



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL 187 OF 2001

FRANCIS KABERIA M'LITHUMAI:::::::::::::::::::::APPLICANT

VERSUS

REPUBLIC:::::::::::::::::::::::::::::::::::::RESPONDENT

(Appeal from the Conviction and Sentence in Chief Magistrate's Court criminal Case No. 1647/2001 by J.N.Nyangah on 1.11.2001)

JUDGMENT

1. The Appellant, Francis Kaberia M'Lithumai was convicted and sentenced to death in Machakos Chief Magistrate's Court Criminal Case Number 1647/2001 on 1.11.1.2001. He had been charged with two counts of the offence of robbery with violence contrary to section 296(2) of the Penal Code. On count 1 the particulars were that

“ on the 30th day of June 2001 at Ngei phase II in Athi River settled Area Location, Athi River Division within Machakos jointly with others not before court while armed with pangas, rungas, iron bars and stones robbed Alexander Ogola Adem of one woolen coat, a wrist watch, three jackets, one suitcase, one handbag, one small radio, one pair of shoes, blow dry hair drier, iron box, one shoe, two children's wrist watches, one blanket, one , one bed sheet, valued at Kshs. 15,400/= the property of Alexander Ogola Adem and at or immediately after the time of such robbery wounded the said Alexander Ogola Adem.”

2. On count II,

“on the 30th day of June, 2001 at Ngei Phase II in Athi River Settled area Location, Athi River Division within Machakos District of the Eastern Province jointly with others not before court, while armed with pangas, rungas, iron bars and stones robbed Abel Ominde Ogola of one shirt Kshs. 250/= the property of the said Abel Ominde Ogola and at or immediately before or immediately after the time of such robbery wounded the said Abel Ominde Ogola.”

3. Upon conviction and sentences, the Appellant preferred this Appeal on the following ground;-

“i. That the trial magistrate erred in both points of law and fact

in basing his conviction on reliance of identification of PW1, PW2, and PW4 and failed to caution himself that the same was done under harsh and difficult conditions.

ii. That the trial magistrate erred in both points of law and fact when he based his conviction on

reliance on the alleged bullets lodged on [him] and also the money and failed to consider that [he] had accounted on the same. (sic)

iii. That the trial magistrate erred in both points of law and fact when he became impressed on [his] mode of arrest and did not take into consideration that [he] was a victim of circumstances.

iv. That the trial magistrate erred in both points of law and fact when he relied on the crown's witnesses which were both meager and inconsistency to base a conviction.(sic)

v. That the trial magistrate erred in both points of law and fact in shifting the onus on the defence and rejected [his] defence without giving his points of determination in contravention of section 169(1).(sic)

vi. That since [he] cannot recall all that transpired during the trial, [he] prays that [he] be furnished with the courts proceedings so as to add more reasonable grounds during the hearing and [he] also wishes to be present during the hearing of the same. (sic)”

4. It is our duty as the first appellate court to submit the evidence tendered before the trial court to a fresh and exhaustive examination and reach our own decision on that evidence (see ***Pandya vs Republic [1957] E.A. 336***). We are also well aware that we do not have the advantage, as did the trial court, of hearing and seeing the witnesses (see ***Peters vs Sunday Post [1958] E.A. 424***). To enable us properly appreciate the evidence we deem it proper to summarize it as follows:-

