



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL 102 OF 2004

(From Original Conviction Sentence and in Criminal Case No. 390 of 2003 of the Senior Resident Magistrate's Court at Voi)

**1. ISMAEL MBONJA MLANDA.....
APPELLANT**

VERSUS

**REPUBLIC.....
RESPONDENT**

CONSOLIDATED WITH CRIMINAL APPEAL NO. 104/04

**2. DAVID MSHILLA NYAMBU.....
APPELLANT**

VERSUS

**REPUBLIC.....
RESPONDENT**

**CONSOLIDATED WITH CRIMINAL APPEAL NO.
105/04**

**3. OLIVER MMWANDANGO MAGHANGA
APPELLANT**

VERSUS

**REPUBLIC.....
RESPONDENT**

JUDGMENT

The Appellants were jointly charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code and upon trial before the Principal Magistrate at Voi they were convicted and sentenced to death. They have appealed to this court against both the conviction and sentence.

At the hearing of the appeal before us on 13th September 2005 Miss Mwaniki, learned state counsel, conceded the appeal by the second and third Appellants on count I on the ground that theirs was only dock identification which is worthless and that there was no other sufficient evidence against them. As regards the first appellant she submitted that PW 1 the complainant in count I, positively identified him and was two days later led to where the first Appellant was and had him arrested. She said there was therefore no need for identification.

On count II she submitted that PW 2, the complainant in that count only identified the Appellant in court. As there was no identification parade conducted and the dock identification being worthless there was no evidence of robbery against any of the three appellants on that count. She however submitted that there was evidence of assault of PW 2 by the three appellants and they should, pursuant to the provisions of Section 363(3) Criminal Procedure Code, be found guilty of assault and sentenced accordingly.

On their part the Appellants submitted that there was no evidence against them to support the charge of robbery against the first Appellant in count I or of assault against all of them in Count

II.

We have carefully perused the lower court record. We cannot appreciate the distinction the learned state counsel wishes us to draw on count I between the case of the first Appellant and that of the other two especially the second Appellant who was the third accused in the lower court. PW 1 who was the complainant in that count said that he and PW 2 were attacked by six people but he only managed to identify two of them. This is what he said in his evidence:

“I had a look at their faces and marked the faces of the two that were beating me. They are accused 1 and accused 3 (identified in the dock by pointing). Accused 1 is the one who ordered us to release the suspect and we were face to face. He then beat me together with accused 3. Accused 3 is the one who took my wallet and my watch. I was looking at him as he did so.”

If his evidence is to be relied on then it should affect the first and second Appellants. When this witness returned to Werugha with colleagues two days after the incident he said a woman they met told them she knew where one of the people who attacked them was and led them to the first Appellant. The other Appellants were arrested later and he identified the second Appellant in the dock.

As PW 1, the complainant in count I, did not know any of the Appellants before and no identification parade having been held we find that his identification of the first and second Appellants cannot be relied upon. PW 4 whom PW 1 and PW 2 had arrested and was with them at the time of the alleged robbery said he did not see them being robbed. We are therefore unable to agree with the learned state counsel that there was evidence to support the conviction of the first Appellant on the first count. Instead we find that there was no evidence against any of the Appellants to support their conviction on count I and we accordingly allow their appeals on that count.

On count II, as we have said, learned state counsel conceded that there was no evidence to support the conviction of any of the Appellants on that count. PW 2, the complainant in that count said that he marked the facial appearances of the Appellants but he did not see who took his watch. He did not know them before. As no identification parade was held his dock identification of the Appellants cannot be relied upon. On this count we agree with the state counsel that there is no evidence to support the conviction of any of the Appellants and we also allow their appeal on that count.

The learned state counsel asked us to find that there is evidence against all the Appellants to support the offence of assaulting PW 2 and pursuant to section 353(3) of the Criminal Procedure Code convict them accordingly. We are, however, unable to find that evidence. As we have already said PW 2's identification of the Appellants cannot be relied upon. The only other witness who was at the scene at the time of alleged assault was PW 4. According to that witness he only saw the Appellants beat PW 1 and PW 2. In cross-examination by the second Appellant he said, “I never saw other people.”

The evidence of PW 4 besides contradicting that of PW 1 and PW 2 who said they were attacked by six people cannot be relied upon. He said as soon as PW 1 and PW 2 released him on the orders of the Appellants he ran away. And as he did so, he saw the Appellants descend on PW 1 and PW 2. How did he know it is the Appellants who beat PW 2? PW 2 himself said he was beaten by the six people while PW 1 said he was beaten by the first and second Appellants.

Whereas we find that PW 2 was beaten it is not clear who actually beat me. We cannot therefore make a finding of Appellants' guilt regarding the offence of assault as the State counsel invited us to. Consequently we allow the Appellants' appeals in their entirety. We quash their convictions, set aside their sentences and order that they be set at liberty forthwith unless otherwise lawfully held.

DATED and delivered this 27th day of September 2005.

J. W. MWERA

JUDGE

D. K. MARAGA

JUDGE