REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 98 OF 2013 (CONSOLIDATED)

MUSTAFA ABDIRAHMAN ALI.....….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(From the conviction and sentence in Garissa SRM Criminal Case No. 517 of 2001- Hon. King'ori SRM)

JUDGMENT

This appeal has a long history which explains the delay in its determination, and also why there are two appeals arising from the same criminal case.

The appellant initially filed Meru High Court Criminal Appeal No.6 of 2003. In 2009, he filed Nairobi High Court Criminal Appeal No. 329 of 2009. In 2010, the High Court in Meru transferred Meru High Court Criminal Appeal No. 6 of 2003 to Nairobi and it was given Nairobi High Court Criminal Appeal No. 666 of 2010. Therefore on the basis of an application made by the appellant at Meru- another appeal file-MeruHigh Court Criminal Appeal No. 52 of 2013 was opened. Meru High Court Criminal Appeal No. 52 of 2013 was directly forwarded to the Garissa High Court from the Meru High Court . Nairobi High Court Criminal Appeals No. 329 of 2009, and 666 of 2010 were forwarded to Garissa High Court by letter dated 12th July, 2013.

At Garissa the two appeals from Nairobi were given High Court Criminal Appeal No. 98 of 2013. However, the appellant made an application to appeal out of time, and High Court Criminal Appeal No. 105 of 2013 was opened. All efforts to trace the original trial court file were not successful. However the typed record of the trial court was received sent to the Garissa High Court from Nairobi High Court under Appeal No. 666 of 2010.

The appellant was charged in the magistrate's court at Garissa with attempted robbery contrary to section 279(2) of the Penal Code. The particulars of the offence were that on 3rd September, 2001 at Garissa Municipality in Garissa district within North Eastern Province jointly with others not before court or armed with a weapon a Maasai sword attempted to rob Henry Gakiria Gachuri and immediately after the time of such attempted robbery did grievous harm to the said Henry Gakiria Gachuri.

He denied the offence. After a full trial, he was convicted of the offence and sentenced to suffer death as by law prescribed.

He has now come to this court on appeal. It is of note that the appellant filed grownds of appeal in typed form in Meru Criminal Appeal No. 6 of 2003 on 29th January, 2003. He also filed a Memorandum of Appeal in Nairobi Criminal Appeal No. 329 of 2009 on 5th of August 2009, without indicating whether it

is an amended petition of appeal and disclosing that he had filed another appeal in Meru. The file in Meru Criminal Appeal No. 6 of 2003 was later forwarded by the judge at Meru to Nairobi on 17th November 2010, and Criminal Appeal No. 666 of 2010 opened in Nairobi. All these files were forwarded to Garissa. Meru Criminal Appeal No. 52 of 2013 which did not have a petition of appeal was also forwarded to Garissa.

At Garissa, after the court opened Garissa Criminal Appeal No. 98 of 2013, the appellant yet filed another Appeal no. 105 of 2013 whose grounds of appeal which relied upon are as follows:

1. That the trial magistrate erred in convicting him without considering that he was not positively identified as there was total darkness.

2. The trial magistrate erred in convicting him without considering that there was no description or identification mark given in the first report.

3. The trial magistrate erred in convicting him without considering that the doctor who examined the complainant was not brought to testify hence the P3 form was irrelevant.

4. The trial magistrate adds in convicting him without considering that his arrest was poorly administered.

5. The trial magistrate erred in convicting him without considering that an identification parade was not done to ascertain the truth of prosecution allegation.

6. The trial magistrate erred in convicting him without considering that there was no dusting or DNA test done whether he was the holder of the alleged exhibits.

7. The trial magistrate erred in convicting him without considering that the evidence of PW2 was inadmissible, and the rest of the prosecution witnesses evidence was fabricated, contradictory and in consistent.

8. The trial magistrate erred in law and fact to convict him without considering that no investigation was done hence causing great disadvantage in his life.

