



(From original conviction and sentence in SRM'S Court Bondo in Cr. Case No. 1295/08.

MOSES ATELA OTHIRA alias RASTA APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

Coram

Mwera, Karanja JJ.

Mr. Musau for State

Appellant present in person

George CC.

JUDGMENT

The appellant herein was charged with the offence under S. 296 (2) P.C at Kisumu. It was alleged that on 7.11.2006 at St. Andrews Area, Kisumu jointly with another not before court while armed with pangas they robbed Joseph Ayal Ogolla of a mobile phone (Motorolla C113), a wrist watch (Cambridge) and cash Ksh 5,200/= - all worth Ksh 7,599/=. They used actual violence on the said Joseph, during the incident.

There was count 2 also contrary to Section 296 (2) P.C to the effect that at the same place and date the said two robbed Philister Akinyi Ayal of her mobile phone (Nokia 7110) plus a purse all to the value of Ksh 47,000/= and they used actual violence on Philister.

And there was an alternative charge contrary Section 322 (2) P.C in that on the same 7.11.2006 at Manyatta - Gudka Estate Kisumu, the appellant retained the items of property named in the 2 robbery charges above, having reason to believe that they were stolen or unreasonably obtained for his benefit.

After trial the appellant was convicted and sentenced. From the closing remarks of the learned trial magistrate, it appears that the appellant was found guilty of the two robbery charges, while the sentence seems to have been only one. We will revert to this as we review the evidence and come to our own conclusion of the case.

The appellant filed an 8 – point petition of appeal to the effect that identification was not positive; vital witnesses were not summoned to testify; there were contradictions in the prosecution evidence; no exhibit was found on him and his defence was not considered by the lower court.

At the hearing of this appeal before us the appellant who had filed what he called “written submissions”, opted to respond to the reply by the Republic. He had down the line dispensed with services of his counsel, Mr. Nyanga.

Mr. D. Musau, the learned Senior Principal State Counsel, told us that the complainant (PW1) went out of his house on the material night to answer the call of nature. A robber emerged from an abandoned kiosk there and threatened to shoot him with a gun. He ordered PW1 to sit down; he called out to the others. One more joined the first robber and they demanded money from PW1. They walked him to his house which was well lit with electricity and there robbed him of money and 3 mobile phones. Before the raiders left Philister Akinyi (PW2, PW1’s wife) raised alarm. PW1 also confronted the first robber and as they struggled the second robber who had the mobile phones, ran off. Members of the public who answered the alarm beat up the first robber but before he died he disclosed the name of the appellant herein as his confederate that night. That P.C. Jared Rioba (PW5) was woken up by the alarm from PW1’s house; he joined in the chase of the fleeing robber – the appellant. He was caught and found with the mobile phones stolen from PW1’s house. He could not operate them or explain how he came by them at that time. That led to his being charged. The prosecution was at all times conducted by an Inspector of Police. This appeal ought to be dismissed.

In response the appellant told us that a witness (PW3) who was at the scene and also gave chase did not say how stolen items were recovered and that the appellant’s name was not given to anybody. He was surprised as to how he came into all this. We now turn to the evidence presented before the lower court, even with the fact that we did not see or hear the witnesses, with a view to make our own conclusion of the case.

