



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 12 OF 2012

(From the original Conviction and Sentence in the Criminal Case No. 142 of 2010 of the Principal Magistrate's Court at Kwale: E.K. Usui Macharia – P.M.)

HAMISI SHEE MWADZIMEZA APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGEMENT

The Appellant herein **HAMISI SHEE MWADZIMEZA** has filed this appeal against his conviction and sentence by the learned Senior Resident Magistrate sitting at the Kwale Law Courts. The Appellant was first arraigned in court on 26th January 2010 on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the offence were that:

“On the 13th day of December 2009 at Taoba Village, Diani Location of Msambweni District within Coast Province jointly with others not before court being armed with dangerous weapons namely pangas robbed KASSIM SHEE motor bike make HAOJIN valued at Kshs.82,000/- and immediately before or immediately after the time of robbery used actual violence to the said KASSIM SHEE.”

The Appellant entered a plea of ‘Not Guilty’ to the charge and his trial commenced on 26th January 2010. The prosecution led by **CHIEF INSPECTOR GITONGA** called a total of seven (7) witnesses in support of their case. The complainant (**PW1**) told the court that he is a retired chef who runs a boda boda taxi business in Diani. On 13th December 2009 at about 9.45 p.m. he was at the stage known as ‘Corner ya Ibiza’ awaiting passengers. He was riding a motor-cycle red in colour make Haojin. A client came and asked to be ferried to ‘Corner ya Musa’. They agreed on a fare of Kshs.50/-. Upon arrival near a big house the client directed **PW1** to stop and he did so. Suddenly the ‘client’ began to strangle **PW1** using a bicycle chain. **PW1** struggled and managed to remove the chain from his neck. Four other men one of whom **PW1** recognised as his step-brother ‘Hamisi Shee’ came out. They attacked **PW1** with pangas and leaving him for dead took off with the motor cycle. **PW1** managed to crawl to a nearby home and sought help. He was rushed to Msambweni District Hospital and later transferred to Coast General Hospital where he was admitted for about one month. Fellow boda boda operators apprehended the Appellant whom **PW1** had named together with a co-accused also known as **HAMISI SHEE MWADZIMEZA**. Both men were taken to the police station and after investigations both were charged in court. The stolen motorcycle was never recovered.

Upon the close of the prosecution case the Appellant was found to have a case to answer and was placed

onto his defence. His co-accused was however acquitted for lack of evidence under Section 210 Criminal Procedure Code. The Appellant on his part gave a sworn defence in which he denied any and all involvement in this robbery incident. On 20th January 2012 the learned trial magistrate delivered her judgement in which she convicted the Appellant of the offence of Robbery with Violence and thereafter sentenced him to death. Being aggrieved the Appellant filed this present appeal. He opted to rely upon his written submissions which had been duly filed in court. **MS. OGWENO** learned State Counsel made oral submissions opposing the appeal.

The fact that this robbery incident actually did occur cannot be in any doubt. The complainant told the court that he was robbed of a motor-cycle make Haojin. **PW3 HAMISI OMAR KWATUKWAA** told the court that the Haojin motor cycle red in colour Model No. HJ125-11A belonged to him. He testified that he purchased the same on 27th July 2009 for Kshs.82,000/- and produces the receipt for the purchase **Pexb4**. **PW3** confirms that he had employed **PW1** to carry out business of boda boda taxi using his motorbike. There is therefore sufficient evidence to prove that the complainant did have in his possession a motor-cycle on the material day.

The complainant told the court that he was savagely attacked by a group of 4 men armed with pangas who cut him up and left him for dead. Indeed complainant testified that he only managed to crawl severely bleeding to a nearby home from where he sought help. **PW2 MOHAMED SAID FARAJI** confirms that he received news of the attack on the complainant who was his friend and rushed to the scene. He found the complainant bleeding profusely from cuts on his body. **PW3** was amongst those who rushed the complainant to hospital. Evidence of the injury to **PW1** is corroborated by **PW6 ALLAN CHEROP** who is a clinical officer attached to Msambweni District Hospital. He stated that upon examination **PW1** was found to have *“penetrating deep chest injury with fractured sternum and deep cuts on back, cut wound on left thigh”*. The witness filled and signed the P3 form which was produced as an exhibit in court **Pexb1**. This was a particularly vicious assault and was assessed as *“grievous harm”*. From this evidence all the ingredients of the offence of Robbery with Violence are shown to have existed in this incident.

