



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 19 OF 2012

SHEE JACOB THOMAS APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 929 of 2010 of the Senior Resident Magistrate's Court at Kwale – Hon. Usui - PM)

JUDGMENT

The Appellant herein was charged Convicted and Sentenced to death for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

The particulars being that:-

“On the 31st day of May, 2010 at Ukunda Township within Msambweni – Kwale County, jointly, with others not before the Court and while armed with dangerous weapons namely iron rods, and a pen knife robbed HASSAN HAMIS MWAMLONGA a photo printer model DPP, Nokia mobile phone, MP3 make Miyota, Digital life mobile phone, hair gel nice and lovely, perfume and Nivea deodorant, 3padlocks,4 assorted Jeans Ksh. 40,000/=, 300 US Dollars 280 Sudanese dollars, a driving license and a passport all valued at Ksh. 350,000/= and immediately before or immediately after the time of such robbery threatened to use physical violence to the said HASSAN HAMIS MWAMLONGA”.

In the second Count he was also Convicted of the offence of robbery with violence for having robbed **HAMIS SALIM MWAMLONGA** of a wallet and Nokia phone.

In the third Count he was Convicted for the offence of robbery with violence for robbing **TABU HAMISI HASSAN** of a bed sheet, prayer mat, a gold chain, wedding finger rings of the value of Ksh. 30,000/=.

In the 4th Count he was Convicted for the offence of assaulting a police officer contrary to Section 253 (b) of the Penal Code.

The brief facts of this case are that PW 1, PW 2 and PW 3 were attacked at midnight by people they did not recognize or identify. PW 1 was cut with a panga only to find himself in Hospital. His wife (PW 2) was pushed inside the house when she went to open the door. After the men viciously attacked her husband and made away with household goods. She went and reported the matter to the village chairman.

Her phone make Samsung, a prayer mat, yellow bed sheets, her husband's mobile phone, charger, DVD machine and wallet were stolen.

The Appellant was arrested by **PW 4 APC JOHN MAINA** who testified that on 31st May, 2010 at 11:30 a.m. He was on normal patrol with **APC SIMON KARANJA** at Ukunda scheme when they were informed that thugs had raided a house at Ukunda Scheme.

They proceeded to the scene and found that the thugs had seriously injured PW 1 and stole from him and his family assorted items including phones electronics and clothes and left. The Complainant was taken to Msambweni Hospital. Meanwhile dogs were still barking in the neighbourhood. They were shown the path which the thugs took and after some distance they came across a group of fifteen (15) men who upon seeing them started running. The Witness managed to chase the Appellant who was carrying something.

Before he could arrest him the appellant produced a knife and stabbed him on the chest. He struggled with him and the Accused T-shirt got torn. The man was also armed with an iron-bar and was also carrying two bags on each arm and tied at the the back, an iron bar on one hand and the knife on the other. Inside the two bags (Exhibit No. 8) were a black Samsung phone (Exhibit No. 5), Yellow Nokia phone (Exhibit No.3) silver phone (Exhibit No. 4) mobile chargers (Exhibit No. 11) sony charger (Exhibit No. 14), 3 padlocks (Exhibit No. 15) cash Ksh. 3 420/= (Exhibit No. 12 one Identity card (Exhibit No. 2) one body spray, 4 jean trousers, yellow bed sheets, Bunch of keys. The Witness went to Msambweni Hospital for treatment and his P3 form was filled.

APC SIMON KARANJA PW 6 did testify to have been on patrol duties in the company of his colleague **JOHN MAINA (PW 4)** when they were instructed by their boss to proceed to Ukunda Scheme where a report of robbery had been made by the village chairman. They proceeded there in their vehicle and found police officers having arrived at the scene. The Complainant who had been seriously injured was taken to Diani Hospital. After interrogating members of public they were shown the path the thugs had used. They went in pursuit of the attackers and after some distance of 200 metres in the bush they met a group of about 10 – 15 men. The Witness and his colleague flashed torches and they noted that the men were armed with pangas and iron bars. They gave chase. His colleague chased the appellant. He heard him scream and he decided to go and check what was wrong. The man had stabbed his colleague with a knife. He was also armed with a crow bar. They managed to handcuff him on one hand. The man was also carrying two bags tied on his back. Members of public arrived and wanted to lynch him.

