



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 7 of 2008

MOHAMED SAID ABDALLAAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Mohamed Said Abdallah alias Vincent (hereinafter referred to as the appellant) was convicted on a charge of robbery with violence contrary to section 296(2) of the Penal Code, and sentenced to death.

The prosecution case was that on 29th day of November 2003 at Casuarina area in Malindi, jointly with others not before court while armed with dangerous weapons, namely pistols, robbed Emmanuel Sulubu Kazungu of cash Kshs. 74,000/- and at or immediately before or immediately after the time of such robbery, used actual violence to the said Emmanuel Sulubu Kazungu, by shooting him dead.

Appellant had denied the charge.

On 29th November 2003, Katana Charo Kahindi (PW1) was on his way along Casuarina road, going for lunch, when he found two men at the place where Mama Christine was selling chapatti. He did not know the two young men, who were dressed in similar outfits of black t-shirt, black cap, black shirt and black rouser. He greeted them and proceeded on his way to Maweni. He took less than three minutes with them.

On the way, he passed another young man seated under a tree – he too was dressed in black like the others – he was about 20 metres from the other two PW1 became suspicious as he had seen this last one before, at Eden Roc , Complex area running towards town, and then he had greeted him, the man insulted him. PW1 decided to change his route and go straight using the man road. He met a young man whom he knew, riding a bicycle towards Blue Key – they greeted each other. After moving for about 50m, PW1 heard someone whistle and on looking back, he saw that the man who had been seated under the tree had felled the man on the bicycle, and the other two who had been at the chapatti kiosk joined him – and held the cyclist onto the ground. The man who had been sitting under the tree produced a black pistol and said “*toa pesa*” and PW1 saw him get money from the cyclist. The money spilled onto the ground, and the man with the gun and one other, collected the money from the ground and put in their pockets. The man then fired one shot, and a second one onto the ground and PW1 heard a voice “...*wewe pia unaniua*” but he didn’t get the name of the person being

addressed.

People begun gathering and the three men begun running away. Just then a motor vehicle came by and the driver went to help. Upon reaching where the men were, the one with a pistol pointed the gun at him and ordered him to stop – he obeyed. The three gangsters followed a footpath to Muyeye, and PW1, the driver and askaris from St. Peters went to help the man who had been shot in the chest and stomach. He was crying – the driver too him away. PW1 did not accompany them to hospital or the police station but proceed to have his lunch. On his way from lunch, he found police had come to the scene and he volunteered to tell them what he had seen. When PW1 went to check on the injured man at 4.00pm, he found he had died.

On 31-12-03 at about 2.00pm, while PW1 was at Mimdan workshop next to the hospital, he saw two men seated next to a bicycle garage near the mortuary – one of them was the one who had a pistol and shot the deceased.

PW1 was 100m away – so he called police and on arrival pointed out the man to police, and he was arrested. It was PW1's evidence that:

“The man is the accused at the dock. On the material day, he is the man who had been seated under the tree and when I had met earlier at complex running towards town. He is the one I had asked why he had been running. And on the fateful he is the one who had whistled he is the one who had a gun and also ordered the cyclist to produce money before firing the gun. He is also the one who ordered the motorist and bodaboda man to lie down. His two colleagues were not armed.”

On being cross-examined regarding discrepancy on his description of physical offence, PW1 stated that he may have been wrong on height (since in his statement he had described the person he saw as short and black) and he conceded in court that appellant was tall, but he maintained and was certain that appellant was the man he saw on that day.

From his evidence, he had met the appellant about twice before the shooting, the first time was near Complex when PW1 was from work at Eden Roc, then he again saw appellant pass near Beer Garden while on foot whilst PW1 was riding a bicycle and then at Maweni near Mnazi Mitani which is the time PW1 asked him why he was always running and appellant insulted him.

He further explained that on the date of shooting, once he saw appellant seated under a tree, he decided to change his route to Maweni, because he feared the appellant.

PW3 (Marko Banda), the manager of Coral Key told the trial court that on 29th November 2003, the deceased collected Kshs. 74,000/- (which was in different denominations) from him, being money for the daily expenses – this was at about 12.30pm. At about 1.00pm, he received a call from the deceased brother (by name Jason), that deceased was in hospital, having been shot in a robbery. PW3 called his friend, Dr. Paul and they proceeded to Malindi hospital where he found deceased on the bed. Deceased showed them a small bullet hole on the right side of his chest - doctors tried to help him, but he died after a couple of hours.