The appellant also filed a document airing Article 25,27,28,48,50 of the Constitution, as well as sections 347, 351 and 353 of the Criminal Procedure Code (cap. 75). At the hearing of appeal, the appellant stated that as the initial appeal No. 6 of 2003 at Meru was dormant, he filed Criminal Appeal No. 329 of 2009 in Nairobi. Later, the appeal in Meru was forwarded to Nairobi and given no. 666 of 2010, and that all the appeals had now been sent to Garissa and given Criminal Appeal No. 98 of 2013 and No. 105 of 2013. He stated that he had filed written submissions and would await the decision of the court in this long pending matter. He added that because the offence charged was attempted robbery, he should have been sentenced to 7 years imprisonment but instead was sentenced to death. He asked to be released to obtain his identity card which he lost at Garissa Police Station.

Learned Prosecuting Counsel Mr. Okemwa opposes the appeal. Counsel submitted that the offence was attempted robbery and three prosecution witnesses tendered evidence to prove the prosecution case. A P3 form was produced as an exhibit to prove the injury suffered by the complainant. According to counsel, the evidence of the single witness PW1, was corroborated by two other two witnesses. Counsel emphasized that the complainant PW1 was injured and there was evidence that the appellant was armed actually and was in the company of others.

Counsel relied on the case of OLUOCH-VS-REPUBLIC (1985) KLR 545 where the Court of Appeal stated that a fact can be proved by a single witness, though a trial court had a duty to exercise case when relying on such evidence of identification of a single witness to convict. Counsel asked the court to reevaluate the evidence on record and come to its own conclusions.

The prosecution evidence was in summary that PW1 Henry Gakiria Gachuri a business man at Garissa, was on the 3rd of September, 2001 at 10.30 pm walking to his bar on Kenyatta road in Garissa when he passed through an alley and he saw the appellant and others sitting on the edge of the veranda. He knew the appellant before and recognizes him and saw him in the and florescent light on the veranda. The complainant (PW1) then went back home. After 15 minutes as he walked back to his bar, when he felt a person holding his caller from behind and on turning recognized that it was Mustafa holding his collar accompanied by two others. According to PW1 the two other were not armed, but Mustafa was armed with a Masaai sword and ordered him to give him money or he would kill him. The complaint (PW1)then screamed saying that he did not have money and they struggled.

A watchman then approached and the complainant managed to set himself free and Mustafa went back to the alley. Around this time PW2, police constable Evans Ambae of Wilson Airport, arrived at the scene from Nairobi. He saw the struggle and proceeded to his nearby house, armed himself with a rifle and came back. He noticed a man who was bleeding seriously surrounded by three men, who ran away in different directions. The man with the sword however tried to attack him but he fired in the air and the man dropped the sword. He then struggled with him with assistance of three members of the public. He overpowered him and took him to the police station together with the sword. This person was the appellant at the police station,

The complainant(PW1) proceeded to Garissa General Hospital for treatment, before going to the police station. He was treated and a P3 form filled and signed. The injuries suffered were disserved on maim.

In his unsworn defence, the appellant stated that he came from the mosque at 8.15 pm and found a crowd of people arrested by the police. He was arrested, taken to the police station and derogated. On 6th September, 2001 he was charged in court with robbery which he did not know about.

This being a first appeal, I am required to reevaluate the evidence on record and come to my own conclusions and inferences. I have to take in to account the fact that I did not have the opportunity to see witnesses testify to determine their demeanor. See the case of OKENO –v/s Republic (1972)EA 32.

I have revaluated the evidence on record. The appellant has come to this court on appeal on several grounds. This case is predicted on identification.

The appellant was identified by a single witness the complainant PW1 Henry Gakiria Gachuri as his attacker. PW1 is the person who described the incident, the demand of money and the use of a weapon (sword) to stab him. His evidence was that it was the appellant, who he knew before as a neighbor who demands money, held him by the collar, and also stabbed him using the sword . He stated that he knew the appellant before as a neighbor. Further that there was light from an electric lamp at the scene of crime.

