



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Appeal 471 of 2005

ATHUMANI JUMA.....APPELLANT

-AND-

REPUBLICRESPONDENT

(An appeal from the Judgment of Senior Resident Magistrate Ms. Muchira dated 16th September, 2005 in Criminal Case No. 4650 of 2004 at Kibera Law Courts)

JUDGMENT OF THE COURT

The appellant faced three counts of the charge of robbery with violence contrary to s. 296(2) of the Penal Code (Cap. 63, Laws of Kenya).

The particulars on the first count were that the appellant jointly with others not before the Court, on 29th April, 2003 at Kawangware in Nairobi, while armed with a dangerous or offensive weapon namely a pistol, robbed **Harrison Machika** of a wallet, a national identity card and his employment card, and at or immediately before or immediately after the time of such robbery, threatened to use actual violence upon the said **Harrison Machika**.

In the second count it is stated that on the date and place aforementioned, the appellant while accompanied by others not before the Court, and while armed with a dangerous or offensive weapon, namely a pistol, robbed **Oscar M'Meywa** of a wallet containing Kshs. 200/-, a national identity card, and his house keys, and, at or immediately before or immediately after the time of such robbery, threatened to use actual violence upon the said **Oscar M'meywa**.

It is stated in the third count that the appellant while in the company of others not before the Court, on the material date and at the place aforementioned, and while armed with a dangerous or offensive weapon namely a pistol, robbed **Solomon Amogola** of a wallet containing Kshs. 800/=, a national identity card and his house keys and, at or immediately before or immediately after the time of such robbery, threatened to use actual violence upon the said **Solomon Amogola**.

After hearing the witnesses, the learned Magistrate identified as the critical question: “whether it is the accused person in the company of others [who] while armed with a home-made pistol, robbed PW1, PW3 as charged.” This is the process of reasoning which led to the trial Court’s finding:

“PW1 was with PW2 and PW3 when they left their hotel [work-place] in a taxi. PW2 said he was dropped off first and left the others in the car. PW1’s testimony on the attack by gangsters thereafter, is well corroborated by PW3. Both [PW1 and PW3] were robbed of their items [listed on] the charge sheet. PW3 struggled with one of the robbers, and PW1 rescued him. Members of

the public came, and[the] accused [was] arrested before he could escape from PW3's grip. He was beaten and his right leg [cut off]. The Court noted the Missing [leg]. PW4, the Police officer, is called from miles away, and finds the accused surrounded by the mob and the complainants. PW1 said the security lights from.... Democracy Supermarket [were] on. When he [PW1] [was running] away, neighbours heard his screams and switched on their security lights. Hence he was able to see the accused well, and [to] see he was armed with [a] pistol. PW3 corroborated his testimony. PW4 confirmed such lights existed.”

The learned Magistrate's final finding was set out as follows:

“In defence [the appellant herein] said he was at the scene, but on a different mission. I however find it hard to believe his neighbours could Attack him [without cause] and so brutally, as described by the prosecution and [by] [the appellant] himself. I find PW1 and PW3 properly identified [the] accused as one of the gangsters. [The] accused wasn't lucky and he was caught red-handed. He does not leave the scene and the eye-path of PW1 and PW3. I find the prosecution case against him [to be] overwhelming. I find, however, that the 3rd complainant was not called to testify. I acquit the accused of the 3rd count of robbery, but proceed to find him guilty of the 1st and 2nd counts of robbery with violence as charged and convict him accordingly.”

The appellant was sentenced to death in accordance with the law, and he thereafter lodged a petition of appeal the key elements of which may be thus summarized:

- (i) that identification of the suspect was erroneous;
- (ii) that the prosecution case as a whole was marred with contradictions and inconsistencies;
- (iii) that the charge was not proved beyond reasonable doubt;
- (iv) that the defence case had not been taken into account;
- (v) that conviction was arrived at on the basis of insufficient evidence.

On the occasion of hearing this appeal, the appellant came into Court with written submissions, which were annexed to a new document bearing the title: “amended grounds of appeal.” In the said amendments, the appellant stated that he should not have been convicted, for he had been detained for a prolonged period before being taken to Court, in violation of s. 72(3) (b) of the Constitution. He disputed the credibility of the key prosecution witnesses, PW1 and PW3, and stated that the Court should not have relied on their evidence. He urged that when he was arrested, no incriminating material evidence was found in his (appellant's) possession. The appellant contended that after trial *de novo* had been commenced, essential witnesses had not been called.

In his oral submissions, the appellant maintained that the prosecution witnesses had perjured themselves, and that they should have been subjected to the sanctions of the criminal law. The appellant submitted that the case against him had been a frame-up.

Learned counsel for the respondent, **Mr. Makura**, contested the appeal, and supported both conviction and sentence. He submitted that the appellant had not managed to escape from the *locus in quo*, where the robbery with violence took place at about midnight; the appellant had been held by PW3, and the two remained locked in struggle, and this chain was not broken until the appellant was arrested and immobilized; and this evidence is corroborated by both PW2 and PW4, a Police officer who came to the scene and re-arrested the appellant. The trial Magistrate had considered the appellant's sworn evidence, but rejected the same.

On the appellant's new grounds of appeal, **Mr. Makura** urged that the claim that the appellant had been detained for too long before being brought to Court, was coming *too late* to lend itself to accommodation at the hearing of this appeal.

After considering the evidence adduced before the trial Court, we have come to the conclusion that there is no credible basis for disputing the correctness of *identification* of the appellant, as one of the robbers-with-violence on the material night, at the *locus in quo*.

That by itself should lead to an affirmation of conviction and sentence. We have, however, to dispose of the point belatedly raised in regard to the period of detention before the appellant was arraigned in Court. This point is entirely new, as it has not been placed before the Court on any other occasion.

Firstly we have considered the circumstances of this case, and the mortal threat to human life, and the disruption to orderly social life, which were wrongfully visited upon the complainants, on the material night. We have, in this regard, considered the *constitutional duty of the State* to ensure *safety* for innocent people, and to subject crime to the judicial process of resolution. We have paid attention to the terms of *s. 70 of the Constitution*, which guarantees individual rights (such as trial-rights under *s. 72(3) (b)* of the Constitution) subject to *respect for the rights of others*, as well as subject to the *public interest*: and on these foundations we hold that the crimes committed at the *locus in quo* on the material night, should be resolved by suitable sanctions. We would not, therefore, allow the belated argument now being raised by the appellant, in relation to *s. 72 (3) (b) of the Constitution*.

In this regard we have also taken note of concerns now embedded in an important precedent of the Court of Appeal, in relation to rights-claims under *s. 72 (3)* of the Constitution. This is in ***Dominic Mutie Mwalimu v. Republic***, Crim. Appeal No. 217 of 2005, where it had been held that the status of claims under *s. 72(3) (b)* of the Constitution is to be determined on a *case-by-case basis*, through *judicial assessment of facts*, and through *judicial discretion*. It was held in that case too, that grievances founded on trial rights under *s. 72(3) (b)* of the Constitution have to be raised *at an early opportunity*, to enable the prosecution to give any such explanations as may be appropriate.

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

It is so ordered.

DATED and DELIVERED at Nairobi this 21st day of January, 2009.

J.B. OJWANG

M. WARSAME

JUDGE

JUDGE

Coram: Ojwang & Warsame, JJ.

Court Clerks: Huka & Erick

For the Respondent: Mr. Makura

Appellant in person