5. On the night of 29th/30th June 2001 PW1, Alexander Ogola Adem, his son, PW2 Abel Ominde Ogola, his daughter, PW3, Colleta Atieno and his brother PW4, Stephen Nyandera Ochoka, were all asleep in PW1's house within Athi River's Ngei Phase II Estate when robbers struck. PW4 was sleeping on a sofa in the living room and when the door was hit with a big stone, it gave way and according to him, the robbers entered the house and by his count, they were about 6 or 7 in number. They had torches, pangas and rungas and demanded that he should keep quiet and he did. They proceeded on to PW1's room and PW4 heard them demanding money from him. PW1 confirmed that he was woken up by the screams of his children who were in a different room and he turned on the lights in his bedroom. When he went out of that room, he saw people flashing torches in the living room and he started shouting for help. He counted 5 or 6 strangers in the house and three of them confronted him and he noticed that they had Somali swords and pangas. He was ushered back to his bedroom and when he failed to produce any money, one of them cut him with a Somali sword and another cut him on the ***“left ear near the cheek”*** while yet another hit him on the back with a blunt metal object. As he lay on his bed, face up, bleeding, he saw the robbers collecting items from his wardrobe and taking them out. He also heard his neighbour's shouting for help and the robbers ran out. He too went of his house and it was his evidence as was that of PW4, PW2 and PW3 that they heard the sound of a moving motor-vehicle and shortly thereafter they heard gunshots. PW2 said that it was he that pointed the policemen, occupants of the vehicle, to the direction the robbers had fled and he saw the police officers shooting at the robbers.

6. PW1, PW2 and PW4 all stated that they ran to the direction the police officers had also ran to and in a maize plantation, they found the Appellant who had been shot in the leg and another robber who had also been shot and had quickly died.

7. PW1, PW2 and PW4 identified the Appellant in the dock as the man who had been shot in the leg and also as one of the robbers whom they had minutes earlier seen at PW1's house.

8. PW1 said that at the place where they found the wounded Appellant there were items elsewhere above listed in the charge sheet (exhibits 1- 13 plus exhibit 14, which exhibits was some documents belonging to him).

9. PW5, Sgt John Kitonga and PW6, PC Michael Tum stated that on the material night, they were on night patrol within Athi River Township together with one PC Muli who was driving the patrol car. When they approached a place popularly called ***“site”***, they heard a big bang and people started screaming. PW5

and PW6 took off on foot, and met two men who were running after a group of about 8 men ahead of them. They explained that the group had just robbed them. PW5 fired twice in the air to stop the group but they sped on with luggage that they were carrying. They dived into a maize plantation and PW5 and PW6 shot directly at them. Shortly, they reached two of them who had been shot- one was dead and another had been shot in the leg. The latter turned out to be the Appellant. Amongst the items found with him was a suitcase belonging to PW1 (exhibit 1). A number of other items identified as belonging to PW1 and minutes before stolen during the robbery were also recovered at the scene of the shooting. The police officers then arrested the Appellant and took him to Mavoko Dispensary and the dead one's body was taken to Machakos Hospital Mortuary. Later, the Appellant was charged with the offence of robbery with violence.

10. PW7, Dr. Patrick Lumumba, a private practitioner in Machakos examined PW1 on 14.9.2001 and noted that he had a fractured right radius bone which had been treated at Nairobi Hospital where he had been taken after the robbery. The probable weapon used to injure him was in his view, a blunt weapon. He also examined PW1 who had multiple lacerations on the head and bruises in the chest. The probable weapon(s) used in his view was a blunt and sharp object. He produced P3 forms in respect of both PW1 and PW2.

11. After the evidence of PW7, the charge sheet was amended to reflect the fact that the Appellant and others not before the court had wounded both PW1 and PW2 at the time of the robbery.

12. In his defence, the Appellant in an unsworn statement stated that he was a miraa seller and had performed his duties until 9p.m on the material night and at 11p.m he heard screams. When he stepped out, he was shot at and as he sat down a policeman approached him. Instead of helping him, the policeman shot him in the knee, twice, took him to Athi River Clinic and on 10.2.2001 he was charged with the offence of robbery with violence, a fact he denied knowledge of.

