



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 21 OF 2015**

*(From Original Conviction and sentence in Criminal Case No. 1380 of 2013 of the Chief Magistrate's Court at Garissa – B. J. Ndeda – S.PM).*

**IBRAHIM ALI MOHAMED ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant Ibrahim Ali Mohamed was charged in the Chief Magistrate's Court at Garissa with two counts of robbery with violence. He was also charged in the alternative with handling stolen goods.

The particulars of count 1 for robbery with violence contrary to section 296(2) of the Penal Code were that on 31st August 2013 at Dagahaley Refugee Camp in Dadaab District within Garissa County jointly with others not before court robbed Mannah Abdullahi Hamud Kshs 35,000/=, gold chain and ring valued at Kshs 92,000/- and four mobile phones valued at Kshs 25,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the said Mannah Abdullahi Hamud.

The particulars on the 2<sup>nd</sup> count of robbery with violence were that on the same day and place jointly with others not before court robbed Nurta Barre Ibrahim Kshs 3,000/-, and Nokia Mobile Phone make 1280 valued at Kshs 2,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the said Nurta Barre Ibrahim.

The particulars of the alternative count of handling stolen goods contrary to Section 322(1)(2) of the Penal Code were that on the same day and place, otherwise than in the course of stealing dishonestly retained one mobile phone make Nokia 1280 knowing or having reasons to believe it to be stolen goods the property of Nurta Barre Ibrahim.

He pleaded not guilty to all the charges. After a full trial, he was convicted of the two main counts of robbery with violence. He was sentenced to hang as per the law in respect of count 2 but was discharged under Section 35 (1) of the Penal Code for the 1<sup>st</sup> count of robbery with violence.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his initial grounds of appeal on 5<sup>th</sup> March 2015. However before the hearing of the appeal, he filed amended grounds of appeal and written submissions, which he relied upon. His grounds of appeal are as follows:-

1. That the case of the prosecution was not proved beyond reasonable doubt.
2. That there was no evidence tendered regarding his description during the first report that was made to the police on the incident.
3. That he was not positively identified at the scene and that the identification parade was not convincing.
4. That the magistrate wrongly convicted him on an allegation of possession of the mobile phone which was not proved by production of any agreement or tangible evidence that he sold the phone.
5. That the magistrate did not consider his strong defence which rebutted the prosecution evidence.
6. The magistrate erred in convicting him on the basis of contradictory and uncorroborated evidence.

During the hearing of the appeal, the appellant made highlights to his written submissions which I have perused and considered. He stated that he was buying ice in a shop when Abdi Zain brought the police who arrested him. He stated that Zeinab and Abdi were also arrested and confined in the police station but were later released because they paid their way. He stated also that he had a disagreement with Abdi because the appellants son had fought the son of Abdi and he was ordered by the elders to pay Kshs 50,000/= and managed to pay only part of that amount. He asked the court to do justice.

Learned prosecuting counsel Mr. Okemwa opposed the appeal. Counsel submitted that 8 witnesses were called by the prosecution and the ingredients of the two offences on which the appellant was convicted were proved. Counsel emphasized that the culprit were 3 people, they were armed and also used actual violence on their victims in order to make their intended robbery succeed. Counsel submitted that among the 3 robbers, only the appellant did not cover his face and he was thus identified in the electricity light by 4 people. PW1 clearly stated that the appellant had a limping leg. Lastly counsel submitted that the appellant did not ask for the OB entry to be produced in court to show what was actually reported by the complainants to the police and was wrong to raise that issue in the appeal court.

The prosecution evidence in brief is that PW1 Mannah Abdillahi Hamud was at her house at Dagahaley Refugee Camp at 8.00 Pm watching television with her children, when the door was forced open by three people. One of the three people was the appellant who placed a gun on her head and demanded money. The appellant had an open face while the other two covered their faces with veil.

In response to the demand for money, PW1 gave out her purse containing Kshs 35,000/- and the assailants then took a charging mobile phone and her gold chain and earrings. As the incident was unfolding, two girls PW2 Nurta Barre Ibrahim and PW5 Nathifo Barre entered the house without knowing what was happening. They were also robbed of gold rings and a mobile phone.

