REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 214 OF 2003

(From Original Conviction and Sentence in Criminal Case No. 155 of 2003 of the Senior Principal Magistrate's Courts at Machakos: J. R. Karanja Es q. on 17.7.2003)

JOSEPH KAMAU KARERI :: APPELLANT

VERSUS

REPUBLIC :: RESPONDENT

J U D G E M E N T

The appellant Joseph Kamau Kareri was charged along with another in Machakos Cr. C. 155/03. The two of them faced three counts of Robbery with violence Contrary to Section 296 (2) of the Penal Code. After the trial the then 2nd accused was acquitted of all the charges while the appellant was convicted of the 3rd count. He was sentenced to death as provided by law. He was aggrieved by the conviction and sentence against which he has filed this appeal.

Briefly, facts of the case as we understand them are that PW.3 was driving a matatu Reg. No. KAP 355 Toyota which was ferrying passengers from Kitengela to Athi River. On the way some of the passengers turned out to be robbers and robbed him of the vehicle and he managed to jump out. After a while the same matatu was used to block P.W.1's Nissan pick up Reg. KAK 176B and the same robbers robbed him of it. They drove off with P.W. 1 in it and a few metres away it was involved in an accident whereby it collided with a matatu. Some people were injured as a result of the accident. The appellant was arrested at the scene and charged for the 3 offences but as earlier noted he was acquitted of Counts 1 and 2 but convicted of Count 3.

The appellant raised 2 grounds of appeal being that the magistrate erred for relying on a single identifying witness; that the magistrate erred by failing to consider the appellants alibi. He did not raise any other grounds at the hearing of the appeal.

The Learned State Counsel partially conceded to the appeal on grounds that P.W.1, 2 and 3's evidence was never tested on an identification parade but theirs was evidence of dock identification which is weak; that the court relied on the appellants defence that he was at the scene and was commandeered to drive the stolen matatu and P.W.1's vehicle and that there is no evidence to rebut the appellant's defence that he was commandeered to drive the said vehicle. It was also the State Counsel's contention that the magistrate did not warn himself of the dangers of convicting on the evidence of a single identifying witness. His view is that the appellant should have been given the benefit of doubt since his defence was qualified. The counsel asked that in the alternative the offence be reduced to an offence of robbery contrary to section 296 (1) Penal Code since none of the complainants were injured in the robbery and he relied on the authority of **SIMON MUSOKE V. REPUBLIC 1958 EA 715** considering the circumstances of the case.

In light of the State Counsel's submissions, we shall first consider whether the facts disclosed an offence of robbery with violence under Section 296 (2) of the Penal Code or a lesser offence under Section 296 (1) of the offence. The magistrate made a finding that an offence of robbery with violence was committed. In the case of **CHARLES OTIENO ATUNDA & ANOTHER V. REPUBLIC CR.APP. 215/02** the Court of Appeal sitting at Mombasa held that under Section296 (2) of the Penal Code it must be established that at the time of the robbery the offender

(a) is armed with a dangerous or offensive weapon, or

(b) is in company of one or more other person or persons, or

(c) if at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person. For the charge to be valid the charge sheet must contain any one of the sub heads. One only needs to prove one of the above heads.

The evidence before court was that the appellant was in company of others and that they were armed with a pistol. Two of the ingredients of the charge under Section 296 (2) Criminal Procedure Code were proved and there would be no requirement for one to be

assaulted as the Learned State Counsel seemed to be suggesting. It is our finding that an offence of robbery with violence was committed. The only question will be whether the appellant was one of the robbers.

P.W.1 was the single identifying witness of the appellant. It is apparent that the magistrate never warned himself of the dangers of convicting on the evidence of a single identifying witness. In the case of **OLUOCH V. REPUBLIC 1985 KLR J 49** it was held that the evidence of a single identifying witness should be treated with the greatest care. In **KARANI V. REPUBLIC 1985 KLR 290** the Court of Appeal held that

"A fact may be proved by the testimony of a single wi tness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favouring a correct identification were difficult. In such circum stances there is need for other evidence."

P.W.1 did not see the appellant after his arrest. According to P.W.1, only the 2ndaccused who was acquitted by the lower court was arrested at the scene whereas 2 others seem to have escaped. This is contrary to the evidence of P.W.4 who visited the scene and found the appellant arrested by members of public. It means that the appellant had not left the scene and if that were the case if P.W.1 had clearly seen the robbers he should have been able to point him out. P.W.1 identified the appellant in the dock. Dock identification without a prior identification parade has been held to be worthless. In the case of **OLUOCH V. REPUBLIC (1985) KLR 149, it was held that**

"A dock identification of an accused person by a witness where there had been no identification parade conducted earlier and at which the witness is present is almost worthless.

In the present case the appellant admitted having been at the scene of the robbery any way and in our considered view the prosecution case could not have been weakened by the failure to hold an identification parade or the failure by the magistrate to warn himself of the charges of convicting on a single identifying witness. The only issue we find here is whether the appellants qualified defence raised a doubt in the prosecution case as to whether he was one of the robbers or was forced to drive the vehicle. The very fact that P.W.1 could not identify the appellant after the scene of accident after the robbery casts doubts in our minds whether P.W.1 really saw what happened at the time of the robbery and whether the appellant was commandeered to drive the vehicles or not. The doubt the appellant has raised has not been countered by any independent prosecution evidence and the doubt should have been resolved in his favour.

The Learned State Counsel was of the view that in the alternative, we should find the appellant guilty of the offence of robbery Contrary to Section 296 (1) Penal Code. The standard of proof in both an offence under Section 296 (1) and (2) are the same. There remains a doubt in the courts mind as to whether the appellant was one of the robbers or not and there would be no purpose served if we reduced the offence. Besides we found above that the offence committed was robbery with violence contrary to section 296 (2) of the Penal Code.

In sum total we find that the conviction was unsafe, we quash it, set aside the sentence and the appellant is set at liberty forthwith unless otherwise lawfully held. Dated, read and delivered at Machakos this 21st day of September 2004.

Read and delivered in the

Presence of

R. V. WENDOH

JUDGE

J. A. OCHIENG

JUDGE