



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 197 OF 2011

(From the original Conviction and Sentence in the Criminal Case No. 710 of 2010 of the SRM's Court at Kwale)

ANDREA NAHASHON MWAKISHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein **ANDREA NAHASHON MWAKISHA** has filed this appeal to challenge his conviction and sentence on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge before the lower court were given as follows:

“On the 24th April, 2010 at 7.30 a.m. at Golini Ndegeni area in Golini location in Kwale District within Coast Province jointly with others not arrested robbed Rashid Mwakusema Hidadi one motor cycle Reg. No. KMCG 377T make Tianma, one mobile phone make Nokia 3310 and cash Kshs. 945/= all valued at Kshs. 85,110/= and immediately before the time of such robbery beat the said Rashid Mwakusema Hidadi.”

The appellant entered a plea of ‘*Not Guilty*’ before the learned Senior Resident Magistrate Kwale Law Courts and his trial commenced on 10th August, 2010. The prosecution led by **INSPECTOR SIBUNDA**, called a total of seven (7) witnesses in support of their case.

The complainant **RASHID MWAKUSEMA HIDADI** told the court that at the material time he was in business operating a boda boda taxi. On 24th April, 2010 he was at the stage waiting for customers. One **OMARI SANZUA** whom the complainant knew very well approached him and asked to be taken to Ndegeni. The complainant agreed and the two set off. Before reaching their destination, near a forested area ‘*Omar*’ ordered the complainant to stop. He called out to one ‘*Hamisi*’ who emerged with a third man [the appellant] from the bushes. The three men gagged the complainant and tied him up. They then proceeded to rob him of his Nokia mobile phone and cash Kshs. 745/=. The men pushed the complainant into the forest and rode off on the motor-cycle.

The complainant struggled to release himself and walked to a nearby home. He borrowed a phone and called the police. A few hours later the appellant was arrested in possession of the stolen motor cycle. Upon completion of police investigations the appellant was arraigned in court and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. The appellant elected to give an unsworn defence by which he denied the charge. On 5th September, 2011 the learned trial magistrate delivered her judgment in which she convicted the appellant and sentenced him to death in accordance with the law. Being aggrieved by his conviction and sentence the appellant filed this appeal.

Being a court of first appeal we are obliged to re-examine all the evidence presented before the trial court and to make our own conclusions on the same. We have given careful consideration to the written submission filed by the appellant. The appellant raised the following grounds for his appeal

- Defective charge sheet
- Identification
- Insufficiency of Evidence

MR. JAMI the learned state counsel who acted for the respondent state opposed the appeal.

On the first ground the appellant submits that no mention was made of offensive weapons in the charge sheet, and this omission, he argues renders the charge sheet fatally defective. A charge sheet is but a brief synopsis of the evidence to be adduced in support of the charge. It is therefore not essential that the charge sheet include **each and every** element of the offence. The element of the use of violence as against the victim was captured by the words '*at the time of such robbery beat the said*' We therefore find that the failure to include the words offensive weapons does not render the charge sheet fatally defective. In all other aspects we find the charge sheet to have been properly framed and we do hereby dismiss this ground of the appeal.

On the question of identification the complainant identified the appellant as one of the men who attacked and robbed him. The incident occurred at 7.00 a.m. It was day light and visibility was good. In his evidence at page 6 line 18 the complainant states:

“HAMISI removed the money and phone. Andrea (accused) tied my legs and also gagged me.”

The complainant is therefore able to state with clarity the exact role which the appellant played in the robbery and was able to describe him physically. Under cross-examination by the accused at page 9 line 2 the complainant says:

“The incident took time. I was able to identify you from our small moustache, skin colour and your physical features. You are dark-skinned but not totally black.....”

This means that he was able to see the events well. The incident took some fair amount of time and the complainant was in the company of the attackers for a period of time. He had ample time and opportunity to see them all well. We are mindful of the fact that there was no other eyewitness to the incident. However, the evidence of identification is strengthened and given credence by evidence of recovery of the stolen motor cycle.

