



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 11 OF 2005

(From Original Conviction and Sentence in Criminal Case No. 116 of 2004 of the Chief Magistrate's Court at Mombasa: P.M. Ngigi – S.R.M.)

SAID MWAMUNDA TOYA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant herein **SAID MWAMUNDA TOYA**, has filed this appeal challenging his conviction and sentence on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the offence were that:

*“On the 7th day of January 2004 at about 8.30 p.m. at Mtaa Wa Pwani Village in Likoni Location within Mombasa District of the Coast Province, jointly with others not before court while armed with dangerous weapons namely rungun and knives robbed **ABDUL ABDURAHIM** of his wallet containing Kshs.350/-, an ID card and one safaricom line and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **ABDUL ABDURAHIM**”*

The Appellant was arraigned before the learned Senior Resident Magistrate sitting at Mombasa Law Courts on 13th January 2004 whereupon the charge was read out to him. The Appellant pleaded ‘**not guilty**’ to the charge and his trial commenced on 16th June 2004, at which trial the prosecution led by **INSPECTOR ASUNA** called a total of four (4) witnesses in support of their case.

The complainant **ABDUL ABDULRAHMAN**, told the court that on 7th January 2004 at about 8.00 p.m. he was walking towards the ferry. He passed a shop and a group of people caught hold of him. One of the men had a knife which he put at the complainant’s head and another had a rungun. They searched **PW1** and stole from him Kshs.350/-, his identity card and safaricom line. The Appellant was apprehended whilst his companions escaped. He was later arrested and charged.

At the close of the prosecution case the Appellant was placed on his defence. He opted to make a sworn defence in which he denied any involvement in the robbery incident. On 14th January 2005 the learned trial magistrate delivered her judgement in which she convicted the Appellant and after listening

to his mitigation sentenced him to death. The Appellant then filed this present appeal. **MR. ONDARI**, learned State Counsel who appeared for the Respondent State opposed the appeal.

The Appellant was charged with the offence of Robbery with Violence contrary to section 296(2) of the Penal Code. The ingredients of this particular offence were set out by the Court of Appeal in the case of **OLUOCH –VS- REPUBLIC [1985] KLR 549 -**

- (1) The offence is committed by more than one person **or**
- (2) The offender(s) are armed with dangerous and/or offensive weapons **or**
- (3) In pursuance of the robbery real or threatened violence is directed towards the victim

The use of the word '**or**' in this definition means that proof of **any one** of the three ingredients listed above will be sufficient to prove an offence under S. 296(2) of the Penal Code. The complainant did testify that he was attacked by a group of more than 2 men. One was armed with a knife and the other with a panga. The robbers threatened to kill the complainant if he resisted. We are satisfied that all the ingredients set out in the **OLUOCH** case are shown to have been present thus the threshold for an offence under S. 296(2) of the Penal Code has been met.

The incident occurred at 8.30 p.m. No doubt it was dark. However neither the complainant nor **PW2 ASHIBUI HAMISI**, who was an eye witness to the incident tells the court what if any source of light was available to them at the scene. By all accounts the incident took place in the open close to some shop called '**Adonai**'. Were there street lights available or security lights from nearby shops? This was not revealed in evidence. The court cannot make any assumptions on so crucial a matter. If there was light available at the scene then this fact must be elicited directly from the witnesses. The failure by the court prosecutor to establish this fact from the witnesses greatly weakens this case. In the absence of light we fail to see how the witnesses would have been able to see and identify the Appellant?

In his submissions Mr. Ondari learned State Counsel states that the complainant grabbed hold of the Appellant in the course of the robbery. We have anxiously perused the record from the trial court and with respect, we cannot find this statement to have been supported by the evidence on record. **PW1** states at page 7 line 24:

“We managed to arrest one. He is the one over there with a white cap”

PW1 does not elaborate who the '**we**' he refers to are nor does he explain exactly **how** they managed to arrest the Appellant. Nowhere in his evidence does **PW1** say that he caught hold of one of his assailants. He merely states at page 8 line 2:

“The other people ran away and this accused remained”

This statement is quite ambiguous and it raises more questions than answers. How did the Appellant '**remain there**'? Was he detained at the scene and if so by whom? Did the Appellant attempt to flee only to be apprehended? All these are possible scenarios and it is not clear precisely which scenario prevailed.

The evidence of **PW2** who was the eye witness to the incident is of no help. He too does not state that he found the complainant holding on to the Appellant. **PW2** states at page 8 line 15:

“I saw the complainant going home. There is somebody who was following him with a club. Three people were ahead of him. I heard somebody screaming. The person was saying that the person was among them since he is the one who had the club. It is called 'Bakora'. I went and decided to take the report to the police station. I went with the suspect to the police station. Many people escorted us”

It is difficult to decipher from this passage exactly what **PW2** meant to say. He is supposed to have been an eye witness to the robbery but he does not tell the court exactly what he saw. More importantly **PW2** **does not** testify that he found the complainant holding on to the Appellant. In her judgement the trial magistrate stated at page 22 11:

“He [PW2] went and saw the complainant holding the accused”

With respect this conclusion is erroneous and could not have been made from the evidence of **PW2**. On that same judgement page at line 7 the trial magistrate states:

“He [PW2] went there and found the complainant who was saying that the accused was among them since he had the weapon”

This again we find to have been an erroneous conclusion. The mere fact that the Appellant was in the vicinity carrying a weapon does not prove his involvement in the robbery. On the whole we find that the evidence of the prosecution witnesses was ambiguous and confusing. The conclusions made by the learned trial magistrate cannot be supported by the evidence on record. The crucial question of light available at the scene was not addressed by any witness. We find the conviction of the Appellant unsafe and we therefore quash that conviction. The subsequent death sentence is also set aside. This appeal succeeds. The Appellant to be released forthwith unless he is otherwise lawfully held.

Dated and Delivered at Mombasa this 22nd day of March 2011.

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J.B. OJWANG
JUDGE

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M. ODERO
JUDGE