



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 239 of 2006

MWASHANGA MWADINGO.....APPELLANT

-AND-

REPUBLICRESPONDENT

(An appeal from the judgment of Senior Resident Magistrate D. M. Ochenja dated 1st September, 2006 in Criminal Case No. 1387 of 2005 at Kwale Law Courts)

J U D G M E N T

The appellant herein was charged with robbery with violence contrary to Section 296(2) of the Penal Code (Cap. 63, Laws of Kenya): the allegation being that he, jointly with others not before the Court, and while armed with simis and machetes, on 28th March, 2005 at about 1.00pm, at Sunza Sub-Location, Gandini Location in Kwale District of Coast Province, robbed ***Nicasio Njiru Nyaga*** of cash, in the sum of Kshs. 6,800/-, eight cooking pans, two dozen tea cups, one cellphone, Nokia 3310 by make, six plastic basins, and assorted clothing – all valued at Kshs. 16,300/- – and at or immediately before or immediately after the time of such robbery, used actual violence to the said ***Nicasio Njiru Nyaga***.

The complainant (PW1), who is a hawker and staying at Miritini, Mombasa, had on the material date and time gone out hawking his goods. While operating at Sunza, PW1 met three people, among them the appellant herein, who stopped him. When the complainant sought to know what was the matter, he was accosted with beatings and slaps, and he noted that the man who slapped him was the appellant herein; the complainant screamed for help, and offered to give the intruders anything in his possession then. The attackers grabbed Kshs. 6,800/- from the complainant, and also stole the various items specified in the charge-allegation.

The complainant reported the incident to the local Chief on the following day, and subsequently the appellant herein was arrested and charged. The complainant had also reported the incident to Kinango Police Station, where an identification parade was held, and he identified the appellant herein.

PW2, ***Mwatela Kamanza*** who is a farmer, had participated in the arrest of the appellant herein some six days following the incident in question; he had been called by the local Chief, who had information that the appellant was one of those who had been involved in a robbery.

Njuke Nduata (PW 3), a fisherman living at Sunza, had on the material date bought utensils from the complainant; and he witnessed at the time that the appellant herein came along and sought to know the price of some of the complainant's goods. After the appellant had been told the prices, "he ran away", and then, at about 2.00pm while PW3 was at his home, he heard screams emanating from the sales point where the complainant had been; and PW3 rushed to the scene, finding the appellant herein armed with a machete, and in the company of someone else who was not before the Court. What PW3 saw was: "The accused was robbing PW1 of his goods"; and he asked why this was happening – but the appellant herein did not answer; later the appellant and his companion ran away. It was PW3's evidence that he was familiar with the appellant herein, and that he saw the appellant robbing the complainant of the complainant's items. PW3 said there existed no grudge between him and the appellant

herein. Responding to cross-examination by the appellant, PW3 pointedly testified:

“I saw you robbing the complainant. PW1 screamed for help, and I rushed to the scene. I found you robbing the complainant”.

Samzon Mazera Ngecho (PW4), the Assistant Chief of Gandini Sub-Location, had received a report on 30th March, 2005, that the appellant herein, in the company of others not before the Court, had robbed the complainant of his goods. PW4 took the appellant to Kinango Police Station to record a statement, and thereafter, investigations were initiated. During the investigations “the accused went underground”, and was subsequently arrested at a funeral, and charged at Kinango Police Station.

Peter Kathuku Wanja (PW5), a health official from Kinango Hospital, examined the complainant on 30th March, 2005; he found the complainant with a tenderness on the head and chest, and with bruises newly inflicted. PW5 attributed the complainant’s injuries to the impact of a blunt object; and he treated the complainant and dispensed antibiotics, pain killers, and anti-tetanus injection. PW5 classified the complainant’s injuries as harm, and he duly filled in the P3 medical-reporting form.

The appellant gave brief unsworn evidence in which he only spoke of his experience from some four days after the material incident; he said he had been arrested on 2nd April, 2005 for reasons unknown to him. He denied having committed the offence charged.

The learned Magistrate in his judgement, found the complainant’s evidence to have been corroborated by that of PW3; and he came to the conclusion that “the evidence against the accused [was] direct and overwhelming”. The trial Court noted that “the offence was committed in broad daylight and the accused was positively identified by the complainant and PW3”. Of the integrity of the evidence fixing the appellant herein with responsibility, the trial Court remarked:

“There is no evidence of bad blood between the accused and the prosecution’s witnesses; hence they gave their testimonies in good faith”.

The Court found the prosecution case “proved to the required standard”, and found the appellant herein guilty, convicted him as charged, and sentenced him to death as provided by law.

In his grounds of appeal, the appellant contended that: “the charge sheet was incurably defective”; positive identification was lacking; prosecution evidence was contradictory; hearsay evidence had been admitted; conviction was not safe; there was failure to consider the defence case.

These points were canvassed in written submissions which the appellant filed in Court, and which he elected to let speak for themselves.

Learned counsel **Mr. Ondari**, for the respondent, contested the appeal, and urged that there was ample evidence, notably from PW1 and PW3, which showed the appellant to have committed the offence charged: the complainant saw the appellant commit the offence in broad daylight; and he thereafter identified the suspect at an identification parade – which evidence was confirmed by PW3. Counsel urged that identification would present no difficulty, as the complainant properly identified the appellant, and then, in relation to PW3, this was a case of recognition.

The foregoing review of the evidence, and the manner in which the Court treated it, as well as the pointed submissions of learned counsel, show, in our opinion, that the appellant was well identified as one of the suspects at the scene of crime; his hands in the criminal act have been illuminated beyond any doubts. This position is by no means qualified by the original defence case, or by the written submissions which the appellant has brought before us.

We dismiss the appellant’s appeal; uphold the conviction; and affirm the sentence as imposed by the trial Court.

Orders accordingly.

DATED and DELIVERED at MOMBASAthis 28th day of May 2010.

M.K. IBRAHIM
J U D G E

J.B. OJWANG
J U D G E