



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 311 of 2004

FANUEL OTIENO OMIDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Fanuel Otieno Omido, the appellant, and Kombo Juma Joho (hereinafter “the 2nd accused”) were charged in Kwale Senior Resident Magistrate’s Court Criminal Case No. 397 of 2003 with two counts of robbery with violence contrary to Section 296 (2) of the Penal code, one count of Burglary contrary to Section 304 (2) and stealing contrary to Section 279 (1) of the Penal Code, and three counts of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars in the 1st count were that the appellant and the 2nd accused, on the night of 16th February 2003, at Mazeras trading centre, Kasemeni location in Kwale District within Coast Province, jointly, with others not before court, being armed with dangerous weapons namely, pangas, stones, iron bars, bows and arrows, robbed William Mwangi of mobile phone No. 0722-482931, a remote control and cash of Kshs. 4,000/= all valued at Kshs. 20,000/= and at or immediately before or immediately after the time of such robbery, wounded the said William Mwangi.

The particulars in count two were that on the same night, at the material time, the appellant and the 2nd accused, jointly, with others not before court, being armed with dangerous weapons as aforesaid, robbed Abdi Mohammed of one wrist watch make Seiko valued at Kshs. 800/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Abdi Mohamed.

Particulars in count three were that the appellant and the 2nd accused, on the said date at the said time, jointly, with others not before court, broke and entered a dwelling house of Nganasa Momo Bemuringo, with intent to steal from therein and did steal from therein, cash of Kshs. 66,000/= and a torch all valued at Kshs. 66,715, the property of the said Nganasa Momo Bemuringo.

Count four carried the following particulars: that the appellant and the 2nd accused, on the said date at the said time, jointly, with others not before court, unlawfully assaulted Omar Ndegwa Murabu thereby occasioning him actual bodily harm. Count five contained the following particulars: that the appellant and the 2nd accused, on the said date at the said time at the same place, jointly, with others not before court, unlawfully assaulted Rumba Mukusi Rumba thereby occasioning him actual bodily harm. The last count (count six) had the following particulars: that the appellant and the 2nd accused, on the same date at the same time at the same place, jointly, with others not before court unlawfully assaulted Omar Kweka

John thereby occasioning him actual bodily harm.

The appellant pleaded not guilty and after a full trial, the Learned Senior Resident Magistrate L. N. Mbatia convicted him of the offences in counts one and two of robbery with violence contrary to Section 296 (2) of the Penal Code and count three of burglary and stealing contrary to Section 304 (2) as read with Section 279 of the Penal Code. The Learned Senior Resident Magistrate sentenced the appellant to death on the two counts of robbery with violence and discharged him under Section 35 (1) of the Penal Code on count three of burglary and stealing. The appellant was not satisfied and has appealed to this court against both the convictions and sentences.

At the hearing of this appeal, the appellant appeared in person and Mr. Monda, Learned Senior state Counsel appeared for the Republic. Having previously been granted leave to file written submissions, the appellant opted to rely upon the same. Mr. Monda in response to those submissions contended that the same raised five issues namely: that the charge was incurably defective; that the evidence on identification was inadequate; that there was conflict in evidence; that there was breach of the appellant's fundamental rights under the Constitution and that his defence was not considered.

The Learned Senior State Counsel whilst admitting that the value of the property mentioned in count 1 i.e. Kshs. 20,000 differed from the value given in evidence of Kshs. 46,000/= submitted that the variance was insignificant and was curable under the provisions of Section 383 of the Criminal Procedure Code especially as the variance did not cause the appellant any prejudice.

With regard to the challenge made against identification, the Learned Senior State Counsel submitted that the challenge had no merit as the appellant was arrested in the house of one of the witnesses at the time of the robbery. With regard to the alleged conflict in evidence, the Learned Senior State Counsel argued that there were indeed some contradictions regarding whether or not the appellant had a panga which contradiction, according to him, was negligible since the appellant was in the company of about 15 other robbers and the ingredients of the offence of robbery were satisfied.

On the appellant's complaint regarding breach of his fundamental rights enshrined in the Constitution, the Learned Counsel submitted that the challenge was being raised too late in the day and should not be entertained as the Republic cannot now adduce additional evidence to explain the delay in arraigning the appellant within the prescribed time.

With regard to the treatment of the appellant's defence, Learned Counsel submitted that the record was clear that the defence put forward by the appellant was duly considered by the Learned Senior Resident Magistrate who properly rejected the same.

