



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 6 OF 2014

ALI DZOMBO MWAGONGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 294 of 2012 of the Principal Magistrate's Court at Kilifi – A.M. Obura, PM)

JUDGEMENT

The appellant was charged with the offence of attempted robbery with violence contrary to section 297 (2) of the Penal Code. The particulars of the offence were that the appellant on the 18th January 2012 at Ganze trading centre in Kilifi County within Coast Province, jointly with others not before court while being armed with dangerous weapons namely a panga, attempted to rob Njeru Kithinji his motor vehicle registration Number KBE 400B Nissan matatu and at or immediately before or immediately after the time of such attempted robbery wounded the said Njeru Kithinji.

The appellant was also charged with a second count of grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that the appellant on the 18th January 2012 at Ganze trading centre in Kilifi County within Coast province unlawfully did grievous harm to Njeru Kithinji.

There was a third count of malicious damage to property contrary to section 339 (1) of the Penal Code. The particulars of the offence were that the appellant on the 18th January 2012 at Ganze trading centre in Kilifi County within Coast Province, jointly with others not before court willfully and unlawfully damaged a motor vehicle registration No. KBN 671Y Toyota Voxy valued at Kshs.900,000/= the property of Stephen Menge Johnson.

The trial court convicted the appellant on all the three counts and sentenced the appellant to death. The grounds of appeal are that the death sentence is unlawful, that the trial court relied on dock identification, that PW1 and PW3 did not lead to his arrest and no identification parade was conducted, that the appellant's arrest had no connection to the current case, that the photograph evidence produced was inadmissible as it was produced by a person not authorized by the law. Lastly, that his alibi defence was not considered.

Mr. Gekanana, counsel for the appellant argued all the grounds together. Counsel submitted that no identification parade was conducted yet it was important. There was one person by the name of Baraza who was mentioned to have been involved in the hiring of a motor vehicle but he was not called to

testify. The photographs were produced contrary to section 78 of the Evidence Act.

Mr. Monda, prosecuting counsel, opposed the appeal. Counsel submitted that PW1 testified as to how they were attacked by the appellant and his colleagues. He later saw the appellant at a police station and this made an identification parade unnecessary. PW2 identified the appellant through a photograph. The appellant was photographed before a motor vehicle was hired to them. They said they were attending a funeral. The hired vehicle was later recovered. The appellant was at the scene of crime. The evidence was strong against the appellant and the photographs were produced without objection. Baraza was only involved in the hiring of the vehicle and his evidence was not going to add any value.

As the first court to deal with the appeal we are duty bound to evaluate the evidence before the trial court and make our own conclusion. Seven witnesses testified before the trial court. PW1 NJERU GITHINJI was the complainant in counts 1 and 2. He testified that he is a matatu driver. On 18th January, 2012 at about 6.30 pm he was driving his matatu near Ganze and the only passenger was an AP officer (PW7). PW7 got a phone call that there were suspicious people at Ganze shopping centre. They proceeded there and met one Kambe Nyaga. PW7 inquired about the strangers but they were not there. As they drove on, they met two people walking ahead of them. PW7 asked them about their chief and the area but they could not give sufficient information. They were asked if they knew PW1 but they said they did not. PW7 told them there was information that there were strangers in the place. At that junction one of the two people removed a panga and asked who are those who wanted to burn them. They started running away and people started to run after them. PW1 drove the vehicle and met a man ahead of him. The man was armed with a panga and told him to leave the vehicle. The man cut him with the panga on his right little finger as he tried to shield himself. The man tried to start the matatu vehicle but it could not. Shortly, another vehicle registration number KBN 671Y arrived at the scene and the strangers entered and drove off.

It is the evidence of PW1 that he was taken to Ganze dispensary where he was treated. He reported to the police the following day 19th January, 2012. On 13th March, 2012 while following up his P3 form, he passed at the Kilifi CID office at about 4.00 pm. He was surprised to see the appellant who was the same person who had assaulted him at the station. He screamed that that was the man who had assaulted him. He was wearing the same clothes as the ones he was wearing during the attack.