On cross-examination PW3 stated that deceased used to collect different amounts of money from him, almost on a daily basis.

Priscilla Mandi Mwangi (PW4) was selling food along the road leading to Casuarina on 29th November 2003. A man of Orma appearance arrived and had a brief conversation with her mainly inquiring about activities in the area. He was then joined by a second man whom she described as “tall and had a cap on his head. This latter man drew near, then they sat down and told PW2 not to worry, as they were waiting for their money, and after getting it, they would eat. Shortly thereafter a young man named Katana passed and greeted PW4 – he took the main road, to the District hospital where he stayed.

The two men also rose and started walking on the road towards the district hospital. Shortly ahead, a third man – who came from Msambweni direction, joined them – they were 25m away from PW4 and she could see them. She described the third man as tall – they walked together. Just then, a man came from town direction riding a bicycle – he was alone. The tall one who had a cap, held the bicycle (he is the 2nd man who had gone to PW4’s food place) – the cyclist dropped down. The one who had been to PW1’s place first put his hands in the cyclist’s pockets and removed something – PW4 saw things fall, but she did not know what they were. Then she heard two gun shots and saw the cyclist fall down. However she did not know where the gun shot came from or who had fired the gun.

She saw the three men pick whatever had dropped on the ground and put it in their pockets then they walked away. She did not see any of the three men with a weapon.

From the time the first man went to her up until the time they walked away, was about 2 hours. She identified the appellant as one of the three men she had seen and told the trial magistrate:

“I had seen him many times. He would come many times to sit on the road and then leave. Before this incident, I had seen him 3 times. I first saw him standing alone on the road at Maweni. I again saw him there a second time and even greeted him, but he did not reply. I saw him a third time at the same place and did not greet him now. This incident took place, one week after I had last seen him. He is the third man who joined the other two who had been with me....He is the one who held the bicycles first before the other two attacked the bicycle...I saw him and the others picking money that had dropped down....”

Jimmy Karama Kahindi (PW5) was coming from Casuarina, going to Kibokoni, using the main road – he was driving. Suddenly he heard gunshots and he saw a young man who had been on a bicycle fall. He slowed down, and as he drew closer he saw three men – one of them was searching the pockets of the cyclist, while the other two were warning people to stay away – he too was warned to stay away, so he pulled his car aside. The people shot twice and he was ordered to lie down in his car – he obliged. Shortly the robbers went and he went to the injured cyclist whom he realized was someone he knew. He took him to Malindi District Hospital. He stated.

“I cannot identify anyone in court as being one of the 3 men who attacked the cyclist.”

Pc Wilson Lelei received a report about the incident from 999 control room. He and other officers visited the scene and checked the bushes for signs of any suspicious characters, in vain. Then on 31-12-03, the OCS alerted him that some people who were suspected to be robbers, had been seen around Cassuarina area, so he went there and found a group of 9-10 people who on seeing them started running away while engaging the officers in shooting.

After the gunfire ceased, they found four of the attackers had been shot dead – they were all men and next to one was a

German Weber pistol which was loaded with one round of live ammunition.

On returning to the station, they found that three suspects had been arrested – among them was the appellant.

A postmortem carried out on the body of the deceased by Dr. Philip Masaulo disclosed a bullet wound on the left side of the chest, and internally the respiratory system had a collection of blood in the right lung which had collapsed. There was also an entry wound on the abdomen into the right side of the liver and it had exited on the same side. The large intestines were perforated below the spleen and there was a lot of bleeding inside the abdomen. The doctor formed the opinion that deceased had died as a result of excessive bleeding as a result of the wounds in the chest and abdomen. The P3 form was produced as exhibit.

PW9 Rtd IP Chai confirmed that appellant was taken to the police station on allegation that he had been identified by PW2 who had earlier recorded his statement saying he could identify the attackers.

On cross-examination IP Chai told the trial magistrate that he did not find an identification parade necessary because appellant was well known to the witness.

In his unsworn defence, appellant said he did not know anything to do with the charges. He told the trial court that he traveled to Malindi from Mombasa on 30th December 2003 to see a friend and spent the night in Malindi. On 31st December 2003 he did his business until about 2.30pm when he went to hospital for treatment as he was having a toothache. While at the hospital police arrived and arrested him on pretext that his name was Vincent – he denied but eventually he was charged.

