REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
Criminal Appeal 81 of 2002

MBARAK IDD MOHAMED

…….....……ACCUSED

VERSUS

REPUBLIC

…….....……RESPONDENT

J U D G M E N T

The appellant was tried and convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code by the Senior Resident Magistrate's Court at Mombasa and sentenced to suffer death. Being aggrieved he preferred this appeal to challenge that decision. In his amended petition of appeal, the appellant put forward six grounds of appeal.

The facts leading to this appeal are largely short and straightforward. On the 10th day of October 2001 at about 6.00 a.m., Patrick Kidula (P.W.1) arrived in Mombasa from Nairobi upon which he proceeded to withdraw money using an A.T.M. Card at the Maritime branch of the Standard Chartered Bank. He walked towards Digo Road using Lions Club Road. He was attacked from behind along that road by people who were armed with knives and pangas. P.W. I surrendered everything he had for fear of his life when those people held him by the neck after which they snatched from P.W. 1 an ATM Card, a wallet, a mobile phone make Siemens and a black bag containing 1 shirt, 2 trousers and 1 T-shirt. The gang fled after robbing P.W. 1. P.W. 1 screamed and his screams attracted the attention of Titus Mwaha Aronje (P.W.3), a security guard attached to Chui Lodge who saw 5 people attack P.W. 1. P.W.3 blew his whistle to signal danger. P.W. I, P.W. 3 and members of the public gave a chase and managed to arrest the appellant. The complainant's (P.w.1's) black bag was recovered from the appellant. He was then taken to Central Police Station where I.P. Daniel Mchoro re-arrested the appellant.

It is now appropriate to consider the appeal before us. The appellant relied on detailed written submissions to buttress his appeal. Miss Mwaniki learned state counsel vehemently opposed the appeal on behalf of the state. The first ground of appeal is to the effect that the charge which the appellant was tried on was incurably defective in that it did not state that the alleged pangas and knives were dangerous or offensive weapons. The appellant accused the learned Senior Resident Magistrate of introducing particulars in the matter which were not in the charge. Miss Mwaniki conceded that the charge did not have such particulars. She however was of the view that did not render the charge fatally defective because the other ingredients were stated in the charge and proved by evidence tendered.

We have considered the two rivaling submissions. We have also perused the charge and the evidence tendered in support of it. We think it is necessary to reproduce the particulars of the offence as stated in the charge before the trial court as follows:

"On the 10th day of October 2001 at about 6.30 a.m. at T.S.S. Mosque along Machakos Road jointly with others not before court, being armed with knives and pangas robbed Charles Kidula Arden of his cash Kshs.7,000/, Identity Card, ATM Card, Mobile phone make Siemens C.M.30 and a bag containing assorted clothes all valued at Kshs.25,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Charles Kidula Arden."

It is clear that the charge did not contain a statement to the effect that the knives and pangas were dangerous and offensive weapons. Where a charge of this magnitude does not contain such particulars the court of appeal has held that the charge was fatally defective and incurable under section 382 of the Criminal Procedure Code. In the case of Daniel Morara Mose =vs= Republic Cr. Appeal No. 86 of 2000 (unreported) the Court of Appeal when dealing with such a charge had this to say:

"But the omission of the essential ingredients in the particulars of the offence the appellant was alleged to have committed meant that he had to wait until 3rd September 1998 when P.W. 3 and P.W 4 had given evidence in the court of first instance to know what the charge against him entailed after having been arrested on 13th March 1998 and brought to court on the 17th day of the same month. Considering that the nature of the charge against the appellant was a matter of life and death and that he was unrepresented at his trial in the court of first instance, the omission referred to above constituted a defect in the said charge which may have embarrassed the conduct of his defence with the resultant failure of justice. On this account, we think that such defect is not curable under Section 382 of the Criminal Procedure Code in the sense that the particulars of the charge did not state an offence known to the law under Section 296(2) under which the charge was laid."

We have carefully perused the record and we think that though the charge did not state that the pangas and knives were dangerous and offensive weapons, still, the charge will stand because the charge specified the other particulars necessary under Section 296(2). That is to say that the offender was in accompany with one or more other person or persons. It suffices to refer to the decision of the court of appeal in the case of Oluoch =vs= Republic [1985] K.L.R. at P.549 in which the court of appeal said:

"That the offence of robbery with violence under section 296(2) of the Penal code is committed in any of the following circumstances namely:

"(i) The offender is armed with any

dangerous or offensive weapon or

instrument

or

(ii) The offender is in the company with one or more other person or persons

or

(iii) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."

In the case of Juma Mohamed Gonzi & 2 others =vs=

Republic CR Appeal No. 275 of 2002, the court of appeal referred to their decision in Oluoch =vs= R (Supra) and went further to state as follows:

"The offence of robbery with violence under section 296(2) of the penal code is proved if the prosecution proves any of those three elements. Firstly, the mere omission of the words "dangerous or offensive weapon or instrument in the particulars of the six charges of robbery that were under consideration does not make the charges defective because as the charges show, the prosecution was relying on the other two

elements of a charge of robbery ……"

We have noted that the learned Senior Resident Magistrate considered in detail this issue in her judgment and we are of the view that she properly directed herself. In the end we see no merit on the first ground of appeal.

