



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 195 of 2006

MICHAEL WAMBUA.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

JUDGMENT

Michael Wambua, (hereinafter “*the appellant*”), together with two others (hereinafter “*the co-accused*”) were charged in Mombasa Chief Magistrate’s Court Criminal case Number 374 of 2002 with the offence of robbery with violence contrary to section 296 (2) of the Penal code. The particulars were that the appellant together with the co-accused on the 21st day of December, 2001 at around 6.00 a.m. at Kwa Melerum stage, along Mombasa-Mariakani road in Kilifi District within Coast Province, while armed with a dangerous weapon namely a pistol, jointly robbed Jackson Waita Ivulu, (hereinafter “*the complainant*”) of his motor vehicle Reg. No. KAN 032W Toyota Shaky valued at Kshs. 850,000/=, a Seiko 5 watch, open shoes and a cash sum of Kshs. 400/= all valued at Kshs. 852,400/= and at or immediately before or immediately after the crime of such robbery threatened to use actual violence to the said complainant.

The appellant and the co-accused pleaded not guilty and at the close of the case for the prosecution, the co-accused was found to have no case to answer and was accordingly acquitted at that stage. After a full trial however, the Learned Senior Principal Magistrate, J. S. Mushelle convicted the appellant of the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced him to death. The appellant was not satisfied with his conviction and sentence and has appealed to this court against both conviction and sentence. He has raised two main issues:- Inconclusive identification and failure to consider his defence.

During the hearing of the appeal, the appellant appeared in person and Mr. Muteti, the Learned Senior State Counsel, appeared for the Republic. Having previously filed written submissions, the appellant opted to rely upon the same entirely. Mr. Muteti opposed the appeal contending that the evidence of identification was water-tight and that the appellant was convicted on sound evidence.

The brief facts of the case before the Learned Senior Resident Magistrate were as follows: - The complainant, a matatu driver, on 21st December, 2001, commenced his trade at about 5.30 a.m. He drove his motor vehicle registration number KAN 032 W Toyota Shaky (hereinafter “*the said vehicle*”) along Mombasa/Mariakani road. He was with his conductor Emmanuel Bindo, (PW 2). The first passenger for the day was a lady, Gladys Lucas Shida, (PW 3). At Uwanja Ndege stage near Mabati Rolling Mill factory, five (5) people stopped him. They then boarded the vehicle: one sat in the front cabin and the other four sat at the rear. That was between 5.45 a.m. and 6.00 a.m. At Maryland, near Kibanda stage he was asked to stop by his conductor (PW 2). As he slowed down the passenger who was sitting with him in the cabin placed a pistol on his neck and ordered him to free the gears. Another of the five passengers who had sat at the rear locked the back door to prevent PW 2 from leaving. The complainant was hit on the face and forced to a rear seat by the armed passenger who then took control of the vehicle. The complainant was blind-folded and tied by arms and legs and so were PW 2 and PW 3. The vehicle was driven off the main road and into a murram road where it thrice stuck in mud. After a while the complainant, PW 2 and PW 3 were untied and led to a bush where they were abandoned. They then untied each other and started looking for assistance finally ending at Mariakani Police Station. Somehow the appellant was arrested and charged as already stated.

C.I. Guyo Mathi, (PW 4) was asked by Sgt. Leonard Mbisi, (PW 5), the Investigating Officer to conduct an Identification Parade at which the appellant was identified.

The appellant gave an unsworn statement on how he was asked to participate in an Identification Parade while in remand in another case. He complained that the parade was not properly conducted and denied the charge.

The Learned Senior Principal Magistrate, on the above evidence, found that the appellant had spend a long time with the complainant, PW 2 and PW 3 and therefore had ample opportunity to identify him and had, in addition, identified him at an Identification Parade. In those premises, according to the Learned Magistrate, the identification of the appellant was free from error.

We have re-considered and re-evaluated the evidence upon which the Senior Principal Magistrate relied to convict the appellant as we were bound to (see *Okeno – v – Republic* [1972] EA 32). Having done so we have made the following observations: The Learned Magistrate stated as follows on the identification of the appellant:

“The witnesses had the opportunity to observe the thugs right from the time they boarded the vehicle upto the time they tied them with

pieces of cloth upto the time they abandoned them in the bush.”

That conclusion does not however flow from the recorded testimony taken by the Learned Magistrate. The complainant is recorded as having stated as follows:-

“I was tied on the face with a lessa. My conductor was also tied with a piece of cloth. We left the tarmac and followed a murrum road.

After a while it again got stuck it is then we were untied and led to a bush. Our hands were untied plus legs.....My hands were swollen. I called out to be untied. Nobody responded. I called my conductor. We untied one another. It was now 5.00 p.m.....”

The testimony of the complainant clearly indicates that as they were led from the vehicle into the bush only their hands and legs were untied. They therefore continued to be blindfolded upto the time they untied each other at about 5.00 p.m.

PW 2's evidence was similar to the complainant's. In his own words:

“After a distance the ... was stuck. It was pushed. As for us we were dumped in a bush. Our hands had been tied with lessa, our faces were also covered with lessos. After the thugs left we untied ourself (sic).”

And PW 3, Gladys Lucas Shida also testified that she too was tied. In her own words:

“I was ordered to lie down. The bag of mangoes was placed on me. They tied me with lessos. They also tied the driver and turnboy.....We heard bulls making noise. It turned out the bulls had been used to pull out the Nissan from the mud. We continued with the journey. On the third time it got stuck again, they took us into a bush.....They abandoned us. We struggled and untied ourselves.....”

PW 3 did not expressly state that she was blindfolded. But her above testimony suggests that she was indeed blindfolded. That is why she could only hear the noise of the bulls but not see them. Further they struggled to untie themselves must have been to remove the blindfold stated by the complainant and PW 2.

The testimonies of the complainant, PW 2 and PW 3 as can clearly be observed show that they did not, as the Learned Magistrate found, observe the thugs right from the time they boarded the vehicle upto the time they were abandoned in the bush. So, whereas the complainant, PW 2 and PW 3 spent the better part of the day with the robbers, they were for the most part blindfolded. The basis upon which the Learned Magistrate found positive identification was not correct.

With regard to the identification Parade, the record shows that the complainant, PW 2 and PW 3, did not know the attackers before the robbery and that although they testified that they could identify the appellant, they did not give his description to PW 4, C.I Guyo Mathi prior to mounting the Identification Parade. The appellant was indeed arrested on an unrelated offence and not on the basis of the description given by the complainant PW 2 or PW 3.

In Fredrick Ajode Ajode – v – Republic [CR APPEAL NO. 87 of 2004] (UR) the Court of Appeal held as follows:-

“It is trite that before such a parade is conducted and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”

On the authority of the above Court of Appeal decision, the purported identification of the appellant by the complainant, PW 2 and PW 3, was not free from error. Their identification of the appellant was therefore mere dock identification which is generally worthless.

For the above reasons, we have come to the conclusion that the identification of the appellant was not positive. In the premises, we do not find it necessary to consider the other complaints raised by the appellant. We find the conviction of the appellant unsafe and are unable to uphold it. We allow the appeal, quash the conviction and set aside the death sentence which was imposed on the appellant. We order that the appellant be released from custody forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THE 22ND DAY OF SEPTEMBER 2010.

F. AZANGALALA
JUDGE

M. ODERO
JUDGE

Read in the presence of:-