



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 263 OF 2005

(From Original Conviction and Sentence in Criminal Case No. 2541 of 2004 the Chief Magistrate's Court

at Mombasa: B.T. Jaden – P.M.)

SEIF HAMED ABDALLAHAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The Appellant herein **SEIF HAMED ABDALLAH**, has filed this appeal against his conviction and sentence before the lower court. The Appellant was arraigned in court on 30th August 2004 and charged with the offence of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of this offence were that

“On the 26th day of August 2004 at about 12.30 p.m. at Tamarind Beach area in Mombasa District within the Coast Province, jointly with another not before court while armed with dangerous weapons namely knife and a bottle robbed DELUAN MWARASHU KIZANGAONE off cash Ksh.200/- and at or immediately before or immediately after the time of such robbery used actual violence and wounded the said DELUAN MWARASHU KIZANGAONE.”

The Appellant faced a second charge of **BEING UNLAWFULLY PRESENT IN KENYA CONTRARY TO SECTION 13(2) OF THE IMMIGRATION ACT CAP 172, LAWS OF KENYA**. He pleaded guilty to this latter offence and was sentenced, thus it is not part of the subject matter of this appeal. On the charge of Robbery with Violence the Appellant entered a plea of Not Guilty and his trial commenced on 21st January 2005 at which the prosecution led by **INSPECTOR NYAMAI**, called a total of four (4) witnesses in support of their case. The brief facts were that on the material day of 26th August 2004, the complainant was walking along Tamarind Beach. He had tied around his waist his camera. Two men whom he did not know approached him and requested that he take them a photograph. The complainant was persuaded and agreed to do so. Suddenly one of the men moved behind him and placed a knife at his back. The other man (the Appellant) who was holding an empty bottle hit

the complainant on the head and injured him. The bottle broke. The complainant struggled with the two men during which process his shirt got torn and cash Kshs.200/- was stolen from him. Members of public rushed to the aid of the complainant. They gave chase and managed to catch the Appellant who was handed over to security guards and later to the police. The other man escaped.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He opted to give an unsworn defence and denied the charges. On 28th November 2005 the learned trial magistrate delivered her judgement in which she convicted the Appellant. After listening to his mitigation, the court sentenced the Appellant to death.

The Appellant who was unrepresented at the hearing of this appeal chose to rely entirely upon his written submissions which had been duly filed with the leave of the court. **MR. ONSERIO**, learned State Counsel who appeared for the Respondent State made oral submissions in opposition to the appeal.

Being a court of first appeal, we are guided by the decision of the Court of Appeal in the case of **AJODE –VS- REPUBLIC [2004] 2 KLR 81** where it was held

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

We have carefully perused the written submissions filed by the Appellant and note that he basically raised two grounds for his appeal

§ Identification

§ Insufficiency of evidence

At the outset it is important to establish whether the incident described by the complainant amounted to Robbery with Violence as envisaged by S. 296(2) of the Penal Code. In the case of **OLUOCH –VS- REPUBLIC [1985] KLR 549**, the Court of Appeal laid out the key ingredients of this offence as follows:-

“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”***

The use of the term ‘**or**’ in this definition means that where any **one** of the above ingredients is shown to exist the offence of Robbery with Violence is established. The complainant told the court that he was attacked by two men, one of whom was armed with a knife, which is a dangerous weapon and the other who attacked him with a bottle which broke on his head. These two attackers did use violence against the complainant in the perpetration of the robbery. The complainant suffered injuries. This is proved by the evidence of **PW4 DR. SAID OMAR SAID**, a medical officer from Coast General Hospital who testified that he examined the complainant the day after the attack and noted a cut wound about 3 cm long on the left side of his scalp. The complainant also told the court that he did put up a fight during which his T-shirt got torn. The torn T-shirt was produced before the lower court as an exhibit and was identified by the complainant **Pexb3**. From this evidence we are satisfied and find as a fact that this incident did amount to a Robbery with Violence as all the ingredients as laid down in the **Oluoch** case are shown to have existed.

The next crucial question would be the identity of the complainant’s assailants. The complainant himself identified the Appellant as one of the men who robbed him. The incident occurred at 12.30 p.m. – in broad daylight. This was not a fleeting attack. The complainant actually spent several minutes conversing

with the two men. He told the court that the Appellant and his companion approached him as he walked along Tamarind Beach and requested him to take their photographs. They spent some time persuading the complainant and he finally agreed to oblige. It was at this point that one of the men came up and put a knife to his back whilst the other hit him on the head with a bottle. Given the prevailing circumstances it was day time and they spent time in conversation, we find that the complainant had adequate time and opportunity to see and identify his assailants. Furthermore the complainant gives specific evidence on the role which each man played in the robbery. He is categorical that it was the Appellant who was carrying an empty bottle with which he hit him on the head.

The complainant's evidence is corroborated by the evidence of **PW2 JAPHETH MWAHAYA**, who is a work-mate of the complainant. He confirms that during the lunch break the complainant left their place of work saying that he was going for a walk on the beach. He later heard screams from the direction the complainant had gone. **PW2** and others rushed to the beach and found the complainant bleeding from the head. He pointed out his two attackers who were running away. **PW2** and the crowd gave chase and managed to apprehend the Appellant. His companion escaped. **PW2** identifies the Appellant as the man whom they chased and caught. They then handed him over to the K.K. Security Guards. Again all this occurred in broad daylight. Conditions for identification were optimum. **PW2** did not at any time lose sight of the Appellant. They chased and caught him at the scene on the beach. There is no possibility here of a mistaken identity.

The clincher in this case is the photograph which the complainant had taken of the two men as requested by them and which he later developed. This photograph was produced as an exhibit in the lower court **Pexb2**. The photograph shows the Appellant shirtless holding a bottle. The Appellant's defence that this was a photograph which the complainant had previously taken of him was denied by the complainant. In considering this defence the learned trial magistrate found at page J2 line 25

“The complainant also identified the accused in the photograph (exb1) that the complainant had taken. The complainant denied having previously taken the accused any photograph. The complainant also denied having any grudge with the accused or framing up the accused with the case”

In so doing she disposed of and dismissed the Appellant's defence that the complainant had framed the case against him. We are in total agreement with these findings. Our own analysis of the evidence is that there has been shown to have been a clear, positive and reliable identification of the Appellant by the complainant which identification is properly corroborated by **PW2**. We find no possibility of mistaken identity. We are satisfied from the evidence on record that the Appellant was one of the men who attacked and robbed the complainant on the material day.

The Appellant submits that the prosecution case was riddled with inconsistencies and contradictions which made his conviction unsafe. We have ourselves gone through this evidence with a fine tooth comb. We find no instances of such contradictions. On the contrary our own assessment is that the prosecution evidence was cogent, consistent and reliable. The learned trial magistrate gave due consideration to the

Appellant's defence but dismissed the same. We are satisfied that the Appellant's conviction was sound and we have no hesitation in upholding the same.

The Appellant was given an opportunity to mitigate after which the trial magistrate sentenced him to death. This was the only lawful sentence under S.296(2) of the Penal Code and we do hereby confirm the same. Finally this appeal fails in its entirety. The conviction and sentence of the lower court are confirmed and upheld.

Dated and Delivered in Mombasa this 19th day of October 2010.

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M. IBRAHIM
JUDGE

M. ODERO
JUDGE

Read in open court in the presence of:-

Mr. Muteti for State

Appellant in person

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M. ODERO

JUDGE

19/10/2010