REPUBLIC OF KENYA

High Court at Garissa

Criminal Appeal 23 of 2012

(Formerly Nairobi High Court Criminal Appeal No. 271 of 2007 from Original Conviction and Sentence

by the Senior Resident Magistrate at Mandera in Criminal Case No. 163 of 2006)

IBRAHIM ABRAHIM ABDOW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

1. Ibrahim Abrahim Abdow, the appellant, was charged with robbery with violence contrary to section 296 (2) and an alternative charge of handling stolen goods contrary to section 322 of the Penal Code respectively. He was tried by the Senior Resident Magistrate's Court at Mandera, was convicted on a reduced charge of robbery under section 295 of the Penal Code and sentenced to serve a jail term of fourteen (14) years. The particulars of the main charge read that on the 8th day of June 2006 at around 20.30pm at Township location in Mandera District jointly with another not before court robbed one Ahmed Sahie Abdille of his wallet containing his national identity card and cash Kshs 100 and at the time of such robbery used actual violence against the said Ahmed Sahie Abdow.

2. The particulars of the alternative charge are that on the same date and time as in the main count, otherwise than in the course of stealing he dishonestly received and detained two notes of Kshs 50 serial numbers BP 5875380 and BJ 1365738 respectively, national identity card number 6410017 and a leather wallet all the property Ahmed Sahie Abdille.

3. This appeal was first filed at the High Court in Nairobi in 2007 before a single judge. In the course of the proceedings, the then prosecuting state counsel applied for the case to be placed before a bench of two judges to enable him file notice of enhancement. This was done on 3rd July 2008 and the notice of enhancement carefully explained to the appellant who opted to proceed to full hearing maintaining that he was innocent. The matter did not proceed in Nairobi for various reasons as appears on the record. The case was transferred on 16th January 2012 to Garissa High Court when it was established. The case was placed before the judge for the first mentioned on 13th February 2012. The case was initially listed for hearing before **Lady Justices Philomena Mwilu and Stella N. Mutuku** but it did not proceed. It was finally heard by **Lady Justices Florence N. Muchemi and Stella N. Mutuku.**

Facts

4. The facts of this case are simple. **Ahmed Sahie Abdille (PW1),** a businessman and resident of Mandera Town,was walking home from evening prayers at the mosque around 8.30pm on 8th June 2006 when he was hit from behind by unknown people. He fell down. One of the persons held him down while the second person frisked his pockets and took a wallet from his shirt pocket. PW1 screamed for help. The screams attracted members of the public including his two sons **Bishar Ahmed Sahie (PW2)** and **Abdullahi Mohamed Omar (PW4).** The screams also attracted **Abdille Sheikh Billow (PW3)** who had been taking refreshments at Anan Hotel in Mandera Town which was nearby. PW2 and PW4 chased the suspects and arrested one suspect while the other escaped. It is the evidence of PW2 and PW4 that they recovered the wallet with its contents from the arrested suspect whom they identified as the appellant. The appellant was handed over to the police who preferred these charges against him. The appellant denied this offence. In his unsworn defence, the appellant told the trial court that he was in Anan Hotel at Mandera Town where a local Member of Parliament (MP) had come when police brought in some items alleging that the appellant had stolen them and that he was taken to the police station and tortured to reveal who has stolen from PW1.

Grounds of appeal

5. The appellant amended his grounds of appeal with leave of the court and framed them as follows (with grammatical amendments for clarity):

a) That the trial magistrate erred in both law and fact in convicting the appellant on a defective charge.

b) That the enhancement of the sentence to death is against the law.

c) That the trial magistrate erred in law and fact in relying on the doctrine of recent possession when the same was not proved beyond reasonable doubt.

d) That the trial magistrate erred in law and fact by failing to notice that the appellant's fundamental rights under Articles 25 (a), 50 (2) (m) and 50 (3) and (4) were breached.

e) That the trial magistrate erred in law and fact by failing to note that the appellant was not positively identified.

f) That the appellant was denied an opportunity to submit his defence and to mitigate.

