



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 155 OF 2008

*(From Original Conviction and Sentence in Criminal Case No.1286 of 2005 of the Senior Resident Magistrate's Court at Voi: **J.M. Gandani – S.R.M.**)*

JASON MLAMBA SEVENI APPELLANT
VERSUS
REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **JASON MLAMBA SEVENI**, had been arraigned before the lower court charged with the offence of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the offence were that

“On the 15th day of December 2005 at about 2.00 A.M. at Kariokor within Voi town in Taita Taveta District of the Coast Province jointly with others not before court armed with offensive weapons namely bow, arrows, pangas and rungus robbed PIUS NGANDA of (1) Radio Cassette make Sony, video deck make L.G., mobile phone make Nokia, one brown trouser and cash Shs.5,500/- all valued at Khs.50,200/- and at or immediately before or immediately after the time of such robbery wounded the said PIUS NGANDA”

The Appellant entered a plea of ‘**not guilty**’ to the charge and his trial commenced before the learned Senior Resident Magistrate Voi Law Courts on 21st March 2006. The prosecution led by **INSPECTOR MUNGA**, called a total of seven (7) witnesses in support of their case. The basic facts of the prosecution case as narrated by the complainant **PIUS NGANDA**, were that on the night of 15th December 2005 he was asleep in the room behind his Auto Tyres Shop in Kariokor. At about 2.00 A.M. he was awoken by a man whom he identified as the Appellant. The Appellant told him that he had been sent by one **MWANGI PW4** to collect a tyre and a tube. The complainant woke up and switched on the electric lights in his room. He then walked to the shop and switched on the lights. As he turned to collect the tyre the Appellant pointed a bow and arrow at him and ordered him to sit down. The complainant grabbed the arrow and broke it. Suddenly a gang of 12 – 15 men rushed into the shop. One of the men cut the complainant on the head with a panga. The men demanded money. The complainant led them to his room where they stole Kshs.5,500/-, his radio, video, mobile phone and a pair of trousers. The men then escaped into the night. The complainant went to wake up his neighbour **JOSPHAT WAMBUA PW3** who took him to Voi District Hospital for treatment. The matter was reported to police who arrested the Appellant from his place of work the following day. He was thereafter charged in court.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied any involvement in the robbery and also called two (2) witnesses in support of his defence. On 14th September 2007 the learned trial magistrate delivered her judgement in which she convicted the Appellant of the offence of Robbery with Violence and sentenced him to death. Being dissatisfied with this decision the Appellant filed this present appeal.

The Appellant who was unrepresented at the hearing of his appeal opted to rely entirely upon his written submissions which, with the leave of court had been duly filed. **MR. ONSERIO**, learned State

Counsel opposed the appeal and urged us to uphold both the conviction and sentence of the lower court.

This being a court of first appeal we are mindful of our obligation to re-examine and re-evaluate all the evidence adduced before the lower court [**AJODE –VS- REPUBLIC 2004 KLR 81**]. We have carefully perused the record of the proceedings before the lower court. Equally we have given very careful consideration to the written submissions made by the Appellant as well as the oral submissions of the learned State Counsel. Having done so we do find that the incident on the night of 15th December 2005 as described by the complainant did amount to a robbery with violence as envisaged by S. 296(2) of the Penal Code. The complainant told the court that he was robbed by a group of 12 – 15 persons. These people were armed with pangas and runguns and did not hesitate to put these weapons to use. One of the robbers slashed the complainant on the head with a panga. **PW3** the complainant's neighbour confirms that when the complainant came to him for help after the incident he was bleeding from the head. **PW7 DR. KALVIN NYAKURE** from Voi District Hospital produces the complainant's P3 form **Pexb4**. This document confirms that the complainant was examined by a medical doctor who found him to have **“a linear cut wound about 10 cm long on the parietal region”**. There can be no doubt that the complainant was injured in the course of the said robbery.

In order to justify the conviction of the Appellant we must be satisfied that there was a clear positive and reliable identification of said Appellant as one of the robbers. The incident happened at night. The complainant's evidence is that he was woken up at 2.00 A.M. No doubt it was dark at the time. However the complainant told the lower court that upon being awakened he switched on the lights in his room. He states in his evidence at page 8 line 14

“I recognized the accused while he was outside. There was electricity (sic) light from our shop and from Travellers shop. The accused called me by name from the front of the shop. I switched on the lights in my room, toilet and the shop”

In addition the complainant stated that the security lights outside the shop were also on. From this evidence it is clear that the area was well illuminated providing the complainant with adequate light to see and identify the person who was calling him.