This is a first appeal. We are therefore duly bound to reconsider and re-evaluate the evidence upon which the Learned Senior Resident Magistrate relied to convict the appellant and reach our own conclusion on the same bearing in mind that we did not see and hear the witness testify, an advantage enjoyed by the Learned Senior Resident Magistrate. (See **Okeno – v – Republic [1972] EA 32**). The brief facts of the case were as follows: - PW 1, William Mwangi Njoroge, the complainant in count one, on the night of 15th and 16th February 2003 was in his house when he heard an unusual noise from outside his house. He went to investigate and on realizing that a robbery was in progress, locked himself in his bedroom. The robbers went to his door and forced it open and a group of the attackers entered and ordered him to lie down. He complied and some of the attackers stepped on him as others ransacked his boxes. Yet others demanded money. One of them raised a panga to get him and his wife screamed. One of them alerted the rest of a problem outside and they ran out. PW 1 then heard a gunshot and realised that there were people outside his house. They enquired whether he was alright whereupon he went outside and found that the attacker who had been stepping on him had been shot dead and his body was lying at the door. PW 1 then realized that the people at his door were police officers. They said that one of the attackers had rushed back into the compound and after a short search the attacker was flashed out of PW 1's neighbour's house. Another robber was lynched by members of the public. PW 1's mobile phone and remote control were recovered from one of the robbers. He (PW 1) also lost Kshs. 46,000/= during the robbery. At the scene, a hammer, an axe, a panga and arrows were recovered.

PW 2, Osmane Hussein, a neighbour of PW 1, testified that on the same night: 15th and 16th February 2002 when he was outside his house robbers entered PW 1's house and that of Abdi Mohammed Gurachu (PW 8) and broke into a shop. The robbers were armed with pangas and other weapons. They charged at PW 2 and the watchmen who were with him. PW 2 then ran to an Administration Police Camp nearby to report. He returned with armed Administration Police who shot at the robbers killing one of them. Another robber was lynched by members of the public. PW 2 further testified that another robber went back to his house and was flashed out. According to PW 2, that robber was the appellant.

There was also the evidence of PW 3, Omar Ndegwa who testified that on the material night when he was outside his house, he saw a group of 15 thugs breaking into a shop. The group threw stones at them and shortly afterwards police officers arrived and shot two of the robbers. One robber was killed by members of the public and the appellant was flashed from the house of PW 2.

PW 4, Rumba Mkusi, a watchman, was with PW 2 and PW 3 when the robbers struck on the material night. He was hit with a stone and he fell down. Later he was in the team that flashed out the appellant from PW 1's house. PW 5, Nyale Lujanje, was attracted to the scene by noise. He rushed there and saw seven robbers. Two of them were killed, one by a gunshot and another by members of the public. PW 5 was also in the search team that flashed out the appellant from PW 2's house.

PW 6, APC Peter Juma, was informed of the robbery by two people including PW 2. Accompanied with APC Fumo (PW 7), they went to the scene and found the robbery in progress. The robbers were armed with pangas, bows and arrows and shot arrows at them prompting APC Fumo to open fire killing one of the robbers. At the scene, the Administration Police Officers were informed that another robber had locked himself in a room in the compound. Members of the public opened the room and flashed out the robber who happened to be the appellant. APC Fumo Omar Hiribae, gave similar evidence to that of PW 6. He confirmed that he shot one of the robbers and people scattered. However, one of the attackers ran back into one of the rooms at the scene of the robbery. He was flashed out by members of the public. The person who was flashed out according to PW 7 was the appellant.

On the same night, PW 8, Abdi Mohamed Guracho was robbed of a Seiko watch. He testified that PW 2 alerted those present that one of the thugs was in one of the rooms. A search was carried out and the appellant was flashed out.

PW 9, Ganaza Moma Bemwingo, was only informed of the robbery and when he later went to the scene, he found that he had lost Kshs. 66,000/=, a torch and a bag.

The appellant gave an unsworn statement that he was looking for medicine for his epileptic sister and ended up at the scene of the robbery. He heard shouts and decided to check and was attacked by three people when they learnt that he could not understand and speak their language. The people took him to an empty house and left him there. Later, police officers opened the door and a person hit him on the head. Police officers however prevented members of the public from further assaulting him. The appellant denied his involvement in the offences which he faced.

The Learned Senior Resident Magistrate, on the evidence outlined above, found that the appellant was **“without an iota of doubt one of the robbers who attacked and robbed the complainants herein. He went and hid in PW 2's room after his escape was foiled by the arrival of the Administration Police.”**

Having reconsidered and re-evaluated the evidence which was presented before the Learned Senior Resident Magistrate there is really no dispute that PW 1, William Mwangi, the complainant in count one was on the night of 15th and 16th February 2003 attacked by a gang of robbers at his house who demanded money from him with threats. The attackers stepped on him as others ransacked his boxes. He lost money in the attack. There is variance between the amount PW 1 stated he lost and the amount stated in count one. The variance in our view, did not vitiate the charge and is curable under Section 383 of the Criminal Procedure Code. That variance, in any event, did not cause the appellant any prejudice.