Submissions

6. The appellant has submitted that the charge as drawn is fatal and incurably defective because it quotes the penalty section of the law that does not constitute an offence; that it omitted to state that the robbers were armed with dangerous or offensive weapons, and that it did not specify whether violence was used at, before or after the commission of the offence. He cited the case of **Mutinda Mwai Mutana v Republic in Criminal Appeal No. 282 of 2008** where the High Court allowed the appeal in that case because of a defective charge.

7. The appellant submitted that to enhance the sentence is to deny him justice; that the evidence on record does not give substantial information on how many people were involved in the robbery and the ingredients of robbery with violence were not proved. On recent possession the appellant submitted that the alleged stolen items were not found with the appellant but the complainant's sons; that the notes presented as exhibits were two notes of 50 shillings with serial numbers when the money alleged to have been stolen is 100 notes whose serial numbers were not given.

8. On the issue of breach of constitutional rights the appellant submitted that he was tortured by the police before he was taken to court and he alerted the trial court about this; that although the trial court called for a report from the prosecution on the issue this was not given thereby denying him a fair trial; that he was not accorded the assistance of an interpreter despite the fact that some witnesses were speaking in English.

9. On the issue of identification the appellant has submitted that he was not identified by the prosecution witnesses; that no identification parade was conducted and that the trial magistrate did not conduct dock identification. On contradictory evidence the appellant submitted that there was contradiction on the time and the place the offence took place.

10. In the opposing side, the learned state counsel submitted that the case was proved beyond reasonable doubt; that the charge was properly framed in accordance with section 137 of the Criminal Procedure Code; that various decisions of the Court of Appeal have held that for a charge of robbery with violence to be sufficient it has to contain all the particulars and that the accused was clearly notified of the charges facing him. On the doctrine of recent possession it was submitted that the trial court did not err as alleged by the appellant; that the appellant was arrested while escaping within the vicinity of the robbery in possession of a wallet with an identity card and cash belonging to the complainant; that the appellant did not offer any explanation how he came by the wallet and its contents; that the scene was near Anan Hotel where the appellant admitted in his defence to have been. On the violation of his constitutional right it was submitted that the trial court ordered that the appellant be treated upon his complaint that he was tortured by the police and that the prosecution makes a report on the matter thereby adequately addressing the issue.

11. The learned state counsel further submitted that the prosecution obtained its evidence in the right way without violating the rights of the appellant. On the issue of identification it was submitted that there was dock identification as required in addition to other evidence adduced by PW1, PW2 and PW3 and this evidence was clear on identification of the appellant; that the identification was positive. On the issue of an interpreter it was submitted that there was an interpreter in Somali language and that all the key witnesses testified in Somali language; that the appellant was given a chance by the trial court to mitigate before sentencing; that the evidence disclosed an offence of robbery with violence but the appellant was convicted on a lesser charge of robbery; that the state gave notice to enhance the sentence because the reasoning of the trial magistrate was erroneous; that all the ingredients of robbery with violence were proved as set out in the case of **Moi Ochogo Onchiri v. Republic in Criminal Appeal No. 196 of 2006.**

Duty of the court

12. We have reminded ourselves of the duty of this court when sitting on first appeal that we are under a duty to reconsider the evidence presented before the trial court, evaluate the same afresh and draw our own conclusions in deciding whether to or not to uphold the judgement of the trial court. This duty has repeatedly been emphasized by the courts (**see Criminal Appeal No. 7 of 2006 Alloys Omondi Nanga v. Republic** where the Court of Appeal quoted with approval the case of **Okeno v. Republic [1972) E.A 32** on this point**).**

Issues and determination

13. We will be determining whether the charge is defective; whether the evidence on record discloses an offence under section 296 (2) of the Penal Code; whether the doctrine of recent possession was properly invoked; whether the appellant's constitutional rights were violated; whether the appellant was positively identified as one of the robbers; whether the appellant was denied a chance to submit and mitigate.

