



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 435 OF 2010

(FROM THE ORIGINAL CONVICTION AND SENTENCE IN THE CRIMINAL CASE NO. 3859/2009 OF THE CHIEF MAGISTRATE'S COURT AT MOMBASA: R. KIRUI – PM)

PETER MIYOGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein **PETER MIYOGI** has filed this appeal against his conviction and sentence by the learned principal magistrate sitting at Mombasa Law Courts. The appellant was first arraigned before the trial court on 30th November, 2009 facing a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were that:

“On the 18th day of September, 2009 at Corner Zamani area in Likoni Division of Mombasa District within the Coast Province, jointly with others not before court while armed with pangas and knife robbed HAMISI MBEGA NDORO of one motor cycle Reg. No. KBH 081F, one mobile phone make vodaphone and cash Kshs. 650/= all valued at Kshs. 86,050/= and at or immediately before or immediately after the time of such robbery used actual violence to the said HAMISI MBEGA NDORO.”

The appellant entered a plea of ‘*Not Guilty*’ to the charge and his trial commenced on 1st March, 2010. The prosecution led by **CHIEF INSPECTOR NCHORO** called a total of four (4) witnesses in support of their case. **PW1 HAMISI NDORO** told the court that on 18th September, 2009 at 11.00 p.m. he was at the ferry stage operating a boda boda taxi Reg. KBH 081F. The appellant, whom he knew approached him and requested to be taken to a place known as Corner ya Zamani. They agreed on a fare of 100/= and **PW1** ferried the appellant to his destination. Upon arrival there the appellant suddenly turned on **PW1** and instead of alighting from the motorbike he grabbed him by the neck. Six other men emerged from the nearby bushes. One who was armed with a panga cut **PW1** on the head. They pulled him off the motorbike and appellant rode it away. The men tied up **PW1** and left him on the ground bleeding. After the assailants left **PW1** managed to untie himself and sought help from another boda boda rider. He went to report the matter at Likoni police station and later went to Coast General Hospital, where he was treated and his wound stitched. **PW1** also informed **PW2 ATHMAN ABUD MOHAMED** the owner of the motor cycle about the theft. About one and a half months later **PW1** spotted the appellant at the stage. He raised the alarm and members of public apprehended the appellant and began to beat him. Police came and rescued the appellant and took him to the police station. The motor cycle was never

recovered. The accused was later charged with the offence of Robbery with Violence.

At the close of the prosecution case the appellant was found to have a case to answer and was placed on his defence. He gave a sworn defence in which he denied any involvement in the robbery against **PW1**. On 4th October, 2010 the learned trial magistrate delivered his judgment in which he convicted the appellant and sentenced him to death. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

Being a court of first appeal our duty is to re-examine and re-evaluate the evidence on record and to draw our own conclusions on the same. The existence of the motorbike is not in any doubt. **PW2** confirmed that he was the manager of the motorbike Reg. No. KBH 081F and he confirms that the said motorbike had been assigned to **PW1** for use as a boda boda taxi. **PW2** also produced in court the log-book for the motorbike **Pexb1** and the receipt for its purchase **Pexb2**. **PW1** told the court that although the incident occurred at night when it was dark, the bus stage where he met the appellant was well lit by security lights and he was able to see him well. The two spoke as they negotiated the fare and **PW1** ferried the appellant on his motorbike. We are certain that given these circumstances **PW1** had ample time and opportunity to identify the appellant. In addition **PW1** told the court that the appellant was a man whom he knew before as he had met him several times prior to this incident. Thus aside from visual identification there is evidence of recognition which was held by the Court of Appeal to be **“more satisfactory, more assuring and more reliable than identification of a stranger**” [see **ANJONONI & OTHERS –VS – REPUBLIC [1980] KLR**]. **PW1** told the court that he went further and positively identified the appellant at a police identification parade. The officer who conducted this parade was not called to testify and no parade forms were produced as exhibits. In any event given the fact that **PW1** knew the appellant prior to the incident, our view is that an identification parade would have been superfluous in those circumstances. There is therefore clear and reliable evidence on identification and on this ground the appeal would fail.

We further note that evidence has been adduced to show that **PW1** sustained injuries. **PW4 DR. BAJABER ABDALLA** a medical doctor at Coast General Hospital told court that he examined **PW1** on 18th September, 2009 and found him to have a stitched cut on the left forehead. **PW4** filled and signed the P3 form which is produced in court as an exhibit **Pexb3**.

Indeed at a first glance it would appear that the prosecution had mounted a watertight case against the accused. However, a deeper look reveals certain unexplained anomalies. The first is that when **PW1** made the report to the police it was he who was placed in cells instead of the appellant who was the alleged culprit. The appellant was not placed in cells initially but was told by police to go and seek treatment. This implies that the appellant did have injuries. **PW1** in his evidence at page 5 line 22 states:

“Because the accused was injured, he was told to go to hospital while I was locked in cells.”

This makes no sense. Why would police lock up the victim and release the alleged culprit to go to hospital? It is only after a week or so that police decided to release **PW1** and then re-arrested the appellant and placed him in cells. It would appear that the police were not certain about who was at fault. The appellant while cross-examining **PW1** suggested that the police only changed their minds due to some inducement from **PW1** and **PW2**. Although **PW1** denied this the flip-flopping by police about who to charge certainly lends credence to this claim.

In his defence **PW1** states that the incident arose due to a dispute over parking space for the motorcycle. This dispute led to an altercation in which the appellant was beaten. He later claimed that **PW1** had stolen his motorcycle. They were all taken to Likoni police station. In his defence at page 13 line 34 the appellant says:

“At the station, I and those people were interrogated by the police. The police officers who handled the case released me and put the person who had beaten me in cells.”

This from the evidence of **PW1** is exactly what happened. If initially police determined that **PW1** was at

fault why did they later change their minds and charge the appellant in court. **PW3 SERGEANT SAMWEL AWUOR** the investigating officer is of no help in solving this anomaly as he opted to adopt a '*see no evil, hear no evil and speak no evil*' approach. He denies having been present when the parties were initially brought to the police station and he denies having been the one who released the appellant. His evidence is of no help to the court. It is pertinent that appellant was issued with a P3 form by police. No evidence has been adduced by any doctor with respect to the injuries sustained by appellant. The appellant told the court that he signed the parade forms but noted his dissatisfaction with the process. The officer who conducted the parade was not called to testify nor were the forms produced as exhibits. Clearly the prosecution were not keen to present before the court any evidence which would not favour their case.

All in all from the above anomalies we are not satisfied that there was a genuine investigation into this matter. The charging of the appellant did not appear to be bona fide. The actions of the police were suspicious to say the least. These anomalies raise in our minds a lot of doubt regarding the guilt of the appellant. The benefit of such doubt must be awarded to the appellant. For this reason we allow this appeal and quash the conviction of the appellant by the trial court. The death sentence imposed on the appellant is also set aside. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

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

M. ODERO

M. MUYA

JUDGE

JUDGE