



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA Criminal Appeal 126 of 2007

ALI SHABAN ALI APPELLANT

-AND-

REPUBLIC..... RESPONDENT

*(An appeal from the judgment of Senior Resident Magistrate T. Mwangi dated
30th July, 2007 in Criminal Case No. 4190 of 2005 at Mombasa Law Courts)*

JUDGMENT

The appellant was charged with robbery with violence contrary to s. 296(2) of the Penal Code (Cap. 63, Laws of Kenya). It was alleged that the appellant, on 22nd November 2005 at about 1.00 p.m, at Mtopanga Village, Bamburi Location in Mombasa District within Coast Province, jointly with others not before the Court and while armed with an offensive weapon, namely a knife, robbed **George Omondi Oliech** of one cellphone, Nokia 8210 valued at Kshs.11,000, and a pouch containing Kshs.100/=, and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said **George Omondi Oliech**.

After analyzing the evidence, the learned Magistrate came to this finding:

“I am satisfied that [the] prosecution has proved its case beyond reasonable doubt. [The] upshot is that the accused person is found guilty as charged and is accordingly convicted under section 215 of the Criminal Procedure Code.”

The trial Court sentenced the applicant to death, as required by law.

In his grounds of appeal the appellant thus states: the sentence imposed was harsh and oppressive; the police investigations did not provide a basis for prosecution; goods said to have been recovered did not link appellant to the offence; the circumstantial evidence relied on by the trial Court was not corroborated; the charge sheet was defective; the trial Court failed to take the defence case into account.

At the hearing of the appeal, the appellant who had also filed written submissions, did not say anything save to express satisfaction with the respondent's case – conceding “on a technicality”.

Learned counsel **Mr. Onserio** submitted that an **identification parade** was necessary to identify the appellant, but none was held; and consequently the Court relied on mere dock identification. Counsel urged that even though the material incident took place during the day, the appellant was a stranger to the complainant, and an identification parade was required, to rule out mistaken identity.

How did the trial Court deal with the question of identification? These are the Court's words touching on **identification**:

- (i) ***“a knife was recovered from [the] accused, while [the] complainant's mobile phone and pouch were recovered from deceased's pocket”.***
- (ii) ***“Two of them [i.e. three attackers] were arrested less than a kilometre away. On being searched a knife was recovered from accused herein. Another accomplice was searched and [the] complainant's mobile phone plus [pouch] recovered”.***
- (iii) ***“From [the] evidence of the complainant, it is very clear that he was alert all along. The way he expressed himself clearly showed he was composed and had enough time to see the accused persons before, during and even after the attack. He stated that the accused was armed with a kitchen knife that was recovered from him on arrest. Accused was arrested by members of the public”.***

- (iv) ***“The evidence on record is very clear, witnesses on record ... consistent and very cogent”.***
- (v) ***“Accused person was arrested still in possession of the knife he had used to attack the complainant. It was the complainant who pointed him out to members of the public. Offence and arrest [were] in broad daylight.”***
- (vi) ***“[The] issue of identification is thus very clear PW1 managed to clearly identify his attackers. That is [how] he was able to pursue them. The Police Officer (PW4) found [the] accused still at the scene [at the] office of the vigilante group”.***
- (vii) ***“I am satisfied that the prosecution has proved its case beyond reasonable doubt”.***

From the foregoing several points at which the trial Court drew inferences on the identification of the appellant herein, we are not yet able to see clearly whether identification was accurately carried out. Therefore we will look at the evidence of some of the witnesses, in particular the complainant, and PW2, PW3, and the Police Officer (PW4).

George Omondi Oliech (PW1) was serving in November, 2005 as an electrical technician for Campaign Salvation Ministry Church, at Mtopanga in Mombasa. PW1, on 22nd November, 2005 at 1.00 pm, was proceeding on foot from his house at Kisauni Bhakarani to Mtopanga. When PW1 reached Bachir Primary School compound, he saw three people ahead of him, two of them seated and one standing, next to a classroom. On seeing PW1, the man who was standing started walking towards him, from a distance of some 15 metres; and when this man was some three metres short of reaching PW1, he drew a knife, and ordered PW1 to surrender all his effects. The knife was a kitchen knife - and PW1 identified it in Court. In a struggle that ensued, the attacker cut PW1 on the left thumb. At this moment, the attacker's companions came along, running; and one of the two (deceased) removed PW1's Nokia 8210 and a wallet, from PW1's pocket. The wallet contained Kshs.100/=, in Kshs.50 notes. The three men ran away, as soon as they had

robbed the complainant.

