



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 315 of 2010

ERICK AMWATA ONONO APPELLANT

=VERSUS=

REPUBLIC RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 3291 OF 2009 of the Chief Magistrate's Court at Mombasa: T. Ole Tanchu – S.R.M.)

JUDGEMENT

The Appellant **ERICK AMWATA ONONO** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at Mombasa Law Courts. The Appellant had initially been arraigned in court on 21st October 2009 facing a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars were that:

“On the 24th day of September 2009 at about 1.00 A.M. at Vijiwai Village of Likoni Division in Mombasa District within Coast Province, jointly with others not before court while armed with dangerous weapons namely pangas, iron bars, robbed RAJABU HAMISI of his wallet containing Kshs.60/-, National I.D. Card all valued to a total of Kshs.30o/- and at or immediately before or immediately after the robbery used actual violence to the said Rajabu Hamisi”

The Appellant entered a plea of ‘**Not Guilty**’ to the charge and his trial commenced on 10th November 2009. The prosecution led by **INSPECTOR SUMBA** called a total of six (6) witnesses in support of their case. The complainant **RAJABU HAMISI** told the court that on 23rd September 2009 he came home at about 7.30 P.M.. At about 1.30 A.M. whilst he was asleep he heard the door to his brother Rajab’s room being hit by stones, the complainant’s mother began to call out for help shouting ‘**Thief**’ ‘**Thief**’. The attackers were however not deterred. They broke down the door. **PW1** got up and peeped out of his door. He saw a group of 6 men armed with stones. **PW1** picked up an iron rod with which to defend himself. He came out of his room and the men began to throw stones at him. The Appellant who was the ring leader then commanded the others to attack the complainant. The men set upon him and beat him up thoroughly. The matter was reported to police. The complainant was treated for his injuries. The Appellant was later arrested and charged.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He opted to make an unsworn defence in which he denied the charge of Robbery. On 5th July 2012 the learned trial magistrate delivered his judgement in which he convicted the Appellant for the offence of Robbery with Violence and thereafter sentenced him to death. Being dissatisfied by both his conviction and sentence the Appellant filed this appeal. **MR. TANUI** learned State Counsel who appeared for the Respondent State conceded the appeal.

We have carefully perused the record of the trial before the lower court as well as the written submissions filed by the Appellant. The Appellant raised two main grounds of appeal as follows:

- (i) Identification
- (ii) Sufficiency of evidence

On the question of identification **PW1** told the court that although the incident occurred at night he was able to see and identify the Appellant with the aid of security lights. **PW1** gave a clear description of the role which the Appellant played in the incident. At page 2 line 27 he states:

“There is electricity where we stay. One of the attackers is here before court (accused on dock identified). He appeared to be the ring leader. He was holding a torch”

This evidence of **PW1** is duly corroborated by the testimony of **PW3 SOFIA BILALI** who was his mother. She states in her evidence at page 7 line 20:

“There is ample light at my house. We had a security light (electric) I could identify one of them as the one who had come earlier during the day”

Not only was **PW3** able to see and identify the Appellant at the time of the incident, she also recognized him as the man who had come to her home earlier in the day at 4.00 p.m. demanding to use the toilet. **PW1** also told the court that he was able to recognize the Appellant as he knew him as a resident in the area. **PW1** was able to give a clear description of the Appellant at page 3 line 20 thus:

“I described the man as one who sharpens knives. I described him as black and round ears and tall. I also described that you wear akala shoes. Yours are unique ...”

It was through this description that law enforcement agents were able to trace and arrest the Appellant. **PW2 RUA MBARAKA** one of the community policing officers who arrested the Appellant told the court at page 4 line 16:

“The mother of the victim explained that one of the attackers was known as one who sharpens knives and tall and black. We started looking for Onifiso Beba as he is known in the estate”

It is clear that apart from a mere visual identification both **PW1** and **PW3** knew the accused before by the work he did in the estate of sharpening knives. There was therefore clear evidence of recognition which has been held to be ***“more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other”*** [See **ANJONONI & OTHERS –VS- REPUBLIC 1980 KLR 59**]. From the evidence of these two eyewitnesses we are satisfied that there has been a clear and positive identification of the Appellant with no possibility of a mistaken identity.

The charge against the Appellant was that of Robbery with Violence. The ingredients of this offence were well set out in the case of **OLUOCH –VS. REPUBLIC [1985] KLR 549**. These are:

- (i) That there are two or more assailants
- (ii) The assailants are armed with dangerous and/or offensive weapons
- (iii) Violence is visited upon the victim in the course of the theft

In this case the evidence is that there were six (6) assailants. The men were armed with stones which they used to pelt **PW1** in an attempt to keep him away. During the incident **PW1** in his own words was ***“beaten to a pulp”*** and had to seek medical treatment for his injuries. This fact of injury is corroborated by the evidence of **PW6 DR. LAWRENCE NGONE** who produced the complainant’s P3 form. The

doctor found that the complainant suffered bruises to his hands and head. The injuries were assessed as harm and were opined to have been caused by a blunt object e.g. a stone. Therefore we find that all the ingredients of Robbery with Violence have been proved to have existed.

However we do note one major anomaly in this case which anomaly was also pointed out by the learned State Counsel. The Appellant was charged with the offence of Robbery with Violence and the particulars of the charge indicate that the complainant was robbed of **“his wallet containing Kshs.60/- and National I.D. card all valued at Kshs.300/-“**. At no point in their evidence did either **PW1** or **PW2** mention that these items were stolen from them. No mention is made of theft of cash or an identity card. Without evidence of theft the offence of Robbery cannot be found to have occurred. The learned trial magistrate did in his judgement note this anomaly when he stated at page 20 line 4:

“It is alleged that 60/= and ID card and wallet were stolen. I have not seen anywhere in the evidence where PW1 has acceded to that piece of evidence but a charge of robbery can be complete even when the issue of violence alone has been proved ...”

With respect we do not agree with this line of reasoning. If one is charged with robbery then evidence **must** be adduced to prove that a theft occurred. Where there is no evidence of a theft then the charge of robbery cannot be sustained. We find that the learned trial magistrate erred in proceeding to render a conviction on a charge of Robbery with Violence in the absence of proof that any item had been stolen.

However we do agree with the learned State Counsel that the facts do prove the lesser charge of Attempted Robbery with Violence. The only reason six men would break into a house at 1.30 A.M. and proceed to beat up the occupants of that house, would be in furtherance of an intention to commit the felony of robbery. The Appellant and his cohorts were only thwarted by the courageous actions of **PW1** and **PW3** in confronting and launching a counter-attack against the robbers. As such we do allow this appeal. We quash the Appellant’s conviction on a charge of Robbery with Violence contrary to Section 296(2) of the Penal Code and in its place we substitute a conviction for the offence of Attempted Robbery with Violence contrary to Section 297(2) of the Penal Code. The death penalty imposed upon the Appellant being the same penalty imposed by Section 297(2) of the Penal Code is hereby upheld.

It is so ordered.

Dated and Delivered in Mombasa this 9th day of November, 2012.

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M. ODERO
JUDGE

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G. NZIOKA
JUDGE

In the presence of:

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