There is also, in our view, no dispute that PW 8, Abdi Mohammed Guracho the complainant in count two was a victim of the same robbery. He testified that one of the robbers pointed an arrow at him and ordered him back into the house. He lost a wrist watch valued at Kshs. 800/=

There is further no dispute that the appellant was at the scene of the robbery. PW 2, Osmane Hussein was a neighbour of PW 1. On the material night (although the record shows he testified of 15th and 16th February 2002 which we found to be an error in recall or recording since his presence on the night of the robbery was supported by the other witnesses) he was outside his house when robbers entered PW 1's house and that of Abdi Mohammed (PW 8). The robbers charged at him and he ran to the Administration Camp to report. He returned with armed Administration Police Officers who shot one of the robbers. PW 2 saw another robber go back to his house. That robber, according to PW 2, was flashed out and happened to be the appellant.

PW 3, Omar Ndegwa, also testified that one of the robbers was flashed out of PW 2's house. PW 4 was also in the team which flashed out the appellant from PW 2's house. There was also the evidence of PW 5, Nyale Lujanje. He was attracted to the scene of the robbery by noise. He saw 7 robbers. Two of them were killed and he participated in flashing out the appellant. His evidence was somewhat in conflict with that of PW 4, Rumba Mkusi, with respect to whether the appellant was armed with a panga or not and whether PW 5 snatched the panga from the appellant both of which PW 5 denied. We have appreciated that conflict and have come to the conclusion that the conflict did not weaken the case presented by the prosecution against the appellant. The conflict did not also negate the evidence that the appellant was flashed out of PW 2's house.

There is then the evidence of PW 6, APC Peter Juma, who on being informed of the robbery by PW 2, among others, armed himself and proceeded to the scene to find the robbery in progress. At the scene, information was received of a robber who had locked himself in one of the rooms in the compound. According to PW 6, members of the public opened the room and flashed out the robber who happened to be the appellant. That evidence was buttressed by PW 7, APC Fumo Omar. He too testified that when he arrived at the scene, the robbers defied his order to stop and he shot one of them and the rest scampered to safety save for one whose escape route was blocked and he ran back into the compound where the robbery had been staged. PW 7 informed members of the public to carry out a search from the houses, which search yielded the appellant.

Having analysed the above evidence, we have come to the conclusion that the identification of the appellant was beyond dispute. His explanation that he was looking for medicine for his epileptic sister flew in the place of the case of a good Samaritan which he had put up during the cross-examination of the witnesses. This finding leads us to a consideration of the challenge raised by the appellant with respect to failure to consider his defence by the Learned Senior Resident Magistrate. Our perusal of the record of the Learned Senior Resident Magistrate shows that the appellant's defence was adequately considered and was properly rejected as being absolutely without merit. In his own words:

“His allegation that he was locked there by some people is a lie. In fact this allegation is in total contrast to the scenario he created during cross-examination where he tried to create the impression that he was one of the good Samaritans.”

Finally, the appellant contended that his fundamental rights to a fair trial were breached as he was arraigned before court 17 days after his arrest. He invoked the Court of Appeal decision in Albanus Mwasia Mutua – v – Republic (Criminal Appeal No. 120 of 2004) (UR). Mr. Monda replied that the challenge based on breach of constitutional provisions had come rather late and should be dismissed. We concur because the same Court of Appeal has interpreted the provisions of Section 72 (3) (b) of the Constitution as allowing suspects to be held after the time frames given in the section have lapsed, save that there has to be an explanation. (See Dominic Mutie Mwalimu – v – Republic [C.A. No. 217 of 2005] (UR)).

Making a complaint late, as the appellant has done in this appeal, deprives the Republic of the opportunity to furnish an explanation. The playing field in a trial should be kept level all the time. The

appellant's rights to a fair trial exist alongside other rights equally enshrined in the Constitution such as the interests of society. We have, in the premises, come to the conclusion that the contention of the appellant that his fundamental rights to a fair trial were breached is without merit and is dismissed.

The upshot is that the case against the appellant on the counts upon which he was convicted was proved beyond reasonable doubt and he was properly convicted.

With regard to sentence, only one sentence of death can be executed. The Learned Senior Resident Magistrate should have imposed only one sentence of death. Having imposed the sentence of death on the first count, he should not have proceeded to impose the death sentence on the second count. The sentence on count two will therefore be left in abeyance. We, otherwise uphold the appellant's conviction and sentence and hereby dismiss this appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS DAY OF 2009.

J. K. SERGON

JUDGE

F. AZANGALALA

JUDGE

Read in the presence of:-

The Appellant and Mr. Onserio for the Republic.

F. AZANGALALA

JUDGE

12TH MAY 2009