



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 143 & 144 of 2007

1. **ALLAN OCHIENG OKEYO**
2. **RASHID OMAR SHAURI** APPELLANTS
VERSUS
REPUBLIC RESPONDENT

JUDGEMENT

The two Appellants **ALLAN OCHIENG OKEYO** (hereinafter referred to as the 1st Appellant) and **RASHID OMAR SHAURI** (hereinafter referred to as the 2nd Appellant) have both filed this appeal against their conviction and sentence by the **HON. BOAZ OLAO CHIEF MAGISTRATE** sitting at Mombasa on a charge of Robbery with Violence contrary to Section 296(2) of the Penal Code. The particulars of the charge read as follows

“On the 8th day of August 2006, along Mvita Road in Mombasa District of the Coast Province, jointly with others not before the court while being armed with dangerous weapons namely toy pistols and knives robbed PHILLIP MWENDWA MUTISYA of his cash Kshs.76,000/- and at or immediately before or immediately after the time of such robbery used personal violence to the said Phillip Mwendwa Mutisya”

The prosecution led by **SUPT. NDETO** called a total of five (5) witnesses in support of their case. The brief facts of the case were that on 8th August 2006 at about 1.15 p.m. the complainant left his offices of Bawazir Company accompanied by **PW2 HAFIDH SAID BAWAZIR** who was his employer. The two men were headed to Habib Bank to bank cash Kshs.220,000/- which the complainant told the court he was carrying in a black paper bag. Both complainant and **PW2** told the court that since their vehicle had broken down they decided to walk to the bank. The complainant told the court that he was slightly ahead of **PW2** when suddenly he was held from the back and thrown to the ground. People stepped on him and he lost consciousness. He has no idea what happened to the cash he was carrying but when he regained his senses, he found that only Kshs.144,000/- out of the Kshs.220,000/- had been recovered. The balance of Kshs.76,000/- was missing and was never recovered. **PW2** took the complainant to hospital where he was treated for his injuries.

PW2 and **PW3 JUSTUS MASHA BIRIA**, a colleague of the complainant both witnessed the robbery. Both identify the two Appellants as amongst the group of four (4) people who perpetrated the offence. When the complainant was felled he called out for help. Members of public including **PW2** and **PW3** responded and ran to assist. They apprehended the two Appellants as they were taking the bag away from the complainant. Their accomplice managed to escape. The two Appellants were handed over to police on patrol who took them to the police station where they were eventually charged.

At the close of the prosecution case both Appellants were ruled to have a case to answer and were placed on their defence. They both gave unsworn defences in which they denied the charges. On 31st August 2007 the learned trial magistrate delivered his judgement in which he convicted the two Appellants of the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code, and thereafter sentenced each to death. The Appellants being dissatisfied with both their convictions and sentences filed this appeal.

At the hearing of the appeal both Appellants relied on their written submissions which they had duly filed in court. **MR. MUTETI**, the learned State Counsel who appeared for the Respondent State gave oral submissions opposing the appeal.

In view of the fact that we are sitting in this matter as a court of first appeal, we are mindful of our duty to re-examine the evidence

adduced before the lower court and make our own conclusions on the same. In the case of **AJODE –VS- REPUBLIC [2004] 2 KLR 81**, the Court of Appeal held

“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that”.

We have perused the written submissions filed by both Appellants and note that they raise similar grounds of appeal. Of these grounds the major ones which we shall be addressing in this judgement are

- § Identification
- § Insufficiency of Evidence to prove the charge.

Both Appellants have challenged the evidence identifying them as the culprits in this case. The incident occurred at 1.15 p.m. – in broad daylight on Mvita Road which is a very busy street in the city of Mombasa. The complainant was candid enough to admit in his evidence that he did not see his attackers as he was felled from behind. However his employer **PW2** and his colleague **PW3** were both present at the scene and witnessed the events. Both identify the two Appellants as the men they saw robbing the complainant. In addition both **PW2** and **PW3** state that the men who attacked and robbed the complainant were armed with a toy pistol and a knife. The witnesses are consistent in their evidence and both remain unshaken under intense cross-examination by the Appellants. They are clear and specific about the role each Appellant played in the robbery. **PW2** at page 10 line 24 says

“The people came. I saw the 1st accused with a knife at the scene.”

