

REPUBLIC OF KENYA

COURT OF APPEAL,

AT MOMBASA

Masime, Cockar JJA & Omolo Ag JA

Criminal Appeal No 58 of 1990

Lesidai.....appellant

v

Republic.....respondent

Judgment.

The appellant, after trial before the Principal Magistrate in Mombasa Resident Magistrate's court, was convicted of the offence of robber with violence contrary to section 296(1) of the Penal Code and sentenced to a term of six (6) year's imprisonment plus corporal punishment of ten (10) strokes, with a police supervision and reporting order for five (5) years after release. His appeal to the Superior Court against conviction and sentence was dismissed except that the corporal punishment was reduced to six (6) strokes. This, therefore, is his second appeal and, although it purports to be filed against both conviction and sentence none of the grounds of appeal is directed against sentence. Briefly the facts as found established by both the trial court and the superior court are that following an arrangement made between the appellant and the complainant Mr Stephen Alphonse Kimaro, a Tanzanian, the latter collected about Kshs.80,000 from four of his compatriots who were Miss Modesia Thomas Moshiro (PW2) Trifonia Malamosha (PW3), Mrs Margaret Ongache (PW4) and Mrs Anzila Kimaro (PW5) and added Kshs.30,000 of his own, all these sums being in Tanzanian currency. On 31/3/87 he took the total sum of Tanzanian Kshs.110,00 in a paper bag on his bicycle to give to the appellant at Chumvini market near Taveta in exchange of which the appellant had promised to give him an equivalent sum in Kenya currency. At the market the appellant was able to persuade the complainant to accompany him to his, the appellant's, house where the money was. At Thumu stream which lay on the way the appellant suddenly drew out a simi from under his coat, which he was wearing, and viciously cut the complainant at the back of his neck as if to sever it off. While the complainant lay on the ground bleeding the appellant took possession of all the money and the complainant's bicycle and made off. At Chumvini Police station the appellant holding his simi reported that he had slashed someone who had robbed him of Kshs.5,000 and shs.100,000 in Tanzanian currency. He does not appear to have offered any explanation at the police station about the bicycle that he was riding. Both the trial court and the superior court had believed and accepted the evidence of the complainant and the rest of the prosecution witnesses and had rejected the appellant's version of the incident.

Three of the five grounds of appeal have complained of reliance by the 1st appellate court on the findings of the trial magistrate instead of doing its own independent evaluation of evidence, unreasonableness of the appeal judge in calling him a liar on his complaint in the lower court that he did not know Swahili language, and the unfavourable view taken by both the lower courts of omission on his part, to explain to the police about the bicycle he was riding. We have carefully considered these grounds but do not find any relevance in any of them. The learned judge had ample reason to regard the complaint regarding Swahili, as an after thought because it was not a ground of appeal. In any case the record of trial on the date of commencement before the magistrate on 3.7.87 shows that there was a Masai interpreter present. At the conclusion of the trial on the same day an order for payment for services to the Masai interpreter is also recorded.

Clearly the Masai interpreter was there to do interpretation for the benefit of those, including the

appellant, who wanted to have proceedings and evidence interpreted into Masai language. This is an utterly worthless ground of appeal. As regards the unfavourable view taken by the lower courts over the omission by the appellant to explain about the bicycle the courts in our view, were entitled to comment on that omission.

Grounds 1 and 5 of the appeal have expressed the appellant's disbelief over the acceptance of the sole evidence of the complainant about the incident as against the appellant's evidence (unsworn statement) and his action of immediately reporting to the police which was consistent with innocence. Both the trial magistrate and the learned judge had evaluated the evidence in detail. Both had given full consideration to the defence raised by the appellant. The evidence of the sole prosecution witnesses to the incident, that is the evidence of the complainant, was fully corroborated by that of the other four Tanzanians who had contributed to the sum that was brought by the complainant to the market. That evidence established beyond doubt that the sum of Kshs.110,000 had belonged to the complainant. The very foundation of the appellant's defence was thereby demolished. We are in full agreement with the concurrent finding of facts, by both the lower courts. This, in our view, is a sound conviction. The appeal against conviction is dismissed.

Orders accordingly.