The key question and that which forms the basis of the appeal is identification. The Appellant argues that the evidence on identification was not sufficient to warrant his conviction. In his evidence **PW1** told the court that his client (who turned out to be a decoy) directed him to stop the motor-bike outside a big metal gate. Though it was 9.00 p.m. and therefore dark **PW1** asserts that they stopped outside a house belonging to a *‘Mzungu’* where there was sufficient lights from the security lights. The Appellant takes issue with the fact that **PW1** did not mention the security lights in his statement to the police. The said statement was produced as an exhibit in the lower court **Pexb2** and we have carefully perused the same. It is quite correct that no mention is made of security lights at the scene. However this does not mean they did not exist. **PW1** told the court that police recorded his statement and it could well be that this question was not put to him. The complainant did in his oral testimony in court state that there were security lights at the scene. Indeed the fact that the complainant gave such a detailed account of the attack at page 14 line 16 – 20 makes it clear that he was able to see well. He states as follows:

“I looked and saw 3 people on one side, two on the other I looked again and saw the 1st accused as he crossed just 5 metres away. The light was strong and I saw him well. When he saw I had spotted him he stopped. He was rushing towards me”

Such detail could not have come from one who did not have a clear view of the events. There was clearly a source of light at the scene which enabled **PW1** to see and note the movements of his assailants. Moreover **PW1** uses the term *‘I looked’* implying that he saw. One can only see that which is visible. The complainant was cross-examined at length by the Appellant but he remained unshaken on this point. We are satisfied that from the account given by **PW1** visibility must have been good at the scene.

It is not lost on us that the Appellant has been identified by only one witness. The fact that there is only a single identifying witness does not necessarily lessen the value or weight of such identification. **PW1** stated that the Appellant was his step-brother with whom he lived in the same compound obviously he knew him well and was able to recognize him. In her judgement at page 51 line 24 the learned trial

magistrate states as follows:

“The court noted that the complainant is a senior member of the society. His P3 form says he was 54 years at the time of the attack. He was straightforward and calm in his evidence. He is a composed man who even on being faced with questions and having been recalled thrice did not lose his composure. He did not strike the court as a man of malice”.

These observations have been made by the trial magistrate who unlike us had the advantage of seeing and hearing the witness testify and who was best placed to comment on his demeanour. We have no reason to fault these observations. An issue arose that the complainant had more than one step-brother bearing the name ‘Hamisi Shee’. Indeed even the Appellant’s initial co-accused bore the same name. PW1 explained that his father had 3 wives and each wife had a son named ‘Hamisi Shee’. However similar names cannot cause confusion to one who knew them all intimately. The complainant was a brother to all of them and they grew up together and we find it unlikely that he would confuse one brother for another. Indeed that is why PW1 identified the Appellant and not his co-accused as the one whom he saw at the scene. He was categorical that he did not see the co-accused at the scene. Lastly on this point of identification the Appellant in his defence claimed that PW1 was merely trying to ‘fix’ him due to a dispute over their late father’s land. The trial magistrate did consider this defence. The Appellant went on to claim that PW1 attempted to sell of the family land while he was held in remand and he produces a sale agreement in support of this claim Dexb1. In this regard the trial magistrate in dismissing the defence found on page 51 line 16 as follows:

“I have considered the accused’s defence on record. He only dwells on the date of his arrest. He told the court that he had a grudge with the complainant over their land. The letter he produced in evidence talks of a transaction that took place long before he was arrested and which was being followed up. I found no evidence of a personal grudge which would escalate to the fabrication of such charges”.

Here again we find ourselves in agreement with the trial magistrate. The alleged land transaction is dated 21st March 2010. It refers to land sold by the late father of the Appellant and is simply a letter introducing the children of the deceased and includes the Appellant. There is no evidence of an attempt to cut out the Appellant. On the whole and upon careful analysis we are satisfied that there has been a clear and reliable identification of the Appellant as one of the robbers. The trial magistrate did properly warn herself before proceeding to convict on the evidence of a single identifying witness. We are satisfied that the Appellant’s conviction was sound and we do confirm the same.

The Appellant was allowed an opportunity to mitigate after which he was sentenced to death. The sentence was lawful and appropriate given the aggravated nature of the attack on the complainant. We do uphold the sentence. Finally this appeal fails in its entirety.

Dated and Delivered in Mombasa this 18th day of February 2014.

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M. ODERO

M. MUYA

JUDGE

JUDGE

In the presence of:

Appellant in person

Mr. Tanui for State