



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL 271 OF 2004

AGGREY OMBOKI ONDIEKAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Arising from original conviction and sentence in Criminal Case No. 50 of 2004 in the Senior Resident Magistrate's Court at Mombasa – Miss P.N. Ngigi)

J U D G M E N T

The appellant herein, Aggrey Omboki Ondieki alias 'Tally' was tried and convicted for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was then sentenced to suffer death and being aggrieved he filed this appeal. The particulars of the charge are that on the 17th day of December 2003, at about 8.00 p.m. at Kongowea Location in Mombasa district within Coast Province, jointly with others not before court while armed with a dangerous weapon namely a pistol robbed John Wekesa Wanjala of Kshs.100,000/- and a mobile phone make Motorola T190 valued at Kshs.6,500/- all valued at Kshs.106,500/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said John Wekesa Wanjala.

On appeal, the appellant put forward a total of 8 grounds of appeal in his petition of appeal. The appellant was also allowed to file supplementary grounds of appeal.

Before we deal with the merits of the appeal we wish to set out in brief the case that was before the trial court. The complainant, John Wekesa Wanjala (P.W.1) said he had been approached by a person by the name Boss with a request to get for him persons who would dig tunnels to place pipes to supply water. P.W.1 said that on 17.12.2003, Boss brought the accused to him at 8.00 p.m. The said 'Boss' gave the accused a paper bag he was carrying before he left. Boss arrived in the house of P.W. 1 and found P.W.1 and one Gilbert Wanjala (P.W.2) counting money. It is said P.W.2 left the three negotiating for the charges for fixing the pipes. Suddenly, the accused is said to have produced a pistol pointed it at P.W.1 while demanding to be given the money which P.W.1 and Gilbert (P.W.2) were counting. The accused grabbed a sum of Kshs.100,000/- and P.W. 1's mobile phone T190. It is said the accused and 'Boss' left the complainant lying down. The complainant booked a report with the police the next day upon which police commenced investigation. P.W.1 said that on 18.12.2003, he saw the accused come to eat at a nearby food kiosk but he left immediately when he saw him. Saidi Chaka Mondo (P.W.3) said he saw the accused talk to P.W.1 on 18.12.2003. He claimed he heard the accused tell the complainant (P.W.1) to stop reporting him to the police otherwise he would kill him. P.W.3 claimed that P.W.1 told him the person whom he was talking to was the man who had robbed him the previous day. Jonathan Partimo (P.W.4) and a colleague said they arrested the accused on 8.2.2004 at Bamburi on a tip off.

The accused (now appellant) denied committing the offence. He said the police came to arrest him as a suspect for the theft of a T.V. Set owned by one Salim and not for the robbery incident. He said Salim was a disgruntled customer who wanted to see that he was punished because his T.V. was not properly repaired. He said that on 17.12.03 he was in Kisumu hence he had no opportunity to commit robbery as alleged.

Upon receiving the evidence from both sides, the trial magistrate came to the conclusion that the accused was properly identified by the witnesses who testified in support of the prosecution's case. The learned magistrate also concluded that the evidence of the accused did not cast any doubt on the prosecution's case.

We have already stated that the appellant put forward a total of 9 grounds in his petition of Appeal. He also filed three (3) extra grounds in his supplementary petition of appeal. When the appeal came up for hearing, two main grounds were argued. The first ground is to the effect that the appellant was not properly identified and secondly that there were contradictory evidence.

On the first ground, the appellant is of the view that since there was no identification parade, then there is doubt as to whether he was the person who was at the house of P.W.1 on 17.12.2003. We have re-examined the evidence of identification presented before the learned Senior Resident Magistrate. What is clear is that the complainant (P.W.1) did not know the appellant prior to 17th December 2003. The appellant was taken to the house of P.W.1 by another called 'Boss' who was unfortunately not summoned to testify. The complainant said he reported the incident to Nyali Police Station on 18.12.2003. There is no evidence as to how he described the appellant. P.W.4 did not also give details as to how he was able to identify the appellant. From the evidence of P.W.4, it is clear that the appellant is somebody connected to robberies within the area. P.W. 4 said on Cross-examination that the appellant was well known by everybody. It was incumbent upon the prosecution to tender evidence of the descriptions given by PW 1 to the police so that we can safely say that the appellant was properly identified and put at the scene of crime. It is possible the appellant could be a victim of mistaken identity which occasionally arises in our daily lives. We are of the view that the trial magistrate failed to critically look at the issue of identification in the absence of an identification parade.

The second ground argued on appeal is that there is contradictory evidence in the testimony of P.W.1 and P.W.3. According to P.W.3, he saw the accused (appellant) talk to P.W.1 on 18.12.2003 next to the kiosk where he was selling water on behalf of P.w.1. According to P.W.1, he did not meet the appellant. He said that when his eyes met, the appellant fled immediately. We agree with the submission of the appellant that this contradiction is material which should have created doubt in the mind of the trial court. We think doubt has been created in our minds which should be given to the benefit of the appellant.

For the above reasons we allow the appeal by quashing the conviction and setting aside the sentence of death. The appellant is hereby set free unless lawfully held.

Dated and delivered at Mombasa this ...7TH.... Day of March 2008.

J.K. SERGON

J U D G E

D.K. MARAGA

J U D G E