REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 4 of 2012

(Appeal from the judgment of R. Odenyo [Principal Magistrate, Mandera)

ABDIRAHMAN ALI SHEIKH.....….....……..…….APPELLANT
VERSUS

REPUBLIC …….....……..RESPONDENT

JUDGMENT

The appellant Abdirahman Ali Sheikh was convicted of the offence of **robbery** with **violence** by Mandera Principal Magistrate of the offence of **robbery** with violence contrary to **Section 296(2)** of the **Penal Code** and sentenced to death. Being dissatisfied with the judgment, the appellant lodged this appeal. The Amended grounds of appeal filed in court on 29th June 2012 precisely are the following:

a) That the death sentence imposed was wrong in law;

b) That the conviction was based on contradictory evidence;

c) That the evidence of recognition was wanting.

d) That part of the evidence relied on was inadmissible ;

e) That the court introduced extraneous matters;

f) That the appellants defence was not considered.

Mr. Ocholla for the appellant submitted that the offence was allegedly committed at night and that the conditions for recognition were poor. It was argued that the evidence of the prosecution in relation to the lighting of the scene was full of contradictions. The distances from the position of the light to the scene were not given and neither was the intensity of the light described.

The State on the other hand argued that the evidence of the prosecution was clear and sound as to recognition and in regard to all the other ingredients of the offence resulting in a safe conviction.

The facts of the case leading to this appeal was that PW1 who worked as a clinical officer at Mandera District Hospital was walking home from work on 11/09/11 around 8.00 p.m. On the way he met three young men who accosted him and robbed him of his phone and cash Kshs.500/=. He recognized one of them popularly known as “Kullow”. The complainant was injured during the incident. Some friends of the complainant PW2 and PW4 arrested the appellant and another suspect a few days later. The two were jointly charged with the offence as a result of which the appellant was convicted

and the other suspect acquitted.

On the issue of identification, PW1 said there was light from the post office which aided him to see and recognize the appellant whom he knew before the incident. Although the distance of the light from the scene was not given, PW1 said: **“It was also a clear night and I could recognize the 1st accused”.**

The statement clarifies and fortifies the fact that the night was bright with moonlight and in addition with the light from the post office to enable the witness see is assailant well.

However the duration of the incident was not given by the prosecution.

PW1 said:

“He is the one to whom I surrendered the phone”.

As PW1 surrendered the phone to the appellant, he had a second chance of observing his assailant further. The defence argued that PW1contradicted himself when he said that he saw the appellant in the darkness. This is not supported by the evidence on record. PW1 said he saw the second accused in the darkness but not the appellant. The trial magistrate evaluated that evidence and gave the 2nd accused the benefit of the doubt as to identification.

The appellant raised the issue of the prosecution failing to hold an identification parade. There is evidence on record that PW1 knew the appellant before the incident. An identification parade would not have served any useful purpose.

The incident occurred on 11/09/11 around 8.00 p.m. The following morning the second accused was selling the phone to someone. This was less than 24 hours after the robbery. The second accused was arrested with the help of the appellant and the stolen phone recovered in possession of the second accused's younger brother. It would therefore, be correct to say that the phone was recovered with the assistance of the appellant. The appellant knew where the phone was and cooperated with the people who arrested him. He was arrested by friends of the complainant to whom the complainant had told that he had been robbed by a young man he knew by his nickname **“Kullow”**. Some of those friends knew Kullow and took it as their responsibility to arrest him during a football match. The trial court observed the **“chain of events”** as he called it and found that the chain which included the robbery, narration of the incident, arrest of the appellant, arrest of the 2nd accused and recovery of the phone was never broken. The trial magistrate was satisfied with the recognition of the appellant and reached a correct conclusion that the chain of events reinforced PW1's evidence of recognition. It was evidence of a single witness but under special circumstances in the manner the phone was recovered. If the accused did not take part in the robbery, how did he know where the stolen phone was? In his defence which was well considered by the court, the appellant was not able to explain how he came to know where the phone was and where it had come from.

The phone was identified positively by PW1 and by PW3 who bought the stolen property. The defence did not explain which extraneous matters the trial court introduced in the judgment. Neither was it brought out as to which evidence was inadmissible. It is therefore not possible for us to deal with the issues in this appeal.

It is our finding that the appellant was positively recognized by the complainant. There was no possibility of mistake or error on the part of PW1. We find no contradictions in the evidence of the witnesses.

Section 296(2) provides for death sentence where a person is convicted with robbery with violence. The appellant's counsel did not give any reason why he thought the sentence was unlawful. We find no substance in this ground of appeal.

For the foregoing reasons, this appeal must fail. We dismiss it accordingly and uphold the conviction and sentence.

F. N. MUCHEMI **S. N. MUTUKU**

JUDGE **JUDGE**

Judgment dated and delivered on the 31st day of January **2013** in open court in the presence of the appellant, the State counsel and Mr. Ocholla for the appellant.

S. N. MUTUKU

JUDGE