



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 365 OF 2010

ANDREW OLILA MARTINS APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 249 of 2009 of the Principal Magistrate's Court at Voi – **Hon. Khadambi - PM**)

JUDGMENT

ANDREW OLILA MARTINS hereinafter referred to as the Appellant was Convicted and Sentenced to suffer death for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

The particulars in respect to the first count are that on the 6th day of March, 2009 at Travellers Bar and Lodging along Voi- Nairobi Highway Voi town of Taita-Taveta County being armed with dangerous weapons namely, pangas, clubs, bows and arrows robbed **VIOLET MWAMONDO** Ksh. 1,290/=assorted number of beers, spirits, whiskies, cigarettes, soft drinks, sony DVD player, phone make Nokia 2626 and two litres of mineral water all of the value of Ksh. 35,925/= the property of **VIOLET MWAMONDO** of travellers bar and Lodging and at or immediately after the time of such robbery threatened to use personal violence to the said Violet Mwamando.

He is also jointly charged with one **JOSHUA JOHN** in the second count where it is alleged that they robbed **ELIMINA INZIANI LICHINDA** Ksh. 13,600/= and immediately before or after the time of such robbery threatened to use personal violence to the said **ELIMINA INZIANI LICHINDA**.

On the third count the two are also alleged to have robbed **AMINA ATHUMANI ABDALLAH** of one Nokia phone valued at Ksh. 1,700/= and immediately at or before the time of such robbery threatened to use violence to the said **AMINA ATHUMANI**.

The fourth count is for handling stolen property contrary to section 322 of the Penal Code. We do note that this ought not be referred to as a fourth count but as an alternative one. At any rate it does not form part of the present appeal as it relates to another Accused by the name of Joshua John who was acquitted by the trial court.

The brief facts of this case are:

“On the 6th day of March, 2009 at about 4:00am a gang of more than ten men armed with pangas,

clubs and bows and arrows attacked the premises known as Travellers bar Ikanga-Voi. This business operates 24 hours everyday and comprises of a restaurant, a shop, a butchery, Bar and Lodgings.

The Complainants Violet Mwamondo (PW 1) and Amina Inziani Lichinda (PW 2) worked there as an Accountant and manager respectively.

During the attack the gangsters made away with the items enumerated in the charge sheet namely cash Ksh. 12,900/=, Assorted number of beers, Assorted number of spirits, Whiskies, Cigarettes, Soft drinks, Sony DVD player, Nokia phone and mineral water property of PW 1 and from PW 2 Elmina Inziani Ksh. 13,600/=.

We note from the outset that the charge sheet does not specify with sufficient particularity the items stolen from the Bar facility. It refers to assorted beers, assorted sodas, assorted whiskies, assorted cigarettes. This goes to show that no proper stock taking was done at all to establish what indeed was stolen. Failure to clearly indicate what was stolen would be prejudicial to the Accused defence.

Section 137 (c) (i) of the Criminal Procedure Code provides,

“the description of property in a charge or information shall be in ordinary language and shall indicate with reasonable clearness the property referred to, and, if the property is described, it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property”.

We are of the considered view that the provisions of the above quoted section were not adhered to.

On the issue of identification the trial magistrate at page 35 line 14 had this to note,

“As for the 1st Accused, I am satisfied that PW 2 saw him clearly in the light from the torch and the electricity lights. If I had any doubts, the same are quenched by the fact that the 1st Accused was arrested almost immediately after the robbery”.

We note that it is also PW 2 who is said to have identified the 2nd Accused. This is what he says of the evidence against the 2nd Accused at page 35 line 10,

“It may be true that the 2nd Accused was a member of he gang that robbed the evidence on record is not well corroborated to bring in a conviction as against him”.

At page 35 line 2 the trial magistrate further notes,

“only PW 2 claimed she saw clearly two of the robbers, but she emphasized that she could see the one who held a panga to her neck, and that was the 1st Accused. She was not able to state what made her recall the 2nd Accused”.

In the case of **PETER NGIGE WERU –VS- REPUBLIC** Court of Appeal held that,

“Where one witness purports to identify two people under very similar circumstances and the purported identification of one is reflected, then it would require very special circumstances to accept his identification of the other person”.

We find that this case is in all fours with the present one.

Lastly, we find that the circumstances surrounding the arrest of the appellant are not clear. It is alleged that he was arrested by members of public after he was found with two knives.

These two knives were produced in Court as exhibits. There is no evidence adduced on how, where, the knives were recovered. We also note that the two knives are of dubious evidentiary value as they are not shown in the particulars of the charge sheet as having been amongst the properties stolen from the complainants and nor are they indicated as part of the dangerous weapons used by the gangsters during the act of robbery.

We are of the considered view that the Conviction against the appellants was unsafe. We quash it and set aside the Sentence.

The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this **11th** day of **October, 2013**.

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M. ODERO

JUDGE

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M. MUYA

JUDGE