



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 56 of 2006

JACKSON AMATARO OMOTTOAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

JACKSON AMATARO OMOTTO, was with two others charged with two counts of capital robbery. They all pleaded not guilty and upon trial before the Senior Resident Magistrate at Molo the co-accused were acquitted on both counts. The Appellant was not that lucky. He was only acquitted on count one but convicted on count two and sentenced to death. He has appealed against both the conviction and sentence.

The particulars of the count on which he was convicted were that on 28th May 2005, at Kanyoni Estate, Molo in Nakuru District of Rift Valley Province, jointly with the other two accused persons who were acquitted, while armed with pangas they robbed Simon Ngugi of cash of Kshs.2,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Simon Ngugi.

In his Memorandum of Appeal the Appellant has listed four grounds of appeal which are to the effect that the evidence of PW1 and PW2 does not tally with the particulars of the charge; that he was not positively identified as being one of the robbers; that there was no examination of the blood stained jacket to confirm that it was his and that the learned trial magistrate erred in failing to write the judgment as required by Section 169(1) of the Criminal Procedure Code and shifted the burden of proof to him.

The Appellant filed and relied on written submissions. On ground one, he submitted that the alleged robbery was reported on 2nd June 2005 as is clear from O.B. No.21 of that date. He therefore dismissed the evidence of PW3 that a report had been made on 28th May 2005 as a fabrication. He wondered how he could have been arrested on 31st May 2005 when the reported was put in the O.B. on 2nd June 2005.

On ground two, he submitted that his identification was not proper as the conditions were not favourable for a positive identification and the intensity of the light that was used to identify him as well as the time he was under observation were not stated. He cited the case of Joseph Leboi Vs R, Criminal Appeal No.

204 of 1987 and submitted that in view of the poor conditions there was a mistaken identification which mistake can be made even by people who claim to know the accused. Besides that he said PW2 claimed to have known him by a nick name Temba. He denied being known by that name and said if that was true it could have been stated in the charge sheet as his alias name.

On ground three he submitted that as no DNA test was carried out there is no proof that the blood stained jacket found at the scene was his. On the last ground of appeal the Appellant submitted that contrary to the provisions of Section 169(1) of the CPC and the authority in the cases of Owen Kimotho Kiarie Vs R, Criminal Appeal No. 98 of 1998, and Jane Nyamule Vs R [1953] EACA 21, the trial court failed to consider the defence case along with the rest of the evidence on record or to give its reasons for rejecting his alibi defence as required. He said as was stated in the case of Mupuka Mwarura Vs R [1980] KLR 127, the judgment should reflect the entire evidence adduced in court and contended that where an accused person puts forward an alibi defence that is reasonable and may possibly be true, he should be given the benefit of doubt. He said the trial magistrate ignored his defence that PW1 was making advances to his wife and when he questioned that PW1 started beating him up calling him a thief an act that would have led to his being lynched if the police had not intervened. He urged us to allow his appeal.

For his part Mr. Njogu, learned state counsel, submitted that though the attack was at night there was light from Salama Lodge which enabled PW1 to see and identify the Appellant. PW2 who went to PW1's rescue had a torch which he flashed on the Appellant which augmented the light at the scene. In the circumstances he submitted that the Appellant was positively identified and urged us to dismiss this appeal.

Having carefully perused the record we find that ground one has absolutely no merit. There is nothing on record to show that the report of the offence in this case was made on 2nd June 2005. The evidence of PW3 is clear that before the arrest of the Appellant and his confederates a report of the robbery had been made to Molo Police Station on 29th May 2005. We therefore dismiss ground one.

Also for dismissal is ground four in which the Appellant alleged that the magistrate did not write the judgment as required by law and that he ignored his defence. We find that claim totally unfounded. After setting out the prosecution evidence in detail the learned trial magistrate considered the defence case and rightly dismissed it as the Appellant's claim that PW1 attacked him and caused his arrest because of differences over Appellant's wife had absolutely no basis. That ground is also therefore dismissed.

On ground two and three we are satisfied that the Appellant is on firm ground. The blood stained jacket that was recovered from the scene was not examined to match the blood on it with that of the Appellant. There is also no evidence of the Appellant's ownership of the jacket. In the circumstances we find the Appellant's complaint about that jacket being attributed to him justified.

The Appellant is also right in his complaint that he was not positively identified as one of the robbers. PW1 and PW2 claimed that they knew and gave all his names including the alias name of Temba to the police. In their evidence the police witnesses did not state those names. Although he claimed that PW1 said he knew their attackers PW3, to whom they reported the matter, did not say that he was given the Appellants' names and he gave no names in court. Besides that PW1 claimed that he was able to see the Appellant by the use of light from Salama Lodge. PW2 said in addition to the light from Salama Lodge, he had a torch which he flashed on the robbers faces and identified the Appellant and another one. There is nothing on the record to show how far Salama Lodge was and the intensity of the light therefrom as well as the one from PW2's torch were not stated. In the circumstances we have doubt as to whether or not the Appellant was positively identified. We give the benefit of that doubt to the Appellant.

For these reasons we allow this appeal, quash the conviction and set aside the sentence. The Appellant shall be set free forthwith unless otherwise lawfully held.

DATED and delivered at Nakuru this 4th day of July, 2008.

D. M. MARAGA

JUDGE

M. MUGO

JUDGE