14. **Defective charge –** the charge omits to state that the robbers were armed with a dangerous or offensive weapon. This, in addition to the omission to state whether the violence on the complainant was at, immediately before or immediately after, is what the appellant is submitting as the reason he is challenging the conviction and sentence. The Section 137 (a) (i) (ii) and (iii) of the Criminal Procedure Code specifies the manner in which charges should be drawn. A count of a charge or information shall commence with a statement of the offence charged, called the statement of offence. The statement of offence shall describe the offence briefly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence. After the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary.

15. Our understanding of section 296 (2) of the Penal Code is that an offence under that section is committed if any one of the following circumstances exist:

a) if the offender is armed with any dangerous or offensive weapon or instrument,

b) or is in company with one or more other person or persons,

c) or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

16. Indeed the Court of Appeal held that if any one of the above circumstances is proved then the trial court had no discretionbut to convict under section 296 (2) of the Penal Code (**see David Odhiambo & Another v. Republic in Criminal Appeal No. 5 of 2005** and **Johana Ndung'u v. Republic in Criminal Appeal No. 116 of 1995**). Our considered view is that the statement of offence and the particulars are properly drawn and that an offence under section 296 (2) of the Penal Code is committed if any of the above circumstances exist.

17. **Evidence in support of an offence under section 296 (2) of the Penal Code** –the evidence on record shows that PW1 was attacked by more than one person. He testified as follows on this issue **"I was walking to my house when I was hit from behind and I fell down. One got hold of me and another picked my wallet which was in my pocket shirt."** As far as we can ascertain this is the only evidence directly touching on the commission of the offence because the evidence of PW2, PW3 and PW4 was after the offence had been committed. It is evidence of a single witness on this issue. Taking this evidence in its totality it is clear that the attackers were more than one. PW1 places the number of the attackers at two; that as one of the attackers held him down the second person removed the wallet from his shirt pocket. It is evidence we do not doubt since in our view PW1 narrated the event truthfully. It is evidence that is reliable and can be used to convict a suspect after the court has warned itself of the dangers of relying on the evidence of a single witness.

18. As we have reasoned above, the offence under section 296 (2) of the Penal Code is committed when any of the ingredients of the offence have been established. The evidence in this case establish that there were more than one attacker; that PW1 was hit and fell down; that he was held while on the ground and his wallet removed from the shirt pocket. This evidence clearly establishes that robbery as defined by section 295 of the Penal Code was committed. What makes it aggravated robbery and therefore an offence under section 296 (2) of the Penal Code is that there were more than one person and there was violence used when PW1 was hit thereby establishing some form of violence. Although the other ingredient of being armed with a dangerous or offence weapon was not established, we are satisfied that this evidence brings the offence under the ambit of section 296 (2) of the Penal Code. Having stated that the evidence of PW1 is reliable and having in mind the **David Odhiambo & Another** and **Johana Ndung'u** cases above our considered view is that with proof if any one of the above circumstances is proved then the trial court has no discretionbut to convict under section 296 (2) of the Penal Code.

19. **The doctrine of recent possession and identification of the appellant** – in his judgement, the trial magistrate reasoned as follows:

"The accused person when he was chased and arrested had in his possession the wallet and its contents which were identified as those of the complainant. In any event those who chased him never lost sight of the accused person since there were lights (sic). The accused person was found in possession of the items i.e wallet two hundred shilling notes and the identity card of the complainant which were identified by the complainant as his properties (sic). PW2 and PW4 also identified the properties as those belonging to their father. The doctrine of recent possession applies. The accused person could not explain how he came into actual contact with those properties"

20. We have picked some extraneous matters in that judgement which are not part of the evidence and we will comment on them in this judgement.

