

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 321, 326 & 328 of 2006

(From the original conviction and sentence in Criminal Case No. 3674 of 2004 of the Chief Magistrate's court at Mombasa)

DANIEL ADENYIAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

Daniel Adenyi, the appellant herein, was tried on a charge of two counts of robbery with violence contrary to Section 296(2) of the penal Code. It is said that the appellant violently robbed Dominic Kimuli and James Njue Nthiga in Counts I and II respectively. After undergoing a full trial the appellant was convicted and sentenced to suffer death in Count I since the second count was withdrawn. Being aggrieved he preferred this appeal. The appellant put forward a total of five (5) grounds of appeal in his petition of appeal. Mr. Ondari, learned Assistant Director of Public Prosecutions opposed the appeal.

We wish to set out the case that was before the trial court before delving into the grounds of appeal. The complainant, Dominic Kimuli (P.W.1) said he was attacked by people who were armed with bows and arrows. He did not identify his assailants. P.C. Daniel Wangai (P.W.3), proceeded to the scene after the robbery where he was shown the direction the robbers had taken to escape by good Samaritans. P.W.3 in company of other police officers followed that direction and found ten men at the sea bed. The ten men dispersed and ran away when they were ordered to surrender. The appellant herein was arrested when the police gave a chase. Beside him, the police recovered a phone set, a cash box, 3 arrows and a bow. When placed on his defence, the appellant claimed he was a fisherman and that he was arrested on his way home.

The learned Senior Resident Magistrate came to the conclusion that the accused had failed to explain what he was doing in a place not inhabited at night. She also dismissed the appellant's defence for the reason that he never possessed a fishing license. She appreciated the fact that it was necessary in the circumstances of this case to hold an identification parade.

We have re-evaluated the evidence as enjoined by law. The evidence which was used to convict the appellant is purely circumstantial. The learned Trial Senior Resident Magistrate stated in her judgment that the stolen items were recovered barely five metres from where the police officers opened fire. It is said the items were beside where the appellant was lying on the ground.

The appellant argued that the prosecution's case had not been proved to the required standards. According to Mr. Ondari, the Prosecution's case was watertight hence the appeal should be dismissed. We have re-examined the evidence on record. It is apparent that the offence was committed at night. It is alleged that Daniel Wangai (P.W.3) was able to see people who were running away whom he alleged were sharing some loot. There is no evidence to show what sort of light assisted P.W.3 to see. We are unable to find that the piece of evidence could sustain a conviction because there is serious doubt. Further more it is said that the stolen items and the weapons used during the robbery were found besides the appellant. It is not said that they were found in possession of the appellant so that the doctrine of recent possession could apply. The recovery of the items did not sufficiently connect the appellant with the offence.

The appellant also argued that the learned Senior Resident Magistrate shifted the burden of proof to the appellant. This ground was conceded by Mr. Ondari. We have considered this ground. The trial magistrate was of the view that the appellant did not prove that he was a fisherman because he had failed to corroborate his assertion by independent evidence. It is our conclusion too that the learned Senior Resident Magistrate shifted the burden of proof. In such a case the conviction must be interfered with as it was not safe for it to be sustained.

For the above reasons we are of the view that the appeal should be allowed because the case against the appellant had not been proved to the required standard of beyond reasonable doubt and on the basis that the trial Senior Resident Magistrate had shifted the burden of proof to the appellant.

We allow the appeal by quashing the conviction and by setting aside the sentence of death. The appellant is hereby set free forthwith unless lawfully held.

Dated and delivered at Mombasa this 19th day of September 2008.

J.K. SERGON

F. AZANGALALA

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