13. To our collective mind, there is no doubt that the evidence of PW1, PW2, PW3, and PW4 regarding the robbery at PW1's house cannot be faulted. It was consistent, believable and the injuries confirmed by PW7 were consistent with the injuries sustained during the robbery by both PW1 and PW2. However, we wish to add as follows:-

14. The appellant has taken issue with his purported identification at the time of robbery by PW1, PW2 and PW4. We wholly agree with him. PW1 said that he identified the Appellant as the one who had cut him on the first occasion. He went on to describe him as wearing a cap and that he identified the Appellant by the "**clothes**" he was wearing. The clothing was neither stated nor described in any way. PW2 on the other hand stated that the Appellant was wearing a "**white t-shirt**" and he only identified him when the Appellant was running away. PW2 did not say at what point during the after-robbery episode he was able to identify the Appellant and with the aid of what lighting. He said that the "**security light which is outside the house was on**" but it is unclear how he could at that point identify the Appellant who was in any event giving his back to PW2 at the time. Matters were not helped in this regard by PW4 who said that he identified the Appellant when he first entered the house but save for saying that the Appellant had a hat on, his evidence in no way corroborated that of PW1 or PW2. In fact PW4 said that during the robbery the Appellant wore a black coat belonging to PW1. How then could he shortly thereafter be in a white t-shirt as was PW2's evidence?

15. The entire evidence of identification cannot be but faulted for the above reasons but this case does not rest on that evidence. It rests on one piece of evidence only; the shooting, and arrest of the Appellant and recovery of recently stolen goods at the same place. We have no doubt in our minds that the evidence of PW2, PW4, PW5 and PW6 is consistent in that regards. PW2 and PW4 were chasing the robbers and PW5 and PW6 heeding their caller for help joined them, warned the robbers ahead to stop but they refused to do so. PW5 and PW6 shot at a group of 5 robbers simultaneously and two were gunned down. One of them turned out to be the Appellant who was found in a maize plantation and all around him were some of the items minutes before stolen from PW1's house. Apart from the fact that the Appellant was arrested almost red-handed in the sense that PW2, PW4, PW5 and PW6 were hotly pursuing him and his confederate minutes after the robbery without losing sight of him, he has to contend with the stolen items

found in the same scene. As we understand it, that evidence is crucial in determining the guilty of a suspect. In **Kantilal Jirraj vs Republic[1959] E.A.L.R 711** the court quoted the following statements made by the Criminal Court of Appeal in England in the case of **Director of Public prosecutions vs Neiser (1)**.

“The right inference from recent possession may be that the accused himself has stolen the property, or where he is found in the street near the scene of house-breaking in possession of the property which has stolen.”

16. Similarly in **Hamisi s/o Mohamed (3) [1948] in EACA 121 and 122** it was held that;

“On that finding [i.e the possession of property recently stolen] in the absence of any explanation by the Appellant to account for his possession a presumption does arise that the appellant was either the thief or the receiver...We appreciate that this is a difficulty which judges and magistrates often find themselves so it may be [well] to repeat which has been said before that it is a presumption of fact, not an implication of law, from evidence of recent possession of stolen property unaccounted for...”

17. Both these eloquent statements aptly summarize the situation obtaining in the case before us. The Appellant apart from being shot in circumstances that leave no doubt that he is one of a gang of fleeing robbers, is also found in the midst of property recently stolen and he cannot account for his circumstance. His defence that he was shot as he stepped out of his miraa business is an afterthought because all evidence points to the fact that he was in fact shot as he tried to seek refuge in a maize plantation with his loot in tow. The defence is no more than an afterthought and we dismiss it as such.

18. Once we have found that the Appellant was in fact a thief of the property found in his possession, all other evidence surrounding that fact would lead his trail backwards to the scene of robbery and we are reminded that in **Johana Ndungu vs Republic Criminal Appeal No. 116/95(UR)** the Court of Appeal held that following the earlier decision in **Opoya vs Republic [1967] E.A. 752**, the word “***robbed***” is a term of act and “***connotes not simply theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property to obtain or retain stolen property.***”

19. The offence of robbery is proved in circumstances set about above and also in the description of offence in section 296(2) of the Penal Code with provides as follows:-

“ If the offender is armed with any dangerous or offensive weapon or is instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

20. We have clearly demonstrated that the Appellant was properly convicted of the offence of robbery with violence and having now perused all his grounds of appeal, none to our common eye has any merit.

21. The appeal is hereby dismissed.

22. Orders accordingly.

Dated and delivered at Machakos this 17th day of April 2008

J.B OJWANG

JUDGE

ISAAC LENAOLA

JUDGE