21. Turning to the evidence of PW2 and PW4 it is clear that the two heard their father (PW1) screaming for help and dashed out to find out what was happening. PW2 testified that he ran to where his father was attacked and chased the attackers, arrested one while the other escaped and recovered a wallet from a pocket of the arrested attacker. PW2 identified the arrested attacker as the appellant. PW1 said he was near the scene and that he is the one who recovered the wallet from the pocket of the appellant. On cross-examination he stated that, **"I chased you and got hold of you. I was nearer the scene. I chased you when you felled (sic) the complainant…."** Clearly PW4 was not at home with his brother PW2. The latter testified that he was at home preparing for examinations when he heard his father's voice and he went to the scene. On arriving his father (PW1) told them to chase the thieves. They managed to arrest one of the thieves and recovered their father's wallet.

22. The above evidence is clear that both PW2 and PW4 were not together when they heard PW1 screaming for help. The evidence is not clear how they identified the attackers and how far from the scene did the arrest of one of the attackers take place. We find the evidence lacks details of the chase and the arrest. For instance did PW2 and PW4 find the attackers still holding PW1 and if not how did they managed to identify the attackers in order to know who to chase; who among the two of them, arrived at the scene first; what aided their identification of the attackers; details on which pocket of the appellant was the wallet found. These details are crucial to the trial court in order to remove any doubts that the appellant was one of the robbers. We find the evidence of the two witnesses scanty. The prosecutor and the trial court ought to have pursued this evidence further to ensure it leaves no room for doubts. We find the evidence of PW2 especially wanting. He says he was nearer the scene but he does not say much about what he found on reaching where his father PW1 was and what light he used to see and identify the attackers given that it was at night. Our view is that with weak evidence like the one presented here, it would be unsafe to rely on it bearing in mind the guidelines on identification of a suspect laid down in the case of **R v Turnbull and others [1976] 3 All ER.** Taking this reasoning further, it is our view that where identification is not positive, it would be speculative on our part to rely on the doctrine of recent possession for the obvious reason that the appellant was not positively identified as one of the attackers.

23. **Violation of the appellant's constitutional rights and the denial of a chance to submit and mitigate –** the appellant claims that police tortured him and he informed the trial court of the same. He also claims that evidence was obtained in a manner that violates his rights or fundamental freedoms in the bill of rights. He also claims that he was not given the services of an interpreter. He cites Articles 25 (a) and 50 of the Constitution in support of these claims. We are not aware that duress was used to obtain evidence from the appellant. We have however noted that he complained that police had tortured him and he needed medical attention. This is an issue, if proved, that can be handled by a civil claim for compensation and cannot be used by the courts to acquit an accused person where proof exists that he committed the offence he is facing. On the issue of an interpreter, the record shows that the charges were read to the appellant in Somali language which he fully understands and which he has been using during these appeal proceedings. We have noted that the coram of the trial court does not indicate that there was translation of the evidence of the witnesses who spoke in Swahili and English and while we fault the trial magistrate for not indicating this in the coram we do not doubt that there was translation and that the appellant fully participated in the trial and understood what he was being tried for.

24. On the issue of mitigation, it is not true that the appellant was denied a chance to mitigate. The record is clear that he mitigated and the trial court took note of that mitigation.

25. Before we conclude this judgement we wish to point out some anomalies and contradictions noted in the evidence and introduction of extraneous matters in the judgement of the trial court. The charge reads that among the items stolen from PW1 is Kshs 100. This count does not specify in what denomination the currency was. In the alternative count, it is specified that the appellant was arrested in possession of two notes of Kshs 50 and their serial numbers are quoted in the charge. The evidence of PW1 does not state in what denomination the stolen currency was neither does the evidence of PW2, PW3 and PW4. The evidence of the re-arresting officer PW5 and the investigating officer PW6 does not specify the denomination of the currency allegedly recovered from the appellant nor quote the serial numbers. They all state that Kshs 100 was recovered. In our considered view the available evidence does not support the charges on the issue of the alleged stolen and the recovered money.

26. The trial magistrate introduced extraneous matters in the evidence. He states in the judgement that:

"PW2, PW3 and PW4 in their evidence said that they heard the complainant screaming and said two young men attacking him (sic)."