The second ground of appeal argued is to the effect that the evidence tendered by the prosecution did not place him at the scene of crime. The appellant argued that the attack was sudden and from behind. It is also said that the encounter took such a short time that the victim could not notice the appellant, being a stranger to him. This ground was countered by Miss Mwaniki who pointed out that there was broad daylight and that the appellant was arrested near the scene of crime by members of public in the presence of P.W. 1 and P.W. 3, hence there was no break from the scene. It is the submission of the appellant that there was a likelihood of mistaken identity in view of the evidence of P.W.1 and P.W 3 which showed that the attackers were seen from behind. We have carefully considered the evidence tendered by the prosecution. The complainant (P.W.1), told the trial court that he had gone at about 6.00 a.m. on 10.10.01 to withdraw money using an ATM Card. After cashing the money he walked towards Digo Road using Lions Club Road, a short cut. While walking, he was attacked from behind by people who were armed with knives and pangas. He was held by the shoulders by the gang while using threats to demand money. P.W. 1 fell down in the ensuing commotion and in the process he lost to the robbers the ATM Card, the mobile phone, cash and a black bag, which had 2 trousers, 1 T-shirt and 1 shirt. The robbers took off after securing possession of the items. P.W. 1 stood up and started screaming and his screams attracted the attention of P.W 3, a security guard guarding a nearby Chui Lodge. P.w.1, P.w.3 and Members of the public gave a chase and caught up with one of the robbers (appellant) who was found in possession of P.w.1's black leather bag within a distance of between 25 to 500 metres from the scene of robbery. The robber was arrested and taken to Central Police Station where he was booked and re-arrested by P.W. 2. After a careful re-evaluation of the evidence we are satisfied that the evidence tendered placed the appellant at the scene of crime. The issue of mistaken identity does not arise because there was no break in the chain of events from the scene of crime to the point where the appellant was arrested. In any event the doctrine of recent possession applies in this case. The appellant when placed on his defence did not offer any explanation as to how he came into possession of the complainant's black bag to counter the prosecution's assertion that he was one of the members of a gang which had robbed the complainant a few minutes earlier.

The appellant has complained that the evidence of P.W.1 and P.W.3 contradicted each other in respect of the date as to when the offence took place. We have examined both the typed and the hand written proceedings of the subordinate court. We are satisfied that P.W. 1 talks of 10.10.2001 and P.W.3 talks of 10.10.2002 as the date when the offence took place. This is a serious contradiction which the appellant did not querry while cross-examining P.W. 3. We are prepared to excuse the contradiction in view of fact that the proceedings in our courts are taken by long hand and hence subject to the human lapses while recording. We would have ruled otherwise had the appellant raised the matter before the trial court if he felt prejudiced. The appellant did not even mention the apparent contradiction while testifying in his defence. This lends credence to our view that the mistake could have been that of the recording magistrate. We suspect that the appellant got to know of the defect while reading the typed proceedings supplied to him by the Deputy Registrar of this court. We take that position in view of the fact that the complaint was not raised in the original grounds of appeal filed on 1st March 2002. In any case this appeal was filed in the month of March 2002 long before the month of October. In the circumstances we see no merit in this ground.

The third ground argued before us on appeal relates to the arrest of the appellant. The appellant urged us to find that there was doubt that he was found with the complainant's black bag. He argued that there is the possibility that the bag was dropped by the fleeing thugs and that due to mistaken identify he was arrested by members of the public while he was heading to his place of work. Miss Mwaniki, learned State Counsel urged us to reject the appellant's appeal on this ground because the evidence of P.W. 1, P.W. 2 and P.W. 3 placed the appellant at the scene of crime. We have re-assessed the evidence tendered. It is the evidence of P.W. 1 that he found the appellant in possession of his black leather bag. P.W. 2 said that the complainant (P.W.1) with members of the public brought the accused to Central

Police Station where he re-arrested him and took possession of the exhibits. P.W. 3 said that the appellant had the bag when they caught up with him. We have agonized while considering this ground. There is doubt in our minds as to who recovered the black leather bag from the appellant. We think it is not just enough to say that the appellant was found with a bag. There was evidence that the robbers numbering five fled and members of the public gave a chase and caught up with one of them about 500 metres away. It is possible that the fleeing robbers may have dropped the bag next to the appellant who may be an innocent member of the public. We are disturbed by the way the investigating officer investigated this matter. The investigations were so casual in a case that was supposed to be watertight. We agree that the trial learned Senior Resident Magistrate did not seriously consider this element. This has obviously led to a miscarriage of justice. Had she critically considered the issue she could have found that none of the prosecution witnesses actually recovered the black leather bag from the appellant. It is said they merely saw the appellant with the bag. The Trial Magistrate therefore misdirected herself when she made a finding that the appellant was found red-handed with the black bag.

The final ground argued on appeal is that the subordinate court failed to consider the appellant's defence. Miss Mwaniki was of the view that the trial court carefully considered the appellant's defence. We have perused the judgment of the learned Senior Resident Magistrate. It is clear that the learned Senior Resident considered the appellant's defence and she found it shallow. We have on our part reconsidered the appellant's defence. It is his view that he fled when he heard people shout thief, thief and in the process he fell down. He claimed that at this juncture members of the public came and alleged that he was the thief. We also note that there was a chase mounted by members of the public against 5 suspected robbers. The chase covered a distance of 500 metres from the scene of the robbery. We think the appellant's defence cast doubt some on the prosecution's case. We say so because the prosecution did not tender evidence to prove that the appellant had actual possession of the black bag. It is possible that the black bag was dropped by the fleeing robbers next to where the appellant had fallen.

In view of our above findings, we allow the appeal on this ground, quash his conviction, set aside his death sentence and order that he be set free forthwith unless held in custody for any other lawful cause.

Dated and delivered in Mombasa this 23rd Day of May 2006.

J.K. SERGON

J U D G E

D.K. MARAGA

J U D G E