In the case of OLUOCH versus REPUBLIC (1985) KLR 549 cited by Prosecuting Counsel it was held at page 554 as follows:

“Mr. Bwonwoga argued and submitted that the senior resident magistrate and the judge made concurrent findings on identification which are supported solely on the evidence of PW3 Cypriano Onyango. It is trite law that a fact may be proved by a single witness but when such evidence is in respect of an identification it must be tested with the greatest care-Roria versus Republic (1967) EA 583, Abdalla Bin Wendo and Another versus R(1953)20 EACA 166 and Bejamin Mugo Mwangi and another versus Republic – Criminal Appeal No. 100 of 1984 unreported).”

In our present case, the evidence of the complainant PW1 was supported by that of PW2 PC Ambae who, as a passerby, saw people struggling. He rushed to his nearby house took a rifle and came back and saw a person bleeding surrounded by three people. Because he was armed with a rifle the three people tried to run away, but the one of them who was armed with a knife attempted to attack him. PW2 shot in the air and the man dropped a knife and, after struggle and with the assistance of other members of the public, the appellant was overpowered, arrested and taken to the police station by PW2 together with the knife.

The complainant later arrived at the police station after and confirmed that the appellant was the assistant. I agree with the prosecuting counsel that the evidence of the single identifying witness was consistent with that of PW2. There was no possibility was taken to the police station and there were no opportunity to describe the aslant with the police before arrest. That would be impossible. In my view the evidence of PW1 and PW2 on record places the appellant at the scene and connect him to the incident as the culprit. After PW1 the complainant. Freed himself, PW2 arrived at the scene from his home with a rifle and met the appellant and two others and, managed to arrest the appellant after ,,,, in the air and took him and the knife to the police station. The of mass police arrest is not believable.

When the appellant says that there was no positive identification as there was total darkness at the same, the evidence on record is contrary to that allegation. He did not challenge the evidence of the prosecution regarding lighting at of the trial.

When he says and that no description was given in first report I have said above in this judgment that the complainant reached the police station after the appellant was arrested and handed over to the police at the station. The complainant could not this give description of the appellant to the police before arrest, as the complainant proceeded to hospital first.

With regard to the production of P3 form by a person who was not the maker, the law under section 77 of the Evidence Act (cap 80) allows the procedure adopted. The appellant neither objected to the production of the P3 report nor he did the cross-examine serious on its contents. It is too late for him to bring such issue on appeal.

With regard to the mode of arrest, there is nothing on record to indicate that the arrest of the appellant was irregular or poorly administered.

With regard to lack of identification parade, the complainant already knew the appellant before. Therefore an identification parade, would be unnecessary as held in the case of OLUOCH -v/s-REPUBLIC(Supra)

With regard to failure of the prosecution to dust the knife, again that issue has been raised on appeal too late, on the appellant at the trial never denied ownership or possession of the knife.

I see no contradictions in the evidence, or admission of inadmissible evidence the trial court. The investigations also were in view were not faulty in the circumstances of the case.

Lastly the Articles of the Constitution and the sections of Criminal Procedure Code(cap. 75), relied upon by the appellant do not assist him. Merely listing Articles of the Constitution and sections of the written laws without stating or indicating how they are applicable in the particular case, is not helpful to an appellant. In addition, this court at the appellate level cannot issue declarations on fair trial and declarations on remedies. That can only be done in constitutional or civil proceedings. The appellant maimed the complainant. He cannot claim that he was wrongly convicted and sentenced under section 297(2) of the Penal Code.

To conclude, I find that this appeal lacks merit. The sentence is the lawful sentence allowed by law. I dismiss the appeal and uphold both the conviction and a sentence of the trial court.

Right of appeal fourteen (14) days.

Dated and delivered at Garissa this 25th of April, 2017.

Geoge Dulu

Judge