



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang & Odero, JJ.)

CRIMINAL APPEAL NO. 184 OF 2006

-BETWEEN-

MOHAMED MWALIMU MOHAMED.....

APPELLANT

-AND-

REPUBLICRESPONDENT

(Being an appeal from the Judgment of Chief Magistrate B.N. Olao dated 12th June, 2006 in Criminal Case No. 3267 of 2005 at Mombasa Law Courts)

JUDGMENT

The appellant faced a charge of robbery with violence contrary to s.296(2) of the Penal Code. It was alleged that the appellant, jointly with others not before the Court, and while armed with dangerous weapons, namely knives, on 2nd August, 2005 at about 7.00 p.m., at Mwandoni Village in Mombasa District, robbed **Khadija Ahmed** of a cellphone, Samsung by make, valued at Kshs.7000/=, and cash in the sum of Kshs.1,500/= – all valued at Kshs.8,500/= – and at or immediately before or immediately after the time of such robbery, used actual violence to the said **Khadija Ahmed**.

After hearing the four prosecution witnesses and also the appellant herein, and after carrying out an analysis of the evidence, the learned Chief Magistrate thus arrived at his final decision:

“Upon careful evaluation of the evidence on both sides, I am satisfied beyond reasonable doubt that the prosecution has proved that the accused in the dock was amongst those who robbed the complainant on the material day. His defence that he does not know anything about this offence has adequately been rebutted by the strong, reliable evidence against him showing that indeed, he was one of the three persons who robbed the complainant on that day. The evidence shows that not only was the accused in [the] company of others, but that they were armed with ‘dangerous weapons’, that is, knives, which they used in ripping [open] the complainant’s jacket. The ingredients of an offence under s.296(2) of the Penal Code have been adequately established, and I accordingly find the accused guilty of the offence of robbery with violence...and convict him accordingly.”

The trial Court imposed the death penalty in its sentence, in accordance with s.296(2) of the Penal Code.

In his amended grounds of appeal, the appellant stated that:

- (i) the evidence of identification relied on by the trial Court was unsafe;**
- (ii) there was no nexus between the offence, and the circumstances of arrest;**

- (iii) *the prosecution evidence was contradictory;*
- (iv) *the accused's trial rights relating to language, under s.77 (1) and (2) of the [1969] Constitution had been infringed;*
- (v) *the defence case was rejected in error.*

On the occasion of hearing, the appellant indicated that he had nothing to say, beyond his pre-written submissions which had been filed; but, for the respondent, learned counsel, **Mr. Onserio** contested the appeal.

Counsel submitted that the outcome of this appeal case should turn on two issues: identification, and grudge. Counsel submitted that the complainant, beyond identifying the appellant at the material time, had recognized him, as a person he had known as a tout for some three years. On the material occasion, the complainant was just leaving her house for the shops, when she was accosted by a gang, and she recognized the appellant; the time was the early evening, about 7.00 p.m., and the security lighting was switched on; the appellant wore no mask; the conditions for identification were good. The appellant who was armed, demanded the complainant's cellphone; he cut open her pocket, and grabbed cellphone and cash; she screamed, yelling out the name of the appellant; she complained to the Police; the appellant was later arrested.

Learned counsel submitted that, for the bulk of the trial proceedings, the appellant did not claim there was any grudge between him and the complainant; but he claimed so during the defence.

Mr. Onserio submitted that the candour of the prosecution witnesses had been noted on record by the trial Court, which had come to the conclusion that the appellant's invocation of grudge was an afterthought.

After considering the appellant's written submissions, we have had a fresh look at the record of evidence, while paying regard to the learned Chief Magistrate's record on the demeanour of witnesses; he had the opportunity which is not available to us, of observing the witnesses in the witness-stand, and forming contemporaneous impressions on their mien and their frankness. We note, in this regard, the following passage in the trial Court's Judgment:

“Having confirmed that [the] accused was well known to the complainant and other witnesses, is there a possibility that they have ganged up in a group of liars to lay false charges against him? I see no evidence of such. By their demeanour which I noted, the complainant and her mother appeared as truthful witnesses who spoke the truth and had no motive to be against the accused person, and at no stage was it ever suggested that...there was any reason...to motivate the witnesses to give false testimony against the accused person whom they all knew well.”

It was the evidence of PW1, **Khadija Ahmed**, that she left her house to go to the shop, at about 7.00 p.m. on the material day. As she set off, she saw three men standing outside her door – and one of them was the appellant herein, a neighbour, whom she had known for over three years. This neighbour flashed a knife at the complainant, demanding PW1's cellphone; and he cut open her jacket-pocket and grabbed her cellphone and money. The gang then took to their heels, leaving the complainant screaming and making her way back to her house; she met her mother (PW2), **Fauzia** who had been attracted by the commotion; and she told PW2 right then, that she had been robbed by **Amadega** and others. In her later report at Nyali Police Station, the complainant had restated that the robbers were **Amadega** and others. **Amadega** (the nickname for the appellant) was subsequently arrested by the Police, and the complainant who was called to the Police station, identified him as the suspect.

In the cross-examination, the complainant stated that she quite well knew the appellant, who bears the nickname **Amadega**; and she testified that she had screamed out that very name, at the material time. The complainant thus responded to questioning by the appellant:

“I am sure it was you, as I saw you and recognized you. You are the only Amadega in the Estate, and I am not mistaken about your identity. The incident occurred about 7.00 p.m. You were armed

with a knife and you told me to keep quiet. So I kept quiet. You were very close to me and I know you...Even the other neighbours know you by that name.”

PW2, though not a direct witness, gave testimony regarding the circumstances immediately following the incident: PW1 had just left the house, when her screams were heard; PW2 saw PW1 returning to the house, crying, and with her jacket torn; PW2 heard PW1 say “***Amadega*** had robbed her of her [cellphone] and cash.” PW2 had accompanied PW1 as PW1 reported the incident, blaming ***Amadega*** as a suspect.

The appellant, in his very brief unsworn statement, did not address the matters featuring in the prosecution case; he said:

“[The Police] decided to charge me with this offence and others which I do not know about.”

Upon considering all the evidence, and all the submissions in writing, it has become clear to us that the ground of merit upon which this appeal is to be decided, is whether or not the appellant was ***accurately identified*** as a suspect, on the material evening.

Our reading of the evidence leads to perfect agreement with the trial Court, that the prosecution witnesses had candidly given evidence. We find it to have been rightly ascertained that the appellant herein was one of the robbers, and that, using a dangerous weapon, he and his accomplices had deprived the complainant of her money and her cellphone; he was a neighbour to both PW1 and PW2, and he was well known in the neighbourhood, and was not only identified, but recognized as one of the attackers. Consequently, the appellant was rightly found guilty and convicted.

We dismiss the appeal; uphold the conviction; and affirm sentence.

Orders accordingly.

SIGNED

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J.B. OJWANG
JUDGE

.....
M. ODERO
JUDGE

DATED and DELIVERED at MOMBASA this 6th day of September, 2011.

M.A. ODERO
JUDGE