The complainant told the court that the person who called him was the Appellant whom he recognized as he knew him well. At page 5 line 24 he states

“I opened the door and I saw someone I knew. I recognized him as a person who works at Petrozen, a petrol station near Caltex. The person I talked to is the accused here. I knew him as he used to come to collect food from Travellers Cafe which is next to our shop. I had known him for about three months”

There can be no doubt here that the complainant was very sure of what he was talking about and whom he had seen on the material night. **PW2 MOSES OUNA IMO** a pump attendant at Petrozen Petrol Station confirms that the Appellant worked at the petrol station. **PW2** states at page 16 line 12

“Mlamba [Appellant] works with us at Petrozen. He is a cleaner”

This evidence is further corroborated by **PW4**. The complainant told the court that the Appellant after waking him up told him that Mwangi (**PW4**) had sent him to collect a tyre and tube. This is why the complainant moved out of his room to open his shop. The fact that the Appellant and complainant conversed in our view provided yet more time and opportunity for the complainant to confirm the identity of the Appellant. **PW4** while confirming that the Appellant was an employee at Petrozen denies that he sent him to the complainant's shop that night.

We also take note of the fact that the complainant did, immediately after the robbery confirm, that he identified one of the robbers. **PW3** to whom the complainant went for help immediately after the robbery states in his evidence at page 17 line 11

“He [the complainant] told me that he had been robbed and that whosoever woke him up works at Petrozen and he knew him well”

PW4 also confirms that the complainant came to enquire from him the next morning whether indeed he

had sent the Appellant to buy a tyre from him the previous night. The fact that the complainant identified the Appellant to others immediately after the robber, confirms his identification of the Appellant and rules out the fact that this may have merely been an afterthought. The complainant gave very detailed evidence in which he even described what clothes the Appellant was wearing at the time.

The fact that this identification is made by one single witness was properly addressed by the learned trial magistrate in her judgement at page 55 line 7 where she warns herself by saying

“The accused has been incriminated by only the complainant so the complainant’s evidence ought to be treated with caution”

She goes on to state at the same page line 11

“I am persuaded that the complainant knew very well the person who attacked him. Despite the fact that it is only the complainant who saw the robbers, the fact that the complainant clearly saw and talked with the 1st robber under electrical light, are circumstances which can allow one to make a proper identification or recognition”

The complainant does not rely on mere visual identification. He relies on the fact of recognition since the Appellant was a man he knew well. The complainant has correctly identified the Appellant’s workplace and he told the court that he saw the Appellant frequently as he used to come to purchase food for his colleagues at the nearby Travellers Cafe. Evidence of recognition has been held to be more reliable than visual identification alone. In the case of **ANJONONI & OTHERS –VS- REPUBLIC [1980] KLR 59**, it was held by the Court of Appeal that

“recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another”

The possibility of mistaken identity can effectively be ruled out in a case such as the present one where the identification is based upon recognition.

The Appellant in his defence denied any involvement in the robbery. He called two defence witnesses his niece **BEATRICE NDISHA DW2** and his elder sister **LOICE WAMBUGHA SEVENI DW3**. Both state that they were visiting the Appellant from Taveta during that period and they both insist that on 14th December 2005 the Appellant came home at 6.00 p.m. and did not leave until the following morning. Indeed **DW2** categorically states in her evidence at page 44 line 10

“I confirm that the accused never left the house on the night of 14/12/2005 [our emphasis]”

That may well be so but the robbery referred to in this case occurred on the night 15th December 2005 at 2.00 A.M. and **not** the night of 14th December 2005. Thus even if as the two defence witnesses insist the Appellant was home all night on 14th December 2005, no explanation or alibi has been advanced for his whereabouts on the night of 15th December 2005. It is quite possible that the Appellant was out robbing the complainant at 2.00 A.M. on 15th December 2005. Further we find it curious that the Appellant himself made no mention in his defence that his sister and niece were visiting during the material time. This omission casts doubt on this defence. The fact that these defence witnesses even failed to refer to the correct date convinces us that this defence was a mere afterthought and a fabrication to try and prove that the Appellant was nowhere near the **‘locus in quo’** on the material night. The defence has no merit and we do agree with the trial magistrate’s dismissal of the same.

From the evidence it is satisfactorily proven that the Appellant was positively identified by the complainant. He was the **‘decoy’** used by the robbers to lure the complainant out of his room to open the shop. The complainant only responded to the Appellant’s call because he knew him. Once the shop was open the other 15 robbers came in and attacked the complainant. There is no doubt that the Appellant was an active participant in this robbery. We are satisfied that his conviction was sound both in law and on the facts. We have no hesitation in upholding the same.

The trial court allowed the Appellant an opportunity to mitigate after which he was sentenced to

death. This is the lawful sentence provided for by S. 296(2) of the Penal Code. We do uphold the same. The upshot is that this appeal fails in its entirety. We confirm and uphold the conviction and sentence rendered on the Appellant by the lower court.

Dated and Delivered in Mombasa this 5th day of November 2010.

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J.B. OJWANG
JUDGE

Read in open court in the presence of:-

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M. ODERO
JUDGE

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M. ODERO
JUDGE
5/11/2010