



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Criminal Appeal 214B of 2004

JOSEPHAT MBEGE ONYANGO APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

JUDGMENT

Coram:

Mwera, Karanja JJ.

Mutai for State

Appellant in person present

CC. Raymond inter-Eng/Kisw/Luo.

This appellant filed two appeals: CR. A. 251/03 and CR. A. No. 214 'B'/04. On 15.7.2005 he was asked about the former (CR. A. 251/03). He denied knowledge/existence of it and desired that we hear the latter. Both bore the original lower court: **MASENO SRM C.C. 351/02**. Accordingly the present proceedings went on on CR. A. 214B/04. In the circumstances we are bound to mark CR. C. 251/03 as withdrawn and the file closed.

In the lower court the appellant was accused 1. He was charged with others before court and others not before court that on 29/3/2002 at Sosa County Hotel Gisambai, Vihiga District being armed with pangas, rungus and a pistol, they robbed Hudson Kivati Ksh 1780/=, identity card, a voter's card all valued at Ksh 2,000/= and they used actual violence during that incident, contrary to Section 296 (2) P.C. That was count 1.

Counts 2 and 3 also read that at the same place, time and in a similar way the appellant with others robbed Femina Mihayo and Abdalla Asava. While Femina lost a wrist watch and a pair of shoes, Abdalla was robbed of cash, a wrist watch a pair of shoes and an identity card.

After the trial the appellant was convicted and sentenced to death – the mandatory sentence for violent robbery under Section 296 (2) P.C. The learned trial magistrate however did not state on which count this conviction and sentence fell as she ought to have done. Similarly she did not direct the mode of serving the sentences as she found the appellant guilty on all the three counts. She ought to have ordered that one sentence be served first while the others were held in abeyance because practically two or more death sentences or a death sentence plus any prison term (s) cannot be served at the same time.

In the petition of appeal it was claimed that identification was not positive in the circumstances of the alleged attack. The victims did not describe the appellant in a manner that could lead to his arrest and the prosecution did not prove its case beyond a reasonable doubt. The lower court was also faulted as regards Section 169 C.P.C – the contents of a judgment.

The appellant filed what he called “**submissions**” and opted to respond to the reply by the learned Senior State Counsel, Mr. Mutai. He added in his response that he was denied opportunity to be heard in defence.

Mr. Mutai's position was that the appellant was among the group or thugs who raided PW1's (Hudson Kivati) place of work. It put him in such shock that he could not identify any of those robbers. However, it was PW2 (Charles Mugodo) who saw and identified the appellant when they got in close proximity during the incident – face to face in a lit room. That PW2 was able to pick out the appellant from a subsequent identification parade. The appellant who wore a pair of long trousers had not covered his face. He was arrested in a certain house when he with others were preparing to commit a felony.

The appellant countered that the evidence of PW2 was that the raiders got into the house where he was and smashed the lights there. One light remained in the counter where that witness was and he (PW2) claimed that he identified the appellant by it. The two were strangers to each other and there was no specific mark with which PW2 would identify the robber, whom he simply described as a tall and slender man.

Further, that another employee on the premises where the incident allegedly took place PW3 (Cleophas Andiva), testified that when he came back to the bar from outside, he had a torch whose light he directed to the thieves, identifying the appellant. The appellant then claimed before us that on the day of the identification parade, he saw his assistant chief whom he owed money with other people at the police station. He was placed among parade members, unknown to him, and he was of the impression that the identifying witnesses were instructed to pick him out. That he was not of the same height with the parade members and he told the parade officer so and even during cross – examination of that officer. He signed the parade forms, though. The appellant had been arrested in his mother's house and not in a house where they were preparing to commit a felony.