Joseph Ayal Ogola (PW1) of St. Andrew Primary School, Manyatta was going out to answer a call of nature at 4 am., on 7.11.2006 when a bare – breasted man accosted him. He threatened to shoot him with a gun. He ordered PW1 to sit down; he called a mate. The two demanded money from the witness and also assaulted him. They led him into his sitting room and there the appellant took 2 mobile phones. They entered the bedroom where his wife (PW2) was and stole another mobile phone and her purse. Money was given to the appellant. When the other robber bent to take a panga in the room, PW1 jumped on him. As they struggled the appellant ran out. An alarm was raised; neighbours came. When PW1 made to dress himself the robber he had held made to run off but the members of the public caught and beat him fatally. Before that he gave out the name of Moses Atela as his confederate. Police came and took away his body. The following day a local OCS told PW1 that two of the stolen mobile phones had been recovered. PW1 identified them – their property stolen during the robbery. Both PW1 and his wife PW2 reported to the police, and were issued with P3 form for treatment. He told the police that he could identify the other robber. He identified the appellant, a brown man who had a cut on the forehead, on the identification parade the following day. PW1 identified the 2 mobile phones – the Motorola and Nokia as per the two counts aforementioned, and before court. He was able to identify the robber in the security light and the lit sitting and bedroom in an incident that took 15 – 20 min. What was touted as a gun was in fact a pair of iron – cutting scissors which fell down as PW1 struggled with the robber he held on, and who was beaten to death.

In cross – examination PW1 said that he was close to the appellant while in the house which was lit with electricity. He observed that he was brown with a scar on the head. The head was clean – shaven at the time PW1 identified the appellant on the identification parade. He had were a black and white jeans trousers during the incident.

Philister Akinyi (PW2, wife of PW1 and complainant in count 2) gave more or less similar evidence like PW1. The 2 robbers led PW1 into the house from outside and stole money Ksh 5,200/= and phones including the Motorola C. 113. The appellant took the money and phones. As PW1 struggled with the other robber, the appellant escaped. An alarm was raised; neighbours came and beat up the robber whom PW1 had held on. He died. Police came with 2 phones and a wrist watch which had been recovered and they were identified. The following day PW2 identified the appellant on a parade – a tall brown man wearing black & white jeans. The 2 recovered phones were the stolen Nokia 7110 and the Motorola. She identified her own Nokia phone with a crack and also the Cambridge wrist watch – all before court. The

robbery took about half an hour and PW1 had told the police that she could identify their attacker. He had a clean – shaven head with a scar at the time of the incident. PW2 was close to him when she gave him the money. He took the 2 phones in the sitting room and came with them into the bedroom.

Jason Amba (PW3) a resident of Manyatta Estate was asleep on the material night at 4 am when his door was banged hard. He woke up and heard PW1 and 2, neighbours, raising alarm. He ran to their house and found PW1 struggling with somebody. PW3 cut that person with a panga; he released PW1 and made to run. He got to a locked gate with PW3 in hot pursuit. PW3 cut him again. He ran through space cut in the fence. Outside other neighbours caught him. They beat him. He died later. The 2 robbers had stolen 3 phones, a wrist watch and money, as per PW1 and 2.

P. C. Antony Kamau (PW4) of Kondele Police Station produced the exhibits herein – the 2 mobile phones, and wrist watch referred to above. They had been handed to him together with a file by P. C. Kirui.

P. C. Jared Rioba (PW5) of Kisumu Police Station – was asleep in his house at Gudka Estate when, on the material night and time, he heard people making noise outside. When he got there he found Moses Atela, the appellant, wearing an unbuttoned shirt, pleading with people who had surrounded him to leave him alone. PW5 introduced himself as a police officer and Moses told him that he was a security guard coming from his place of work. He did not reveal where the place of work was or which company he worked for. On searching him PW5 recovered 2 mobile phones which were switched off and a wrist watch. Moses was unable to switch on the phones and PW5 suspected that they were stolen. The witness called a colleague Snr. Sgt Maina and they took the suspect (Moses Atela) with the suspected items to Migosi Police Post. As they left the post they heard noises from the area of St. Andrews. They found colleagues on duty in a van and they told them to go to the scene at St. Andrews and investigate what was going on there. The appellant gave his names to the officer in-charge who booked him. He was the suspect he found being beaten by the public and from whom PW5 recovered the 2 mobile phones – Motorola C113, Nokia and wrist watch, Cambridge Orient by make (Exh. P1 to 3). Owners identified them later. PW5 did not know the appellant before and he had no reason to be against him.