PW2, Doctor AGNES KALU produced the P3 form which stated the injuries sustained by PW1. PW3 STEPHEN MWENGE JOHNSON is a taxi operator. He also deals with hiring of motor vehicles. On 18th January, 2012 at about 1.00 pm he received a call from one Baraza whom he knew. Baraza told him that he had customers who wanted to hire a vehicle. He went to the office in Mombasa town and the vehicle was released to the appellant. It was motor vehicle registration No. KBN 671Y Toyota Voxy. The following day he received a call from Ganze District Commissioner's office and asked to take his identification documents for the vehicle. He went there and produced the documents together with the appellant's photograph which he had taken before releasing the vehicle to him. He also had an identification card for the appellant's colleague who was the driver. He did not know the appellant and it is Baraza who introduced him to them.

PW4 JEREMIAH KARIUKI IRERI is PW1's conductor in the matatu registration No. KBE 400B. On the 18th January, 2012 at about 6.00 pm they were at Ganze when they got information that there were some suspicious people at Ganze shopping centre. They met two people and the police officer who was in the vehicle inquired from the two whether they were aware that there were strangers there and it was prudent for them to report to the area chief otherwise they risked being lynched. Suddenly one of the two men removed a panga from his shirt and screened "*tuchomoe ama tuuliwe na nani?*" They started running and the police ran after them. Another group of four tried to attack them and PW1 removed his hand to prevent an attack. He was cut with a panga. One of the thugs tried to start the vehicle but couldn't. The thugs then ran away in motor vehicle No. KBN 671Y. PW4 took PW1 to hospital.

PW5 PATRICK SIMIYU is a taxi operator and hires motor vehicles together with PW2. On 18th January, 2012 they hired their motor vehicle to the appellant and his colleagues. The following day they

were called by police officers from Ganze who wanted to confirm if the motor vehicle was theirs. They went to Ganze and produced the ownership documents. The appellant was introduced to them by one Baraza. After several months he got a call from Baraza informing him that the appellant was about to be killed at Bombolulu. The appellant was arrested and taken to Nyali police station. The driver who was with the appellant signed the motor vehicle hiring agreement. They hired motor vehicle No. KBN 617Y Toyota Voxy.

PW6 P.C. SAMUEL KAUNTI was based at the Kilifi CID office. He was instructed on 22nd January, 2012 to investigate the case. He talked to all the witnesses including PW7. He discovered that the vehicle the robbers were using to escape hit a rock and overturned and the robbers left on foot. On 13th March, 2012 they got a call from the OCS Nyali police station and were informed that there was a victim of mob justice who was a suspect of a crime which had been committed in Kilifi. The appellant was taken to Kilifi police station. While being interrogated PW1 passed by and he informed him that it was the appellant who had attacked him. According to PW1, the appellant was wearing the same clothes as the ones he had during the attack. The appellant was later charged with the offences.

PW7 INSPECTOR AHMED KUGARE was attached to Ganze District Commissioner's office. On 18th January, 2012 at about 6.45 pm he was travelling in motor vehicle No. KBE 400B, a matatu heading to Ganze. He received a phone call that there were some people at the shopping centre who looked suspicious. While approaching Ganze town, they met two men who could not tell him the name of their chief or village chairman. They even didn't know PW1 who is well known in the area. People started shouting "*ndio hao*". The two men started running away and they pursued them. He later learnt that PW1 had been cut with a panga on his hands. The two men he ran after were not arrested.

In his sworn evidence, the appellant stated that he is a carpenter. He had a friend by the name Kahindi Kibunda who is a mason. He told him to get for him a seven seater vehicle. He made inquiries and he was referred to a motor vehicle hirer in Mombasa town. He went to town and told the owners of the vehicle that his friend wanted to go and pay dowry at Samburu. He first wanted to go to Ganze where he comes from. The owners of the vehicle took details of the driver's driving licence and identity card. They even photographed him. His role was simply to hand over the vehicle. The vehicle was Toyota Voxy. He was also photographed as a normal procedure. He was later arrested and taken to Kilifi police station. PW1 was called and went to the station. He was asked whether he knew him and he said he did not. He was later charged with the offence. No identification parade was conducted since PW1 failed to identify him.

The issues for our consideration are whether the appellant was properly identified and whether the prosecution proved its case beyond reasonable doubt. The prosecution evidence shows that there was information at Ganze shopping centre on 18th January 2012 that suspicious people were around. PW1, PW4 and PW7 were in a matatu registration No. KBE 400B when they met two people near Ganze shopping centre. These two people could not tell who their chief was neither did they know PW1 who is a well known matatu driver in the area.