Hudson Mutavi (PW1) told the lower court that on the material night he was selling beer at Sosa Bar counter. At about 10.30 pm he sent one Majani to go and look for money for change. At that time 3 robbers struck. They had approached the premises as customers but when PW1 made to welcome them in, they held him. The robbers had pangas and small axes. They broke electric bulbs. But before the breaking PW1 was able to identify one of the robbers in the light – the one who held him by the belt. Some lights were smashed but one remained at the counter. The robbers broke into the counter, then led PW1 out and knelt him down. They kicked him about and stole cash plus an identity card from him. He was also cut behind the left ear. PW1 was confused. The commotion brought members of the public to the scene before the raiders fled. The witness had been able to identify the appellant well, tall and brown, even if that was his first time to see him. The incident took 5 minutes inside the bar. PW1 was taken to hospital and treated. Police came to the scene.

On 9.4.2002 – about 11 days after the incident, PW1 was invited to an identification parade where he picked out the appellant. PW1 had told the police that one of the robbers was a slender brown man

Charles Mugodo (PW2) worked as a bar man at the said bar while PW2 worked in the restaurant side of the same establishment. When he heard the commotion already described by the PW1, PW2 left the mini – bar where he worked and went 60 metres to the main bar. Before he got in he flashed his torch and noticed a man armed with a panga, an axe and something like a pistol. That man ordered PW2 to go back. Other robbers were inside the bar. The robber armed with a panga chased PW2 into a maize plantation behind the bar. From that spot PW2 was able to identify him, the appellant, by the help of security light and the torch that the witness had. When the robbers escaped, Hudson (PW1) was left bleeding. PW2 called police as PW1 was taken to hospital. Charles then wrote his statement and on 9.4.2002 he picked out the appellant from an identification parade. PW2 insisted that he flashed his torch light on the appellant. The appellant threatened to cut him with a panga. There was also a security light. Appellant wore a sack on the head but his face was not covered. He also wore a long dark coat and a belt. PW2 had come to the scene when a commotion ensued from the bar.

Cleophas Majani Andiva (PW3), a waiter at Sosa Bar went off to another bar to look for change. Thieves struck. On his return, he found all the customers had been ordered to lie on the floor. Hudson (PW1) had been taken outside the bar. He screamed that he was being killed. As one of the robbers broke into the bar counter, another kept guard over the victims. When PW3 tried to enter the premises he was cut. He turned and ran away. Before that Cleophas had noticed that the two light bulbs in the hall had been smashed while the one in the counter was still on. There was also a security light. PW3 ran to report the incident to the bar owner. PW3 had identified the appellant at the scene and he picked him out at an identification parade. At the scene there was light and the appellant wore a cap and a black coat.

Abdalla Asava (PW5) was a customer at Sosa bar on the material evening. When they were about to leave at about 11.00 pm 4 robbers raided the joint, dressed in long coats and caps like police officers. They got where the witness and his mates were and in a rowdy manner ordered them to lie down. When PW5 inquired who these intruders were, he was slapped with a panga. The assailant pulled his cap over his face and Abdalla was not able to identify him. He lay down; his shoes plus cash were taken. PW5 heard bangs at the bar counter. The robbers fled. Police arrived. He wrote a statement. One Femina Mihayo (PW6) was his wife. After a month PW5's identity card was recovered and returned to him.

Femina (PW6) told the learned trial magistrate that armed robbers raided the said bar when she was about to leave with PW5 – her husband. They stole her shoes and wrist watch. A torch was flashed in her face and she was slapped on the back with a panga.

On 4.4.2002 at 8.00 pm while P.C. Gilbert Olinyo (PW2) was on duty at Vihiga Police Station, he accompanied other police officers to a certain house at a place called Mbegwa, where information had been received that people were holed in there preparing to commit a felony. An ambush was laid. After 25 minutes some suspects arrived and the police team arrested them. They included the appellant and his co – accused persons in the lower court. They were taken in on suspicion of committing robberies and later they were charged. The house did not belong to the appellant at all. The witness produced PW1's P3 form under Section 77 Evidence Act.