PW1 gave chase as he screamed, and members of the public came to his rescue. Members of the public gave chase, and arrested two of PW1's attackers; one escaped. Of the role of the appellant in the incident and its aftermath, PW1 said:

“[The] accused herein was found with a knife. He is the one I was struggling with before the others joined in. The one who had [robbed me of] the mobile [phone] was also arrested. He was wearing two pairs of trousers. He was searched by me and [by] the members of the public. The mobile phone and wallet were recovered from him. The mobile phone is the one in Court”

PW1 draws ***distinctions between the three attackers***. He states that the attacker who took his mobile phone and his wallet was not the appellant herein; and this particular mugger who took his phone was assaulted by members of the public, and was later arrested and taken to the police station; and PW1 heard that this attacker later died, before being taken to hospital.

On this testimony, PW1 was cross-examined by the appellant herein. The evidence given in the ***cross-examination*** is as follows:

- (i) PW1 identified the appellant by the hat and clothes the appellant was wearing – a ***white shirt with red stripes***.
- (ii) The incident took place during daytime.
- (iii) After the robbery incident, the three attackers ran away, one after another, and PW1 ***gave chase***; he screamed; members of the public came along, and assisted in arresting the appellant herein.
- (iv) PW1 had been alone at the time of the incident, and at the ***locus in quo*** there were only ***four*** people – PW1 and three suspects.
- (v) After the robbery, the three suspects ran into Mtopanga Estate, and two of them were arrested there.
- (vi) Was the appellant arrested by mistake? This is PW1's statement on this point, in cross-examination;

“It is not true you were arrested by mistake as you went into a shop. The one who was found with my property

is the deceased”.

Osman Omkono Mkhoha (PW2) of Mtopanga gave evidence that he approached the scene where two escaping men were being battered by members of the public, on the material afternoon, and was able ***to save one of these men*** (the appellant) from the irate members of the crowd. PW2 testified that ***PW1 was part of the crowd***, and that PW1 at that moment, ***identified*** the appellant herein as the man who had stabbed him. It is PW2 who called the police, who then re-arrested the appellant herein and the deceased.

During cross-examination, PW2 confirmed PW1’s evidence, that ***“The one who was found in possession of the stolen items was the deceased”***.

PW3, **Abbas Abdala**, of Mtopanga Estate, further confirmed that the stolen effects of PW1 had not been found on the appellant, but on the deceased. PW3 said that what was recovered from the appellant was a ***knife***. PW3, on that occasion ***did see PW1***, and it was his testimony that PW1 had been cut; and indeed, it was PW3 who administered first aid to PW1.

PW3 testified that the complainant, at the time of rescuing the appellant from the crowd, pointed out this particular man, the appellant, as one of the suspects.

Police Constable Samuel Mwandogo (PW4) who was serving at Bamburi Police Station, was summoned on 22nd November, 2005 at 1.30 pm to the scene where members of the public at Mtopanga had arrested the appellant herein. PW4 re-arrested the appellant and took him to hospital; and he also collected exhibits in the form of a ***kitchen knife***, a cell phone (Nokia 8210) and a wallet containing Kshs.100/= in Kshs.50/= notes.

On cross-examination, PW4 testified that his information was that the kitchen knife had been recovered from the ***appellant*** herein; and that the complainant had ***identified the appellant herein by appearance***. PW4 investigated the offence and was convinced of the appellant’s complicity; so he brought the robbery-with-violence charge against the appellant herein.