PW 4 was examined by **ALFRED BAYA MWERI** a clinical officer who found that he had a cut with a well defined borders on the chest 5 cm in length and ½ cm deep. He assessed the degree of injury as harm.

As the first appellate Court we are required and its our duty to re-examine and re-evaluate the evidence on record and if need be come to our own conclusions.

The Court of Appeal in the case of **Okeno –Vs- Republic 1972** held,

“It is the duty of a first appellate Court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the Judgment of the trial Court should be upheld”.

We have observed from the rerecord of proceedings that PW 1 and PW 3 did not identify the attackers. The reason being that the incident took place at midnight and it was sudden. It is also noted that the source of light if any was not indicated.

PW 1, PW 2 and PW 3 testified that the attackers were two but the arresting officers PW 4 and PW 6 testified to have met a group of fifteen (15) men in the nearby bushes.

The appellant was Convicted on the strength of the doctrine of recent possession.

The evidence of PW 4 and PW 6 the arresting officers is that the appellant was carrying two bags and was armed with a crow bar and a pen knife. Upon evaluating the evidence on record we are of the view that if there were fifteen (15) men as alleged by PW 4 and PW 6 how come that only one of them was given the task of carrying all the stolen property?

How was it that then same man was carrying a crow bar and a pen knife? Were these the same people who had attacked the Complainants in Counts 1, 2 and 3?

In the Court of Appeal case of Arum –Vs- Republic EALR 2006 EA. It was held,

“Before a Court can rely on the doctrine of recent possession as a basis of Conviction in a Criminal Case, the possession must be positively proved, that is property was found with the suspect, secondly the property is positively identified as the property of the Complainant. Thirdly, that the property was stolen from the Complainant and lastly that the property was recently stolen from the Complainant”.

We are of the considered view that constituent elements of the doctrine of recent possession as enumerated above were not proved and in particular that of possession of the stolen items by the appellant.

We have noted that the Complainant in Count No. 2 **HAMIS SALIM MWAMLONGA** did not testify yet the learned trial magistrate proceeded to Convict the Appellant on the 2nd Count for robbery with violence contrary to section 296 (2) of the Penal Code. This we find to have been irregular.

As for the 4th Count of assaulting a police officer contrary to section 253(b) of the Penal Code. We are satisfied that PW 4 and PW 6 were on duty and in their police uniform when they came across a group of fifteen (15) men in the bushes and in the course of arresting one of them who is the appellant, PW4 was stabbed with a pen knife. This pen knife was produced in Court as exhibit. The evidence of PW 4 was corroborated in material particulars by PW 6 who was present at the time of the assault. The appellant was arrested at the scene of the assault. The clinical officer who examined the Complainant assessed the degree of injury as harm and produced the P3 form as an exhibit in Court. While we do find that the Conviction on the three (3) Counts of robbery with violence was not safe we find that of assaulting a police officer to have been proved beyond reasonable doubt.

The Conviction on the three Counts of robbery with violence contrary to Section 296(2) of the Penal Code are hereby quashed and the death Sentence on Count 1 is set aside. The other Sentences on Counts 2, 3 and 4 had been put in abeyance. The Sentences put in abeyance in Count No. 2 and 3 are set aside.

In respect to Count No. 4 which is that for assaulting a police officer and in which we have found the Conviction to have been safe. We note that it carries maximum Sentence of five (5) years Imprisonment. Owing to the circumstances obtaining in this case we order that the appellant do serve an imprisonment term of four (4) years from the time of Conviction. To that extent only does this appeal succeed.

Judgment delivered dated and signed this **2nd** day of **April, 2014**.

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M. ODERO

JUDGE

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M. MUYA

JUDGE

In the presence of:-

Learned State Counsel

Learned Counsel for the Defence

The Appellant

Court clerk