There is evidence that barely two hours after the robbery incident the stolen motor-bike was recovered in the possession of the appellant. **PW3 MAULIDI ALMASI** told the court that he was the owner of the motor-cycle Reg. KMCG 377T make Tianma. **PW3** further confirms that he had employed the complainant to use his motor-cycle as a boda boda taxi. **PW5 KOMBO BORA KIDORO** told the court that he too is a boda boda operator. On the material date he received news of the theft of his colleague's motor cycle. **PW5** says that at about 10.00 a.m. he saw the motor cycle emerge from the forest with three men on board. As he followed it two of the occupants jumped off and ran away. **PW5** apprehended the third man and took him with the bicycle to the police station. **PW7 PC SAMMY KIPKIRUI** told the court that on the material day the complainant came to report the robbery at Kwale police station. **PW7** booked the report and commenced investigations. Later he was told that the stolen motor-bike had been recovered in Lutsangoni. He went to the scene and arrested the appellant who was found in possession of

the motor cycle. At the time of its recovery the motor cycle was found bearing a fake registration number plate being KMCA 105K. However, the genuine number plate being KMCG 377T was found in a bag tied on the motor cycle. **PW3** the owner of the motor-bike was able to positively identify it as his by the broken front head light. The complainant also positively identifies the recovered motor-bike as the one which had been stolen from him. The photographs of the motor-bike were produced as exhibits **Pexb1**.

From the above evidence the doctrine of **“recent possession”** comes into play. The only way the appellant could have had in his possession the motor cycle stolen from the complainant barely **two hours** after the robbery is because he was involved in the theft. The fact that this was the motor bike stolen from the complainant is not in any doubt its having been positively identified by the complainant and **PW3** and the genuine number plate having been found attached to the said bicycle. It is clear that the robbers acted swiftly to attempt to disguise the stolen motor-bike by switching the number plate. The doctrine of recent possession was discussed by the Court of Appeal in the case of **ARUM – VS – REPUBLIC [2006] E.A.** where it was held that:

“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, there must be positive proof, first, that the property was found with the suspect, secondly that the property is positively identified as the property of the complainant, thirdly, that the property was stolen from the complainant, and lastly, the property was recently stolen from the complainant.”

We have carefully analyzed the evidence on record as against this ruling. There can be no doubt that the motor cycle recovered in the possession of the appellant was the very same motor cycle that had been stolen from the complainant only a few hours earlier. The complainant and **PW5** have both positively identified the appellant. We are satisfied that there was a clear and positive identification of the appellant leaving no room for a mistaken identification.

The appellant in his submissions suggested that the prosecution case was replete with contradictions and inconsistencies rendering his conviction unsafe. On our part we have anxiously perused the evidence on record and find no examples of such inconsistencies. The prosecution witnesses gave clear and concise evidence and they all remained unshaken under cross-examination by the appellant. The elements of the offence of Robbery with Violence in our assessment have been proved to exist.

These include:

- Participation in the incidence by more than one person.
- Armed with dangerous and/or offensive weapons.
- Actual violence or threat of violence upon the victim of the crime.

Proof of any **one** of the above elements suffices to proof of the offence of Robbery with Violence. In this case the complainant told the court that he was accosted by three (3) people. In furtherance of the robbery his attackers gagged him, tied him up and strangled him causing the complainant actual bodily harm. Proof of this is provided by the evidence of **PW4 CRISPIN MNYAPARA**, a clinical officer attached to Kwale District Hospital. **PW4** told the court that he examined the complainant shortly after the incident and noted swelling and tenderness on his throat, hands and legs. He filled and signed the P3 form which is produced in court as an exhibit **Pexb6**. We are satisfied that this incident did fall under the ambit of section 296(2) of the Penal Code. We are further satisfied that the evidence adduced in support of the charge was cogent and reliable. The appellant’s conviction by the learned trial magistrate is hereby confirmed.

The appellant was allowed an opportunity to mitigate after which he was sentenced to death. We find that the sentence imposed was lawful and we do uphold the same. The upshot is that this appeal fails in its entirety.

Dated and delivered in Mombasa this 5th day of August, 2013.

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M. ODERO

JUDGE

In the presence of:

Appellant in person

Mr. Jami for State

Court Clerk

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M. MUYA

JUDGE