



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MOMBASA

Criminal Appeal 158 of 2008

STEPHEN OCHIENG AWUORA..... APPELLANT

-AND-

REPUBLICRESPONDENT

(Being an appeal from the Judgment of Senior Resident Magistrate

Ms. T. Mwangi dated 15th May, 2008 in Crim. Case No. 707 of 2007

at Mombasa Law Courts)

JUDGMENT

The appellant was charged with the offence of robbery with violence contrary to s. 296(2) of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the appellant jointly with others not before the Court, and while armed with dangerous weapons, namely *pangas* and knives, on **21st February, 2007**, at Mwembe Tayari in Mombasa, robbed **Peter Chege Ngugi** of computer cables, a pair of leather shoes, a cellphone, Sendo by make, one Equity Bank ATM card and cash in the sum of Kshs.600/= – all valued at Kshs.10,600/= – and immediately before or at or immediately after the time of such robbery, used actual violence against the said **Peter Chege Ngugi**.

In the assessment of evidence, the learned Magistrate found that the complainant had been able to identify his attackers, with the help of the security lights; and he alerted the Police officers on patrol, pointing out the appellant herein who was at the time strolling away and had advanced by some 200 metres. The police officers gave chase after the robbers, shooting one of the suspects, and arresting another while endeavouring to escape; and the complainant thereafter identified the arrested one as the appellant herein. The Court inferred good lighting as having been available, since the appellant himself did indicate the time of arrest as 6.00a.m.

The learned Magistrate found that PW1 had correctly identified the appellant as one of the suspects: for he had testified that the attackers had left the *locus in quo* as they walked casually, and when the Police officers began giving chase, they were only some 200 metres away; a Police Officer (PW2) subdued two of the attackers and shot one of them; the complainant, when he saw the body of the man who was shot, was able to identify it as that of one of the robbers.

The trial Court held that the evidence of the prosecution witnesses was well corroborated on the manner

of arrest of the appellant herein; that the complainant had identified the appellant at the scene; that the Police Officer (PW3) “never lost sight of [the] accused from [the] time PW1 pointed him out [until] he apprehended [the appellant]; that there was “**no room for mistaken identity**”.

The Court arrived at its final decision as follows:

“The upshot is that [the] complainant positively identified [the] accused during the attack and at...[the time of arrest] as one of those who robbed him. The charge as drawn fulfilled all the ingredients of [the] offence of robbery with violence... [The] prosecution has proved its case beyond reasonable doubt. I find the accused person guilty as charged, and convict him accordingly....”

After treating the appellant herein as a first offender, and according him the opportunity to make an address in mitigation, the trial Court sentenced him to death, as provided for under s.296(2) of the Penal Code.

The appellant’s case rests on his amended grounds of appeal, of 22nd November, 2010. He contends (in summary) that:

- (i) the trial Court erred in fact and in law in convicting him on the basis of evidence of visual identification which was inaccurate, considering the prevailing circumstances at the material time;*
- (ii) as the attack upon the complainant was “sudden and terrifying, this might have caused fear and panic”, and falsified the process of visual identification;*
- (iii) the trial Court erred in law and fact by convicting and sentencing without establishing a proper connection between the appellant’s arrest, and the causation of the offensive incident;*
- (iv) the trial Court failed to take into account the fact that the appellant was not arrested with anything incriminating;*
- (v) there were inconsistencies and contradictions in the prosecution evidence;*
- (vi) the trial Court had erroneously rejected the appellant’s sworn defence.*

On the occasion of hearing this appeal, the appellant stated that he was relying entirely on his pre-written submissions, and would have nothing to add. The said written submissions consisted in detailed argument founded on the grounds of appeal lodged by the appellant, and this Court has carefully read and considered the same.

For the respondent, learned counsel **Mr. Ondari** assessed the evidence, urging that Police Officers PW2, PW3 and PW4 had seen the appellant walk away after the material incident, and that there was sufficient lighting to enable them to perceive the appellant herein; and when they commenced the arrest, the appellant had attempted to corrupt the process of identification by removing and discarding the shirt he had been wearing. Although the appellant insisted that he had been arrested on Digo Road, evidence was given that he had been arrested at Mwembe Tayari. Counsel submitted that the prosecution evidence had been entirely consistent: the complainant had consistently observed the appellant, following the robbery incident, and had seen the appellant run away after the appellant’s colleague was shot. Counsel urged that the appellant had been in the company of the suspect who was shot, and of fellow-suspects who escaped: and hence all of them were involved in a joint theft-enterprise. Counsel asked that the appeal be dismissed.

The course of events beginning with the act of robbery, and ending with the arrest of the appellant, is not in our view, as contended by the appellant, so obscure as to cloud this Court’s perception of the evidence. The lines of evidence open out with sufficient clarity for the Court to make a definite finding.

The complainant (PW1) had just alighted from a night bus arrived from Nairobi, about 6.00 a.m.

PW1 after alighting, was boarding one of the Mombasa buses, to take him to the Nyali Beach Hotel where he would be working. As he crossed the road, the complainant was attacked by four men, who were armed with machetes and a knife: they cut him in the finger, while robbing him of his effects. The complainant started following the intruders, as they casually made away with his belongings; and when he saw Police officers on patrol, he alerted them, whereupon a chase ensued, leading to the arrest of the appellant, and the fatal shooting of the appellant's accomplice. **Police Constable Albanus Kiviro** was one of the officers who pursued the suspects; and he confirmed in his evidence that the Police officers fatally shot one of the suspects, and arrested another. PW1's and PW2's evidence was well corroborated by the evidence by **Michael Kathua Ndivo** (PW3). The Investigating Officer, **Cpl. Titus Ndambuki** (PW4) too testified that he had been called to the arrest-scene just after the appellant herein had been arrested.

The appellant, though giving sworn evidence, was so laconic as to appear as being simply evasive: and for purposes of the law of proof, his testimony by no means cast doubt on the coherent and well-corroborated evidence tendered by prosecution witnesses. The appellant, therefore, has set up no basis for the play of the **benefit of the doubt** in his favour: and the Court must go by the cogency of the prosecution case only. It is clear to us that the prosecution has mounted a coherent and probative case which shows the appellant to have committed the offence charged.

Accordingly, we dismiss the appeal; uphold conviction; and confirm sentence.

Orders accordingly.

SIGNED at NAIROBI

J.B. OJWANG

JUDGE

SIGNED at MOMBASA

M.A. ODERO

JUDGE

DATED and DELIVERED at MOMBASA this 9th day of November, 2011.

M.A. ODERO
JUDGE