"They said that they identified the accused person through security rights."

"The wallet had two hundred shilling notes and the identity card of the complainant"

27. After our careful reading of the evidence we did not find anywhere that PW2, PW3 and PW4 testified to hearing screams from PW1 saying that he was being attacked by two young men. We also find no evidence that there were security lights near the scene to aid the witnesses in identifying the appellant. Indeed there is no mention of any light or source of light at all. Again there is no mention of PW1's wallet containing two hundred shilling note! All these were introduced by the trial magistrate and we are not able to understand why he was manufacturing non-existence evidence.

28. We also fault the trial magistrate for misdirecting himself on the nature of the offence committed. He writes in his judgement in reference to PW1, **"He never suffered any injuries meaning that this was just a simple robbery. The investigating officer confirmed in his evidence that there were no weapons which were used during the attack".** He further went on to state that **"The standard of proving offences which attract death sentences must be very high. The evidence before this court cannot sustain a conviction under that section and subsection since all the ingredients requiring conviction under section 296 (2) were not proved. However those of simple robbery were proved. ……There must be actual force and violence"** This faulty reasoning led the trial magistrate to convict on the offence of robbery under section 296 (1) of the Penal Code which according to him was the offence that was proved. Our view is that what distinguishes the offence of robbery from the offence of stealing is the use or threat of actual violence to the victim and what distinguishes a robbery under sections 296 (1) and 296 (2) of the Penal Code is that under section 296 (2) the offence is aggravated by the attackers being more than one, or having dangerous or offensive weapon, or if, at or immediately before or immediately after the time of the robbery, they wound, beat, strike or use any other personal violence to any person. To our minds, PW1 was hit and fell down. That is striking and is violence. He was held by one attacker while the other took his wallet from the pocket and again to hold a grown man down one must use some form of force.

29. In our considered view and going by the cases we have cited above, the offence committed was an offence under section 296 (2) of the penal code and the State was right in applying to enhance the sentence. Further the standard of proof in all criminal cases is proof beyond all reasonable doubts and we know no other standard of proof under the law for criminal offices. It will not matter whether the offence is simple battery or murder. The standard remains the same as provided by law. It was therefore erroneous for the trial magistrate to state the standard of proving offences which attract death sentences must be very high.

30. In conclusion, we do not agree with the appellant in many of his grounds of appeal. Specifically, we find and hold that the charge is not defective; that the evidence supports a charge of robbery with violence under section 296 (2); that the appellant was allowed to mitigate and that on violation of the appellant's constitutional rights, we advise him to follow a claim for compensation if he has evidence in support of the same. We however find and hold that the evidence on the identification of the appellant as one of the robbers is shaky and cannot be safely relied on to convict; secondly the doctrine of recent possession is not applicable in this case for the reason that we are doubtful about the identification of the appellant and the alleged recovery of the stolen items from him. We also find that there are contradictions as shown above in this judgement and that the trial magistrate introduced extraneous matters in his judgement that are not supported by evidence. The upshot of this is that the appellant was not accorded a fair trial and the trial court ought to have found there exists doubts in the evidence that ought to have gone to the benefit of the appellant.

31. We have noted the case for the prosecution and the authorities cited in support of their case before us

but much as we agree with them that the offence disclosed here is one under section 296 (2) of the Penal Code, we are not in a position to dismiss this appeal and convict on an enhanced offence because of the reasons we have advanced above. We have noted that the appellant was sentenced on 2nd January 2007 and he has been serving jail term ever since that date. This is a period of six years. It is unfortunate that his appeal has taken this long before it is concluded and we regret the delays. The record of the court file explains the reasons of those delays and majority of them were not caused by the judicial officers. We hereby allow the appeal, quash the conviction and sentence and order immediate release from custody of the appellant unless for some other reason authorized by the law he is being held. Those are our orders.

Florence N. Muchemi **Stella N. Mutuku**

Judge **Judge**

Dated, signed and delivered this 29th day of January 2013