The robbers then left the house and a report was made to the police station. Some days afterwards and after the police had contacted Safaricom Limited, the mobile phone of Nurta Barre was traced at Ifo Refugee Camp. The police traced this mobile phone to Zainab Roble PW4. When she was arrested she gave the name of the person who had bought it for her PW3 Abdi Hussein Ibrahim. Abdi Hussein Ibrahim PW3 stated that he bought the mobile phone from the appellant. Zainab Roble, Abdi Hussein and the appellant were initially arrested, however Zainab Roble and Abdi Hussein were later released and the appellant was charged with offences after he was identified by witnesses in an identification parade.

In his defence, the appellant tendered sworn testimony. He also called three witnesses.

It was his defence that on 5<sup>th</sup> October 2013 at 11.30 am he sold ice to a lady at Kshs 1,000/= and, while returning her change, he suddenly saw a police vehicle. Both were arrested and taken to another lady house, then to Dagahaley police station. He was later charged with an offence he did not understand. He said that he was married to 3 wives one of whom was mentally disabled.

DW2 Hassan Abdi stated that he knew the appellant as a person who sold ice. DW3 Sangaba Ali Hussein also said that he knew the appellant as a person who sold ice. DW4 Abdullahi Hussein also said that the appellant sold ice cubes and that they had lived together since 1994.

This is a first appeal. As a first appellate court, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. See the case of *Okeno -vs- Republic (1972) EA 32*.

I have re-evaluated the evidence on record. The appellant has raised several grounds of appeal.

He has said that the evidence of prosecution witnesses was contradictory. My perusal and evaluation of the evidence does not disclose any contradiction of a significant nature in the evidence of the prosecution witnesses. I dismiss that ground.

The appellant has stated that his son had fought with Abdi's son and according to that was the reason why he was implicated in this matter. There was no such complainant. All the complainants were females. They were all in a house of PWI the complainant in count 1, when the incident occurred. I find no basis for the appellant's contention that he was implicated in this matter because his son had fought the son of another man. I dismiss that complaint.

The appellant has contended that the report in the OB did not indicate or describe him. The issue of the report entered in the OB at the Dagahaley police station did not arise as an issue in the trial. The OB was not produced in evidence. The appellant did not ask for a production of the OB report, nor did he challenge the entries therein. It can thus not be said that his description was not given in that report. That allegation by him on appeal, in my view, is an afterthought. If he was serious and wanted to challenge the contents of that report, he should have challenged that report at the trial court or asked for the production of the OB report which he did not do. Even on appeal, he has not asked for production of the OB report. I dismiss that complaint.

The appellant has stated that his identification was not positive. The eye witnesses to the incident state that there was electricity light in the house that night. They stated that the appellant did not cover his face like the other two robbers. They stated that the incident took long time, approximately one hour, within which they were with the appellant, and thus could identify him.

I note that there is no evidence that the appellant was arrested because of any description given by the complainants. He was arrested because he was said to have sold a mobile phone, the subject of the 2<sup>nd</sup> charge of robbery with violence, to a person who testified as a witness. He denied selling that mobile phone and said that he dealt in the sale of ice cubes. He was arrested in the absence of all the people who were in the house where the robbery occurred.

However when these people were called to an identification parade, they all identified him by touching. There is no evidence that the appellant was seen by any of the identifying witnesses before the identification at the parade. In my view it cannot be a coincidence that all the people who were in the house where the robbery occurred, and were not present when the appellant was arrested, would easily identify him while standing in different positions at an identification parade. In my view it is clear from the evidence that due to the duration of time on the robbery incident of about 1 hour, and the fact that there was light from an electric source, and the fact that the appellant did not cover his face meant that the witnesses could easily identify him when they saw him later at the identification parade. I am mindful of what was stated by the Court of Appeal in *Nzaro -vs- Republic (1991) KLR 70* that

***“whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence allege to be mistaken, the Judge should warn the Jury of the special need for caution before convicting the accused person in reliance of the correctness of the identification”.***

In my view the circumstances of the identification herein were such that there was no possibility of mistaken identity. In my view the appellant was positively identified as one of the robbers. I will uphold

the conviction.

The learned trial magistrate convicted the appellant on two counts but in sentencing, discharged the appellant under Section 35(1) of the Penal Code in Count 1, for robbery with violence and sentenced the appellant to death in count 2 for robbery with violence. Though ordinarily the sentence on the other count should have been left in abeyance instead of a discharge, I find no prejudice caused to the appellant by the trial courts order of discharge. For that reason, I will not interfere with the sentence.

To conclude, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and the sentence of the trial court.

**Dated and delivered in Garissa this 29<sup>th</sup> day of September 2016.**

**GEORGE DULU**

**JUDGE**