005 of the Senior Resident magistrate's Court at Kwale]

JUDGMENT

Peter Malombe Musango, the appellant herein, was tried and convicted for the offence of robbery contrary to section 296(1) of the penal code. The particulars of the offence are that on the 20th day of October 2005 at Magutu village, Ukunda in Kwale district within Coast province, robbed Catherine Muthee Mutala of ksh.17,600/- one golden ring, one car lock alarm, a mobile phone make Motorola a wrist and hand a bag all valued at Ksh.39,700/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Catherine Muthee Mutala. In the end he was sentenced to serve 5 years imprisonment. Being dissatisfied he preferred this appeal. He put forward a total of 11 grounds of appeal in his petition. Those grounds may be summarized to three.

First, that there was no credible evidence which were tendered to prove the charge. Secondly, that the criminal charge and proceedings were maliciously preferred against the appellant. Thirdly, that the trial magistrate did not properly consider the appellant's defence.

When the appeal came up for hearing, Mr. Monda, learned Senior State counsel opposed the appeal. The appellant was granted leave to rely on written submissions.

Let me set out in brief the case that was before the trial court. The prosecution lined up the evidence of six witnesses to support its case. Catherine Mutala [P.W.1] said that the accused [appellant] used to be her taxi driver. On 10/10/05 at about 6.00 a.m. she was at home when the accused went there. He parked his car outside that house. The appellant and the complainant [P.W.1] left in P.W.1's car to P.W.1's place of work. P.W.1 said that on her way the appellant drove the car carelessly but nevertheless they arrived at P.W.1's hotel safely. P.W.1 collected cash from her hotel staff. The appellant told P.W.1 that he had kept the money he earned from the taxi business at his residence. The duo left for the appellant's house. The motor vehicle was being driven at very high speed. P.W.1 pleaded with the appellant to stop the motor vehicle to enable her alight but the appellant refused. He instead started to beat P.W.1. The appellant even switched off P.W.1's mobile phone and drove the motor vehicle towards lunga-lunga. P.W.1 said the appellant threatened to kill her. He drove into the forest where he continued beating her. P.W.1 pleaded with the appellant not to kill her. A struggle ensued and in the process the appellant made away with ksh.17,600/-, a gold ring, wrist watch and a handbag. It is said the appellant reversed the motor vehicle to the road, threw out P.W.1. He also threw at her the handbag. P.W.1 was left stranded on the road while bleeding profusely.

The appellant sped off with P.W.1's motor vehicle. P.W.1 boarded a Matatu to Diani police station where she recorded her statement about her ordeal. She found her car and the appellant at Diani police station. The police issued her with a P3 form. The police arrested the appellant. Upon searching him the police recovered P.W.1's mobile phone and a golden ring. Lucy Patricia [P.W.2] confirmed having seen P.W.1 and the appellant arrive together at Green village café at about 7.00 A.M. on 10/10/05. P.W.2 also saw the duo leave in P.W.1's car. The same story was recounted by Patrick Chege [P.W.3] and Ali Fondo Goni [P.W.4]. P.W.2, P.W.3 and P.W.4 each said they heard the appellant tell P.W.1 that he had left the taxi money in his house.

Corporal Zablou Ondiek [P.W.6] said he was on duty on 10/10/05 when at 10.00 A.M. he received a report through 999 that a woman was being robbed of her car. He visited the scene but was unable to find anybody. P.W.6 said the complainant arrived at the police station and identified the appellant who had already been arrested to be the person who assaulted her. P.W.1 also identified her mobile and gold ring to be her property taken from her by the appellant.

When placed on his defence the appellant denied committing the offence. He claimed the complainant was his girlfriend but the relationship went sour when his wife discovered the love affair.

The appellant said he wanted to abandon driving the complainant on 10/10/05 but the complainant refused to let him go. He said the complainant jumped out of the motor vehicle as he was driving to Ukunda. The appellant said he continued to drive up to the police station where he reported. He claimed the complainant tore his driving licence.

Having set out in brief the case that was before the trial court, let me now consider the grounds of appeal. The first ground of appeal argued is to the effect that there was no credible evidence proving the offence of robbery. It is the submission of Mr. Monda, that the doctrine of recent possession applies in this case. In my view, this ground is the main ground which should determine this appeal. A careful consideration of the evidence on record will reveal that the only evidence is that of P.W.1. There is no doubt that the appellant drove the complainant from her home to Green village café. The problem started when P.W.1 asked the appellant to surrender the money he collected from the taxi business. According to P.W.1, P.W.2, P.W.3 and P.W.4, the appellant told the complainant that he had kept the money at home. P.W.1 said the appellant drove her past her house towards Lunga-lunga and off-the road to the forest. At the forest, P.W.1 said the appellant robbed her of her mobile phone, the gold ring and ksh.17,000/-. P.W.1 also claimed the appellant threw her out of the motor vehicle before speeding off to an un-known destination.

P.W.6 said, he received a report from 999 that a woman had been robbed of her car near Ibis. P.W.6 with two police officers rushed to Ibis but found nobody at the scene. The police went back to continue with their work. P.W.6 said P.W.1 managed to identify the appellant at the police station to be her assailant. P.W.6 does not explain what the appellant had gone to do at their station. P.W.6 said he arrested the appellant. He searched him whereupon he recovered a mobile phone and a gold ring which were identified by P.W.1 to be her property. The appellant claimed the complaint was her girlfriend. Their relationship went sour when the appellant's wife discovered the illicit affair. According to P.W.6, the initial report received through 999 was that the complainant had been robbed of her motor vehicle. There was a no mention of the loss of a mobile phone or a ring. P.W.6 does not state what the complainant recorded in the OB in her initial report. The learned senior Resident Magistrate dismissed the appellant's defence as a make-up story to win the court's sympathy. After a careful re-consideration of the evidence, I am convinced that the appellant's defence was not properly considered by the trial court. It is apparent that the appellant gave sworn evidence and the prosecutor had a chance to cross-examine the appellant. The record shows that the prosecution did not deem it fit to question the appellant to clarify whether or not the appellant had an affair with the complainant. The appellant, made a serious allegation against the complainant which is to the effect that their love affair went sour and that she was bound to revenge by setting up the appellant. This issue has raised doubts in mind as to the genuinity of the charge. Let me go back to the evidence of P.W.6. The initial report is that the appellant had robbed the complainant of her car. P.W.6 did not explain in his evidence the kind of complaint booked by P.W.1. He just rushed and arrested the appellant after which he carried out a search. Without the evidence of the initial report made to the police, I am unable to find any credible evidence proving the offence against the appellant. There is doubt whether the complainant told the truth. I expected P.W.6 to dwell on the robbery of the complainant motor vehicle. In the circumstances of this case I find the evidence of P.W.1 and P.W.6 to be unreliable and untrustworthy. The police informer was not called upon to testify nor was his report to the police disclosed in the OB.

I am in agreement with the appellant that the benefit of doubt should be given to him. I adopt the statement of the law stated by the court of Appeal in **NDUNGU KITHINJI =VS= R. [1985] K. L.R.** that is to say

“a witness upon whose evidence the court is to rely on should not create an impression that he/she is not a straightforward person...”

There is no doubt in my mind that P.W.1 and P.W.6 may have told half truth.

In the final analysis, this appeal is allowed. The conviction and sentence are quashed and set aside respectively. The appellant is hereby set free forthwith unless lawfully held.

Dated and delivered at Mombasa this 5th day of May 2009.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Monda learned Senior State Counsel and the appellant in person.