These accounts give a more complete picture on *identification*, which break down as follows:

- (i) the complainant is certain that, of the three men he met near Bachir Primary School at the material time, the one who was standing and who first confronted him was wielding a kitchen knife which he used cut the complainant, and the man he saw at close range, in broad

daylight, make that assault on him, was none other than the **appellant** herein;

- (ii) the complainant first **struggled with the appellant** herein, before the appellant's two colleagues closed in, and the **kitchen knife** which the appellant had, was an exhibit in Court and was identified by the complainant;
- (iii) **cross-examination**, the common law system's special device for getting at the truth, elicited from the complainant the evidence that he had **identified the appellant by his white shirt with red stripes, and by the hat he was wearing**;
- (iv) it emerges from the cross-examination and from other evidence, that the complainant wasted no time after his attackers took off; he went **in hot pursuit**, chasing and calling out to members of the public who intercepted and arrested two of the attackers, including the **appellant** herein;
- (v) it also emerges from the cross-examination that the prevailing conditions for identifying the attackers at the material time were good: it was **broad daylight**; the complainant had **only three people in sight**, there being no crowd of people at that time;
- (vi) it emerges from the cross-examination that members of the public **quickly came out and arrested the attackers**, and even as recoveries of effects were being made, the complainant had caught up with them at Mtopanga Estate and he **loudly identified the suspects**, and declaimed the hurt they had just caused him;
- (vii) it emerges from the cross-examination that the complainant **very well saw** which attacker was to be associated with which item – the appellant with the **kitchen knife**, the deceased with the complainant's **cellphone** and **wallet**;
- (viii) the complainant's evidence of effects to be associated with which suspect, was correct, as **confirmed by several other independent witnesses** – such as PW2, PW3 and PW4;
- (ix) other witnesses confirmed the complainant's evidence that he was

in hot-pursuit of the suspects, and that he was **present and speaking about his plight at the scene where members of the public arrested two of the suspects** and subjected these suspects to punitive blows;

(x) PW3, was quite clear that the complainant had **pointed out the appellant** to members of the public as one of the suspects;

(xi) PW4, on cross-examination, stated that his information was that the kitchen knife produced in Court as an exhibit had been recovered from **the appellant's possession**, thus confirming the identifying evidence of the complainant.

All these instances make, in our opinion, an unexceptionable case, with strong attributes of veracity, that PW1 (the complainant) did very well **identify** the appellant herein as one of the robbers who attacked him.

How does the appellant deal with that inculpatory evidence, in his sworn evidence? He gives rather cursory evidence, saying that at 1.00 pm on the material date he had gone to the shop at Mtopanga, and then he saw some six people coming towards him, and one of these six was a vigilante leader, called **Omar Chai**. No other witness spoke of this **Omar Chai** and he was not called as a witness. The appellant blames the said **Omar Chai** for his arrest, saying he had personal differences with **Omar Chai who**, on the material date, assaulted him and he lost consciousness, only recovering much later and finding himself in hospital. This account is, clearly, very different from that of other witnesses, especially PW4 who said he is the one who took the appellant to hospital after members of the public arrested the appellant and injured the appellant.

It is clear to us, firstly, that the appellant was correctly identified **at the scene of crime and at the time he was arrested**. It is clear that the complainant diligently perceived the suspects, one of whom was the appellant, chased them and had two of them arrested by members of the public, amidst whom the complainant **continued to identify the suspect and the effects associated with them**. Not only did the complainant well identify the appellant at the very beginning, he followed in hot-pursuit, and kept the suspects as close to view as possible: so that the act of identifying the appellant and his associates, was practically continuous and contemporaneous, giving the most reliable identification possible in the circumstances.

There was no basis, in our view, for learned counsel **Mr. Onserio** to concede to the

appeal on the ground that an identification parade had not been conducted. With the clear and extended mode of identification we find to have taken place, there was, in our opinion, no need for an identification parade; and so absence of such a parade cannot be a basis for conceding the appeal. It should be clear that an identification parade, in situations of crime, is not a fixed requirement, and the operative facts and circumstances must be the basis for determining whether or not an identification parade is necessary.

We have no doubts at all that the appellant herein was one of the robbers who attacked the complainant and robbed him of his personal effects, on the material date.

We dismiss the appeal; uphold the conviction; and affirm the sentence as imposed by the learned Senior Resident Magistrate.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 9th day December 2009.

M. IBRAHIM

JUDGE

J.B. OJWANG

JUDGE

Coram: Ibrahim & Ojwang, JJ.

Court Clerks: Kazungu & Ibrahim

For the Respondent: Mr. Onserio

Appellant in person