PW3 on his part states at page 14 line 16

“The police came and arrested them at the spot and recovered a knife and a toy gun on them”

As stated earlier this incident occurred at 1.15 p.m. in broad daylight. Conditions were favourable for a clear and positive identification. The two Appellants were caught at the scene and in the very act of robbing the complainant. In these circumstances there was no possibility of a mistaken identity. The evidence of **PW2** and **PW3** is further corroborated by the evidence of **PW5 PC KIPMOI ROTICH** who tells the court that on the material day he was about his duties as a police driver in the city of Mombasa. As he drove his boss around he heard a commotion and shouts of **‘Thief’ ‘Thief’**. He went to check what was happening and found the two Appellants having been apprehended by members of public. He too identifies the two Appellants and confirms that he recovered a knife and a toy-pistol which he kept as exhibits **Pexb 1** and **Pexb 2**.

In their defences the Appellants denied that they were part of the group who robbed the complainant. They both claim to have been merely passing by. The learned trial magistrate did give consideration to this defence and he found as follows at page J8 line 17 of his judgement

“I have explored the possibility that the accused were indeed victims of the crowd who arrested them. I have ruled out that possibility. The witnesses were all strangers to the accused and impressed me as honest witnesses who spoke the truth. They did not strike me as a group of dishonest witnesses out to falsely give evidence against the accused whom they had never met before and indeed there was no suggestion from the accused persons that the witnesses were malicious persons. All that the accused suggest is that they may have been mistaken for the robbers. But the totality of the evidence from those who witnesses the incident is that infact they (accused) were caught red-handed in the act. There is no way that the eye witness could have picked upon them and not the other person passing by. The only reason why the accuseds were arrested is because they were the ones who were spotted attacking the complainant and struggling with his money bag ...”

We felt it necessary to quote from this judgement at length because the learned trial magistrate in our view made an excellent analysis of the evidence relating to identification and gave concrete reasons for his dismissal of the Appellant’s defence. We too are satisfied that there was positive, clear and reliable identification of both Appellants as having been the ones who robbed the complainant. We therefore dismiss this ground of the appeal.

The second ground of appeal raised by the Appellants is that the evidence adduced before the lower court was not sufficient to support their conviction. We have ourselves, as is our mandate, carefully examined the evidence on record. In our view it passes muster. The Appellants were charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. The ingredients of this offence were set out by the Court of Appeal in the case of **OLUOCH –VS- REPUBLIC [1985] KLR 549** where their Lordships held (obiter) that

***“Robbery with Violence is committed in any of the following circumstances:
(a) The offender is armed with any dangerous and offensive weapon or instrument; or***

(b) *The offender is in company with one or more other person or persons; or*

(c) *At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person”*

It is important to note that proof of **any one** of the above ingredients is sufficient to prove the offence of Robbery with Violence. In this case the men who attacked the complainant were armed with a toy-pistol and a knife. **PW2** and **PW3** both identified these exhibits in court. The investigating officer **PW5** confirms having recovered these items at the scene. Both a toy-pistol and a knife fall under the description of **‘dangerous’** or **‘offensive’** weapons. The robbery in question was perpetrated by the two Appellants and a third accomplice who managed to escape with the loot. **PW2** clearly said in his evidence page 11 line 13

“You were three of you but one ran away”

Lastly the Appellants did use force in order to achieve their objective. **PW1** told the court that he was held from behind and fell to the ground causing him to lose consciousness. Violence was meted out against him. The Appellants made much of the fact that no P3 form was produced in court to prove the injuries suffered by the complainant. As we have stated earlier the prosecution only needs prove **one** of the ingredients laid down in the **Oluoch** case to secure a conviction. Secondly in our view failure to produce a P3 form is not a fatal omission and does not necessarily negate a conviction. The totality of evidence was in our view overwhelming. The guilt of the two Appellants was proved beyond a reasonable doubt. We are satisfied that the trial magistrate’s conviction of the two Appellants was both sound and safe. We therefore uphold the same.

Both Appellants were allowed an opportunity to mitigate. Thereafter the learned trial magistrate sentenced both to death. This is the only lawful sentence provided for by S. 296(2) of the Penal Code of Kenya. We therefore confirm these death sentences. The upshot of the above is that this appeal fails in its entirety. The conviction and sentence rendered by the lower court are hereby confirmed.

Dated and Delivered at Mombasa this29th..... day of June 2010.

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F. AZANGALALA
JUDGE

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M. ODERO
JUDGE