



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, DULU, JJ.)

CRIMINAL APPEAL NO. 41 OF 2005

BETWEEN

MARKO ISULI ZAKAYO.....APPELLANT

-AND-

REPUBLICRESPONDENT

(An appeal from the Judgement of Senior Resident Magistrate Ms. Muchira dated 24th January, 2005 in Criminal Case No. 2752 of 2004 at the Kibera Law Courts)

JUDGEMENT OF THE COURT

The appellant was charged with the offence of robbery contrary to s.296(2) of the Penal Code (Cap.63). The particulars were that on **5th April, 2004** at Kawangware in Nairobi the appellant, jointly with another not before the Court, while being armed with dangerous or offensive weapons namely knives, robbed **Frederick Wekesa Baraza** of cash in the sum of Kshs.20/=, one wrist watch of make Orientex, and one pair of leather shoes, all valued at Kshs.2,210/=, and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence against the said **Frederick Wekesa Baraza**.

The complainant (PW1) testified that on **5th April, 2004** at 7.30 p.m. he was alone, walking home from his work-place. As he approached an institutional building, an academy, he saw two men ahead, walking towards him. One of these men held him by the neck, and ordered him to be silent; he told PW1 that he and his companion had a knife, and they could kill PW1. When PW1 struggled, the man holding his neck now pierced him with a knife, on the chest. The two attackers ransacked PW1's pockets and took his Kshs.20/=, his wrist-watch, and his shoes. At this moment, a security guard came along, torch in hand, from the near-by academy. When the attackers saw the guard, one of them took to his heels; but the one who had stabbed PW1 with a knife just strolled away. The guard, who saw the incident, blew his whistle, attracting several young men who came and began a chase at the attackers. They caught the appellant and took him to the local Chief, in the presence of PW1. In accordance with the Chief's advice, PW1 was taken to Kenyatta National Hospital, where he was admitted for one day. During cross-examination, PW1 testified that the appellant after stabbing him, had passed on the knife to his companion who ran away with it. PW1 said he had been able to observe the appellant's face when that face was lit-up by the guard's torch.

PW2 testified that he worked as a security-youth at Kawangware. He was at his place of work on 5th

April, 2004 at 7.30 p.m. when he heard the blowing of a whistle, as well as screams. He came out of the office, finding two of his colleague security-youths. The three of them identified the place from which the noises were originating, and when they got there, they found PW1 lying on the ground, bleeding. He told the three that he had just been attacked by two robbers who had grabbed his wrist-watch and his shoes. PW1 pointed in the direction taken by the robbers; and, in the testimony of PW2, the security-youths saw the two robbers, chased after them and caught one of them, the appellant. PW2 and his colleagues took the appellant to the Chief's camp, before taking PW1 to Kenyatta National Hospital for medical attention.

On cross-examination, PW2 testified that the appellant had been caught when he had bloody hands. PW2 also testified that in their chase of the robbers, there was no crowd of people around, and they caught the appellant in a solitary situation.

PW3, a security guard at Jaget Academy, testified that on 5th April, 2004 at 7.30 p.m., he heard screams at the gate. He went close-by, and saw that PW1 had been attacked, and stabbed with a knife; and he also noticed two men fleeing from the *locus in quo*. The two fleeing men ran into youths who chased them and caught one of them – the appellant. PW3 testified that he had seen the appellant well, by means of his torch which he had lit. He testified that it was the security-youths arresting the appellant, who also carried PW1 away.

PW4, the investigating officer began his investigations when the appellant was already arrested. He testified that he found PW1 to have injuries, issued him with a P3 form, and charged the appellant.

PW5, the Police doctor, testified that he had examined PW1 on 24th April, 2004. He found PW1 with a healing wound in the middle 1/3 sternum. The wound, which was 14 days – 1 month-old, had been treated at Kenyatta National Hospital. He classified the said injury as harm, and filled the P3 form which he produced as an exhibit.

The appellant made an unsworn defence in which he said he had been walking home after work, at about 7.30 p.m., when he stopped at a kiosk to buy sugar. And suddenly, the appellant said, he felt two men grab him saying it was him who had just robbed somebody.

The learned Magistrate stated the issue for determination: whether it is the accused person who, with another person and armed with a knife, robbed PW1 of his watch, shoes and money.

After systematically reviewing the evidence tendered, the learned Magistrate found the testimonies of PW1, PW2 and PW3 to be mutually corroborative. She assessed the evidence given by the three witnesses as presenting an account of events which is “uniform, consistent, and [suggesting] no falsehood”. She remarked the testimony of PW5, the Police doctor, which confirmed the nature of the injury, and which dove-tailed very well with the testimony of PW1. The learned Magistrate also recalled the highly material element in PW2's testimony, that when he and his fellow security-youths arrested the appellant, he had blood on his hands. The learned Magistrate thus stated her finding:

“I therefore believe that, [just] as PW1...saw, the [appellant] and his accomplice are the ones who attacked [and robbed him] and, in the process, stabbed him at the sternum.”

The learned Magistrate rejected the appellant's defence statement which was in conflict with PW1's testimony. She remarked:

“I ...do believe PW1's [account] as it is consistent [and] bears truth even in...voice. He recognised and identified [the] accused as [the] robber for he never lost sight of him as he fled and was caught. I find the prosecution case is proved beyond reasonable doubt...”

We think this is a trial well-conducted, in the methodical manner in which the appellant was identified as the culprit. The learned Magistrate has touched on the question of *demeanour* – which only she could have observed. She remarks that the complainant's *voice* has the *ring of truthfulness*. But more importantly, the learned Magistrate notes that the arrest of the appellant was *immediate*, following the

commission of the act of robbery; the complainant's indication of how and where in his body he had been stabbed during the robbery, is what the medical doctor also confirms; there is reliable evidence (of PW2) that the appellant when apprehended, had blood on his hands; there is evidence too that the complainant retained continuous view of the attackers, as they fled following the robbery attack; we may add that it is precisely that *unbroken vision-link* between the complainant where he lay in blood, and the location of the fleeing robbers, that PW2 and his fellow security-youths built upon to confirm the vision-chain, and to apprehend the robber-in-flight, namely the *appellant*. Such a *chain of visibility*, we would hold, is a most dependable scenario of identification of a culprit.

The fact that the complainant was able to point out his attackers, and the fact that these attackers could be seen from where the complainant lay, is a clear indication he *kept them in sight*; and what PW2 and his companions did, in chasing and arresting the appellant, amounted to *hot-pursuit*, so that there was no significant break in the chain of identification. It is not denied that the appellant, who had just decamped from the scene of crime, was found with gory hands; and the *logical conclusion* to draw is that the blood on his hands came from the stabbing act which he had just done on the complainant. This chain of circumstances is founded, moreover, upon the *direct evidence* of identification given by both PW1, PW2 and PW3; and no credible evidence was adduced that contradicts the testimonies of those three witnesses.

We have come to the conclusion that the appellant was properly and reliably identified as the robber who had attacked the complainant, in the company of a fellow robber.

Therefore, we dismiss this appeal, uphold conviction, and confirm sentence as meted out by the learned Senior Resident Magistrate.

Orders accordingly.

DATED and DELIVERED at Nairobi this 12th day of July, 2007.

J.B. OJWANG

JUDGE

G.A. DULU

JUDGE

Coram: Ojwang & Dulu, JJ.

Court Clerks: Tabitha Wanjiku and Erick

For the Respondent: Ms. Gateru

Appellant in person