In his judgment, the trial magistrate noted that the offence was committed at 12.30pm the appellant was positively identified by PW2, whose evidence was corroborated by that of PW4. He took into account PW4's evidence that moments before the robbery, the appellant had been seen hovering around the scene of crime. On 31st December 2003 PW2 spotted the appellant near Malindi District Hospital and alerted police, leading to the appellant's arrest. The trial magistrate stated:-

“The offence was committed in broad daylight and PW2 was able to identify the accused persons....”

The trial magistrate held that there was light from the sun, and the conditions were favourable for positive identification. The trial magistrate considered the appellant's defence and found it lacked credibility and was intended to solicit sympathy from the court, so he dismissed it.

The findings were challenged on grounds that:

- (1) Section 150 of the Criminal Procedure Code was not adhered to.
- (2) The trial magistrate relied on the evidence of a single witness.
- (3) There wasn't sufficient corroboration in the prosecution witnesses' testimony.
- (4) Two magistrates handled the matter.
- (5) The trial magistrate shifted the burden of proof onto the appellant
- (6) Appellant was not positively identified during the parade.

- (7) The defence was not properly considered.
- (8) There were contradictory reasons on the judgment.

At the hearing of the appeal, Mr. Angima submitted on behalf of the appellant was not positively identified at the scene of crime. He acknowledged that ordinarily, an occurrence in broad daylight has conditions favourable for positive identification, but such conditions also call for a very high and flawless standard.

He argued that PW2's evidence did not meet that high standard because he gave a statement to the police two days later in which he described the suspect as short and black, but in court on 26th October 2005, he described him as being of medium height and in court on cross-examination admitted that appellant was a tall person by any standards.

Further that in his statement, he described appellant as a young man, but admitted in court that appellant was not a young man. Also that at some stage PW2 described appellant as bald headed and then later he described him as clean shaven. It is Mr. Angima's contention that the person PW2 described to the police did not fit with the description of the appellant and one is left wondering why he implicated the appellant and he suggested that it was because the witnesses had personal interest in the appellant, even on the first occasion when they met and so PW2 was not a disinterested witness as his evidence disclosed that he harboured a grudge against appellant. Further that at the scene of crime, PW2 kept a safe distance and was not involved even as others were rushing to assist the deceased – so he did not accord himself the opportunity to identify the attackers.

Mr. Angima submits that PW2 feared appellant to the extent that he would even alter his course of walk to avoid him – which could be the reason for giving adverse evidence i.e so as to get rid of the appellant.

As for the trial magistrate's finding that PW4 evidence corroborated that of PW2 on identification Mr. Angima submitted that PW4 was not in a position to identify the person and she stated as much, so this rendered the rest of her evidence to be of no use and that the trial magistrate took the easy way out by not analyzing the evidence at all. He pointed out that the trial magistrate totally ignored the material contradictions in the evidence of PW4 on cross-examination and was dismissive of appellant's evidence without saying why. It was his argument that there was absolutely no evidence adduced to link appellant with the firearm which was recovered by the police.

As regards the evidence of PW3, Mr. Angima drew to this court's attention his evidence that he had given the police a hint, that he suspected the robbery to be an inside job, yet no investigations were undertaken to establish who gave the deceased away especially in the light of what PW2 said that he heard deceased ask:

“you are also killing me?”

The appeal is opposed, and in response the ADPP Mr. Ogoti, submitted on behalf of the State, that the star witnesses were PW2 and PW4 who watched the events unfold in broad daylight.

That PW2 vividly watched and described where he was before the offence was committed and the fact that appellant was not a stranger to him, having seen him twice before and then at the scene of crime and every detail of his evidence confirmed that he witnessed the incident. Mr. Ogoti urged the court to consider the evidence that appellant acted with two others as confirmed by the evidence of PW4 and that PW2 and PW4 corroborated each other on the material particulars, infact PW4 reiterated the evidence of PW2 version of events and she too had seen appellant many times before the incident. Mr. Ogoti urged the court to take note that PW2 and PW4 were persons who were going on with

their own activities and had no relationship between them – they just happened to have witnessed the incident; identified appellant and placed him at the scene.