On 9.4.2002 I. P. Peter Kuria (PW4) arranged and conducted an identification parade at Vihiga Police Station involving the appellant – with 5 witnesses. On the parade were eight members. The witnesses were kept far from the parade and the appellant agreed to take part in the parade. Hudson Kivati (PW1) Charles Mugodo (PW2) and Cleophas Majani (PW3) were able to pick out the appellant. Other witnesses including Femina (PW6) did not (Exh. P1). The appellant was satisfied with the parade and he signed the due form. In the evidence of PW4 PW1 appears as Wilson Kwati but his name is clear in Exhibit P1 (parade form). PW4 arranged and re-arranged the parade as the appellant chose without any hitch and he did not lay any complaint. The appellant told us that he had raised a complaint that witnesses at the parade had seen him earlier or that they were coached to pick him out. Or that he was not of the same height as other parade members. Neither of those complaints featured in the cross – examination of PW4 or the parade form. The prosecution case ended.

Put on his defence the appellant told the learned trial magistrate:

“Accused: I pray that my defence in CR. C. 350/2002 do apply herein as I was arrested the same day.”

In reviewing the lower court evidence it appears that the learned trial magistrate alluded to a defence the appellant did not state before her e.g. that the appellant alleged that the witnesses on the identification parade had seen him before the parade was conducted and the assistant chief saw to all this. We were unable to find such defence on the record since the appellant merely declined to say anything in the case when he was given the opportunity. He asked the learned trial magistrate to refer to the defence in another case but that was not the thing to do. The appellant was accorded opportunity to defend himself but he chose a different course himself. He could as well have kept silent in his defence. The learned trial magistrate however went on to find that the appellant was identified by PW1, 2 and 3 and that led to his conviction.

In our view the alleged robberies took place. The victims PW1 (Hudson), PW5 (Abdalla) and PW6 (Femina) were assaulted and robbed on the night in question by armed thugs. So there is no doubt about their testimonies on this aspect.

As to visual identification, we are satisfied that PW1 and 2 (Hudson, Charles) well saw the appellant at the scene. For Hudson there were light in the bar. Before some were shattered, while the one in the counter remained on, he was able to identify the appellant by that light. The appellant held him and the incident took 5 minutes inside the bar before the robbers took the witness outside to kneel him down. The appellant was tall and brown, though a stranger. But some eleven (11) days later PW1 picked him out on an identification parade which appeared to have been regularly conducted. It ended without complaints from the appellant who signed the parade form. PW2 too saw the appellant first in his own (PW2) torch light. The appellant chased him into the maize crop behind the bar. PW2 continued to see the appellant by his torch and the security light. His face was uncovered. Later PW2 picked out the appellant on a parade which we think was properly conducted. It could be said that that was some days later, but the witness had seen the appellant in torch light and security light – a stranger. But all in all, we think PW2 identified the appellant. PW2 and 3 had seen the appellant dressed in a long coat.

As for Cleophas (PW3) he came back to Sosa bar to find the robbery in progress. There was light in the bar. When he tried to enter it, the appellant made to cut him with a panga. They had come face to face. PW3 ran off. The appellant wore a cap.

As for Femina (PW6) although PW4 told the court that she was able to pick out the appellant from the parade he conducted, her evidence before the lower court does not bear such. She had never seen the robbers; a torch was flashed in her eyes and she was slapped on the back i.e she was lying face downwards.

The appellant was arrested, not at the scene and not with anything stolen during the robbery, but in a house where he was with others, on information that they were arranging to commit a felony in the locality. They were suspected of having committed robberies and so were taken in. The witnesses, victims of one of the recent robberies (PW1, 2, 3) identified him on a parade. The prosecution discharged its onus of proof and as remarked upon earlier, we did not find that the

appellant was denied an opportunity to defend himself.

As for complying with Section 169 CPC regarding judgment writing, our view is that the learned trial magistrate wrote a short judgment, but we think she covered the pertinent areas.

In sum, we dismiss this appeal and direct that the appellant do serve the sentence on count 1 first as the other two are held in abeyance.

Judgment on 16.9.2008.

J. W. MWERA

JUDGE

J. R. KARANJA

JUDGE

JWM/hao