



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 4 OF 2011

(From The Original Conviction And Sentence In The Criminal Case No. 1474/2009 Of The Senior Resident Magistrate's Court At Kwale: E. K. Usui Macharia – Srm)

ABDALLA MALOBA ANYANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant **ABDALLA MALOBA ANYANGA** has filed this appeal to challenge his conviction and sentence by the learned Senior Resident Magistrate sitting at Kwale Law Courts. The appellant was first arraigned before the trial court on 16th October, 2009 facing two counts as follows:

- i. Robbery with violence contrary to section 296(2) of the Penal Code.
- ii. Resisting lawful arrest contrary to section 253(b) of the Penal Code.

The appellant entered a plea of 'Not Guilty' to both counts and his trial commenced on 4th January, 2010. The prosecution led by **CHIEF INSPECTOR GITONGA** called a total of six (6) witnesses in support of their case. The brief facts of the prosecution case were that on 3rd May, 2009 **PW1 ABDALLAH OMAR DOSHO** who operated a boda boda taxi was hired by two men to ferry them from Kwale town to Mwachinga in Mwaluganje. They agreed on a fare of Kshs. 800/= for the journey. The party set off for their destination in the morning hours. After dropping them off the two men instructed **PW1** that they would call him when they were ready to leave. At 3.00 p.m. they called **PW1** who returned to Mwachinga to pick them up. On the return journey the two passengers asked **PW1** to stop saying that they wanted to relieve themselves. When he stopped the two turned on him and pulled out a knife demanding that he hand over the motor cycle to him. They pulled **PW1** off the bike and rode off. **PW1** reported the incident to police at Kinango police station. He also informed his brother **CORPORAL MATANO HASSAN MABEYA PW2** who had purchased the motor cycle for him. Thereafter police officers from Diani CID managed to obtain a printout of the phone number 0710-569055 which the robbers had used to communicate with **PW1** from the service provider. Using this information they traced a man known as Saidi. This Saidi then led police to Mtwapa where he pointed out the appellant. Upon seeing the police the appellant took to his heels. The police gave chase and in the melee that followed the appellant was shot in the neck. He was rushed to Msambweni District Hospital where he was treated. **PW1** went to the police station and identified the appellant as one of the men who had robbed him. The appellant was thereafter charged with the two offences.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He gave a sworn defence in which he denied in any way being involved in the robbery against **PW1**. On 6th January, 2011 the learned trial magistrate delivered her judgment in which she convicted the appellant on both counts and sentenced him to death for the charge of Robbery with Violence. Sentence on the second count was held in abeyance. Being dissatisfied with his conviction and sentence the appellant filed this appeal.

The appellant who acted in person during the hearing of this appeal chose to rely entirely upon his written submissions which had been duly filed in court. **MR. MUNGAI** learned state counsel made oral submissions opposing the appeal. We note that in his written submissions the appellant confined his submissions **only** to the conviction on the first count of Robbery with Violence. He made no submissions challenging his conviction on the 2nd count. Likewise we shall confine ourselves only to consideration of his appeal against his conviction on this first count. The appellant raised the following grounds in his appeal:

- Identification
- Lack of recovery of exhibit
- Failure to conduct an identification parade

The first question this appeal court must ask itself is whether **PW1** did have in his possession an item capable of being stolen i.e. the motor cycle. **PW1** did in his evidence produce a copy of the receipt for purchase of the motor cycle for the sum of Kshs. 77,500/= **Pexb1** as well as a certificate of insurance for the same from Blue Shield Insurance Company **Pexb2**. Although the motor cycle was not registered, it was identified by means of the chassis number LYPPCJIA786678711. **PW1** told the court that his brother a corporal Matano had purchased the motor cycle for him to enable him have a source of livelihood. **PW2** Corporal Matano confirmed that **PW1** was his brother and further confirmed that he had indeed purchased the said motor cycle for him to use as a boda boda taxi. We are therefore satisfied that **PW1** did indeed have in his possession an unregistered motor cycle which he was using for taxi business.