As to the allegations regarding grudge, Mr. Ogoti submitted that no such issue arose during the proceedings and it was being introduced as a new defence line on appeal. Mr. Ogoti urged this court to find that the apparent encounters PW2 had with the appellant only made him take note of and mark the appellant and that altercation did not constitute a grudge. Mr. Ogoti argued that the gun recovered after the chase by police and exchange of fire by gunmen was subjected to investigations, and the recovered cartridges were well connected from the ballistics expert's report.

What about the contradictions referred to by appellant's counsel? Mr. Ogoti submitted that those were so minor and did not affect the prosecution case. Further that appellant's defence was duly considered and found to lack credibility and nothing had been placed on appeal to dislodge evidence which was presented in the lower court. Mr. Ogoti urged for the dismissal of the appeal.

Mr. Angima's response is that PW2's contradiction regarding appellant's physical appearance when he purportedly saw him in broad daylight is so significant that it must be resolved in the appellant's favour saying that if you mark a man, then you must be definite about his appearance and that PW2's evidence stemmed from ill will.

The crux of this appeal is basically on identification. It was not disputed that the offence took place in broad daylight along the road in Casuarina area whereupon the deceased who was riding a bicycle was accosted by three men, robbed and shot, and he later died from his wounds – all prosecution witnesses were consistent on that aspect.

Both PW2 and PW4 witnessed the incident – they were certain appellant was among the three men, not just because they happened to have seen him involved in the attack on that day, but he was someone they had seen and encountered in the past. On different occasions when PW2 and PW4 attempted to greet the appellant, he displayed open hostility or indifference.

Both PW2 and PW4 gave similar versions of events pointing out that appellant was the third man who came, after the other two had lingered at the scene before the incident took place. PW2's evidence in-chief during the trial with regard to the appellant was this:

“On the way, I passed another young man seated under a tree, also dressed in black like the others ...he was also of medium height. I became suspicious as I had seen the one who I found seated before at Eden Roc at Complex area...”

On cross-examination PW1 stated:

“Accused is tall and he is older than me. He is not a young man. It is accused who had the gun. I have no doubt about this. It is true I said the hug who shot deceased was short and black. I may have been wrong on his height but in the name of God, I am sure the accused is the one. I did not say I saw a young man seated under a tree. I only said another man.”

The issue to be considered is this – was PW2 only able to see, identify and recognize appellant because of his height and

colour. We have taken into account that this was someone he had encountered previously, spoken to previously and recognized – he admitted that he may have been mistaken regarding his height, but he was still certain it was the appellant but he did not make reference to his facial appearance. Then look at PW4’s evidence that:

“shortly ahead, a third man joined them..... I did not see the appearance of the third man, but he was tall. The tall one then held the bicycle.”

That action as described by PW4 is important because it corroborates PW2’s evidence that the man whom he saw first holding the cyclist’s bicycle was the third man who is said to be appellant.

PW4 further stated:

“I can see one of the three men in court today ...I had seen him many times. He would come many times to sit on the road and then leave. Before this incident, I had seen him three times...He is the third man who joined the other two who had been with me.”

On cross-examination PW4 stated:

“It is true I did not scrutinize the appearance of the third man who joined them. I am not sure the man I had been seeing before is the one who joined the two men in attacking the cyclist.”

Can this last statement be resolved in any manner?

We have considered PW4’s answer on re-examination:

“Before the third man joined the other two, I had not seen the man I had seen him three times earlier that day. On that day, I did not see the man I had seen three times before. I did not see the man I had seen three times before attack against the cyclist”

In essence, PW4’s answer on re-examination negated everything else she had said about appellant being the culprit. We bear in mind that she confirmed that she did not scrutinize the appearance of the third man.

So what constitutes appearance? It includes height, size, colour, age, and facial appearance – yet here PW2’s evidence in court was a complete departure from what he told police in his statement immediately after the incident – short and black, cannot be the same as tall – especially because PW2 confirmed in court that appellant was taller than him. Young and old, are not the same – the terms may be relative – used in terms of what the other person perceives as young or old by physical appearance, but in this instance PW2 confirmed to the trial court that appellant was not a young man. These material contradictions regarding the physical appearance of the person the star witnesses saw during in the attack can only be resolved in favour of the appellant because they create doubt as to whether in broad daylight, for someone who was not a stranger to the witnesses, such significant discrepancies could actually arise.

As consequence thereof, we find that this appeal must succeed and we allow it. The conviction is quashed and the sentence set aside.

Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this **16th** day of **March 2010** at Malindi.

H. A. Omondi
JUDGE

M. A. Odera
JUDGE