It is also established that PW7 asked the two people to go to the area chief or they risked being lynched by members of the public. One of the two people removed a panga and started running. The police officer ran after them but did not manage to arrest any of them. On the other hand, PW1 drove ahead and met one of the two men. He switched off the vehicle. The man tried to attack PW1 with a panga and hit him on the right little finger. It is the evidence of PW1 that the men asked who wanted to burn them. This is in line with the evidence of PW4 who indicated that the men shouted "*Tuchomoe ama tuuliwe na nani*".

The other relevant evidence is that of PW3 and PW5. It is their evidence that they hired their vehicle to the appellant on the same day 18th January 2012. The appellant was not arrested at Ganze on that day. It seems he was arrested at Bombolulu on 13th March 2012. PW1 and P36 did not give the date when PW1 saw the appellant at the Kilifi CID office and recognized him.

The picture painted by the evidence is that no robbery had taken place at Ganze shopping centre. It cannot be concluded with finality that the appellant had hired the motor vehicle registration No. KBN 671Y with the sole intention of using it to commit a robbery. There is no evidence that a specific business or household at Ganze shopping centre was targeted to be robbed. It can be noted that the evidence shows that the two men were armed with a panga.

The appellant's evidence is that he did not travel to Ganze. PW1 saw the appellant in around March, 2012, about two months later and was able to identify him as one of those people who were at Ganze on 18th January, 2012. That identification by PW1 led to the evidence by PW3 and PW5 that indeed the appellant had hired a vehicle from them on 18th January, 2012 at Mombasa. That evidence cannot be held to be mere coincidence. The allegations of alibi defence cannot hold. We do find that the appellant was at Ganze on 18th January, 2012 at about 6.30 pm.

The next issue is whether the prosecution proved its case beyond reasonable doubt. It is established by the evidence of PW1 and PW4 that the residents of Ganze were out to lynch the suspicious people. The appellant and his colleagues felt that their lives were in danger. According to PW4, they asked who wanted to burn them. PW7 told them that they would be lynched by members of the public if they did not report to the area chief. PW7 testified that people shouted "*Ndio hao*" – "It is them". We do not find that there was no intention to steal the matatu at that time. The evidence further shows that PW1 drove ahead and caught up with the appellant. By that time the Voxy vehicle was not at the scene. The appellant felt that his life was in danger and the only way out was to defend himself. PW1 ran out of the vehicle. By the time the appellant entered the vehicle, PW1 was not driving it. The appellant tried to use the vehicle to escape. He had already assaulted PW1. The vehicle could not start. The scene paints a picture of tension. The tension had not been caused by the appellant. The residents were out to kill the appellant and his colleagues. They were only two people as there is no evidence that many people emerged from the Voxy vehicle.

Given the evidence on record, we do find that there was no intention to rob PW1 of the matatu vehicle. The appellant simply wanted to use the vehicle to escape from being lynched. Fortunately, the vehicle did not start. The Voxy vehicle emerged and the appellant managed to escape.

Given the evidence on record we do find that count one of the charge in relation to attempted robbery with violence was not proved beyond reasonable doubt. There was no intention to rob PW1 of the vehicle. We however find that count II in relation to causing grievous harm was proved. We do find that although the appellant was trying to defend himself from being lynched, he was already armed and assaulted PW1. The 3rd count involves the damage to motor vehicle registration No. KBN 671Y. That count was not proved. There was no evidence that the vehicle was damaged. No valuation or inspection report was produced. Photographs alone cannot prove loss. PW3 and PW5 did not provide documentary evidence on the alleged loss.

In the end, we do find that count I and III of the charges were not proved beyond reasonable doubt. We do find the appellant guilty of count II, causing grievous harm contrary to section 234 of the Penal Code. The death sentence is hereby set aside. According to the P3 form PW1 suffered a deep cut on the right little finger. The injury was stitched.

In the end, we do find that the appeal on the first count of attempted robbery with violence is merited and is hereby allowed. The circumstances made the appellant to try all possible means to escape. The appellant is found guilty of the second count of causing grievous harm contrary to section 234 of the Penal Code. He shall be convicted accordingly. Count III was not proved. Taking all the circumstances of the case into account, the appellant is hereby sentenced to serve five (5) years in prison from the date of conviction. The death sentence imposed by the trial court is hereby set aside.

Dated and delivered in Malindi this 29th day of August, 2016.

S.J. CHITEMBWE

MARTIN MUYA

JUDGE

JUDGE