In this case there was only one eye witness to the robbery that being **PW1**. Although the evidence of a single witness may suffice for purposes of identification, the court must carefully analyze such evidence of identification and satisfy itself that the same is watertight. According to the evidence of **PW1** this incident occurred during the day. There was enough light and he was able to see clearly. Further, we note that the witness spent several hours in the company of his attackers. He rode with them all the way from Kwale to Mwachinga. **PW1** told the court that during the trip they were all chatting cordially and he made stops on the way to enable his passengers buy bananas and to relieve themselves. **PW1** even revealed that in the course of their conversation the two men told him that they had been sacked from their jobs and the aim of the trip was to enable them to visit a medicine man (No doubt in an attempt to solve this dilemma). After dropping the men off at their destination, **PW1** left. He later returned at 3.00 p.m. (still during daylight hours) to pick up the two men when they called him as agreed. We find therefore that **PW1** spent more than ample time in the company of the two men. The conditions were conducive for a positive identification. **PW1** was able to state the specific role which the appellant played in the robbery. At page 5 line 28 **PW1** states:

“Your colleague had a handbag under his arm. You even bought bananas and was eating them as we were moving.....”

Later at page 22 line 29 **PW1** states under cross-examination:

“You are the one who produced a knife and pulled me off the motor cycle. Then your colleague drove off as he carried you. You are the one who gave me your number. It was 0710569055.....”

The witness all along gave clear and concise evidence. He remained unshaken under cross-examination. He was very sure of what he saw. In the circumstances we find that the evidence of identification though that of a single witness is water-tight and passes muster. There is no room for any mistaken identity.

PW1 did positively identify the appellant after his arrest at Kwale police station.

At this point the court must consider the question of the failure by police to conduct an identification parade – does this failure negate the evidence of identification. We think not. There may have been some difficulty in mounting an identification parade immediately after the arrest of the appellant given that he had been shot and injured and was admitted at Msambweni hospital for treatment. No parade could possibly have been mounted until the appellant had fully recovered. There is evidence that **PW1** did positively identify the appellant at Kwale police station. Given the strength of the identification by **PW1** we find that failure to conduct an identification parade does not in any way weaken or water-down that evidence. It must be remembered that the mobile number used by the robbers and given to **PW1** was used to trace one ‘*Saidi*’ who led police to the appellant. This ‘*Saidi*’ absconded and has not been traced to date. It is also pertinent that when police approached him the appellant took off and police had to use force to subdue and arrest him. This is evidence of a guilty mind. If the appellant had nothing to hide why run away from the police. Finally on this point **PW1** did tell the court that he gave a description to police of one of his attackers as being ‘*dark-skinned and stout*’. It is not lost on us that from our own observation the appellant is indeed dark-skinned and stout. It is clear therefore that **PW1** did not identify the appellant out of the blues. He was infact describing the man he had seen. We are therefore satisfied that the appellant was properly identified as one of the men who robbed **PW1** of his motor-cycle on the material day.

The appellant in his submissions raised the issue that the stolen motor cycle was not recovered in his possession at all. Given that the appellant was arrested 3-4 months **after** the incident there had been ample time for him to dispose of the motor cycle. The fact that the motor cycle was not recovered on him does not absolve him of guilt.

Finally, we do agree with the trial magistrate that the charge of Robbery with Violence was proved as required in law against the appellant. The incident involved all the ingredients for this offence. There was more than one perpetrator and the use of a knife to threaten **PW1** amounted to a threat of actual physical harm in committing the offence. The trial magistrate did give due consideration to the appellant’s defence which she dismissed as a mere denial. We are satisfied that the charge was proved beyond a reasonable doubt and we dismiss this appeal in its entirety. The appellant’s conviction is hereby upheld and the death sentence is confirmed.

Dated and delivered in Mombasa this 19th day of February, 2014.

M. ODERO

S. MUKUNYA

JUDGE

JUDGE