Dr. Kephah Otieno Mukodo (PW6) of Nyanza Provincial Hospital examined Philister (PW2) and Joseph (PW1) with history of assault on 7.11.2006 at Manyatta. Both were certified to have suffered harm as per P3 forms produced in court.

In his defence the appellant, claimed that he was charcoal seller at Kondele. On 8.10.2006 in the morning he met 2 police officers who directed him to follow them to a police station. Once there they ordered him to sit down. He was then booked, detained and later charged in court. He did not understand the charges. He did not understand why adverse evidence was led against him. No identification parade was conducted and he did not commit the offence. There was nothing to show that the exhibits produced in court were recovered from him.

In our appreciation of the evidence we, like the learned trial magistrate, find that the offences of robbery with violence contrary to Section 296 (2) P.C. were perpetrated against the 2 complainants herein (PW1, 2) on the night in question. The two were attacked at night in their home, threatened with shooting but instead assaulted, by more than one person and their property was stolen in the incident. Accordingly, ingredients of an offence under S. 296 (2) P. C. were established hence the charges.

The next question we address is whether the appellant was one of the 2 people who robbed the 2 complainants here. We say he was as per the evidence. The incident which took about 20 to 30 min was in a compound with electricity light outside and in the sitting - and bedroom of the victims. The victims were not blind-folded, pushed under the bed or ordered to lie face - down. They gave out money to the appellant who also took the mobile phones and the wrist watch. The 2 victims who had ample time to see their attacker in electric light, told the police that they would identify the robber who ran off with the phones and money as his confederate was cornered and beaten to death. That he gave out the name of the appellant, as his mate, before he died. But leaving that aside P. C., Rioba (PW5) a resident of where PW1 and 2 lived was at the time in issue, woken up by noises from people outside his house. When he went to see he found they had surrounded the appellant, baying for his blood. The appellant was pleading with

them to leave him. PW5 intervened to save him. But on searching him the appellant was found with the 2 mobile phones, not too long ago robbed from PW1 and 2, together with a wrist watch. The appellant could not operate the mobile phones. PW2 suspected them to have been stolen. He with Snr. Sgt. Maina led and got the appellant locked up at a police station and the recovered items were accordingly retained there. The following morning a local OCS got PW1 and 2 to see the items and they identified them as the ones stolen from them during the robbery. The appellant did not claim those items or explain how he came by them before PW5 (P.C Rioba) got him with them soon after they were stolen from PW1 and 2. PW5 had no reason to frame up the appellant; he did not know him before. Our conclusion is that the appellant was one of the robbers. As his mate was cornered by members of the public who beat him to death, the appellant had made to fly but was caught by other members of the public who held and beat him until PW5 came along. It was very close to the place of the robbery and at more or less the same time. We think the learned trial magistrate correctly arrived at the conclusion that the appellant was one of the robbers. He was caught and found with the stolen phones and wrist watch in the same estate soon after the robbery. PW1 and 2 told the lower court that an identification parade was conducted on the second day after the incident. They picked out the appellant. The evidence of that parade was not tendered but we hold that the prosecution tendered overwhelming evidence.

The appellant's defence did not even come near the case before the learned trial magistrate. He testified of his arrest for unknown reason on 8/10/2006. The case concerned 7.11.2006. He was talking of something totally different and so all was irrelevant.

In the event, this appeal is dismissed in its entirety. Now may we do what the learned trial magistrate ought to have done regarding the sentence but she overlooked to do – namely that the appellant had been found guilty of robbing the two complainants. She ought to have directed that with the 2 counts of robbery having been proved the appellant do suffer due death sentences, beginning with one while the other was held in abeyance because no two death sentences or a death sentence plus a prison term can be served at one and the same time.

Accordingly, the appellant here will serve the sentence on count 1 while that on count 2 is held in abeyance.

Judgment accordingly. Delivered on 29.10.2009.

J. W. MWERA & J. R. KARANJA

JUDGE

JUDGE

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