REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CR. APPEAL NO.321 OF 2003

AMIN MOHAMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Coram: Before Hon. Justice Mwera
Hon. Justice Maraga
Miss Mwaniki for the State
Court clerk/Mitoto

J U D G E M E N T

The appellant was charged under S.296 (2) Penal Code in that on 23.4.2003 at Sega area Mombasa, jointly with others not before court, armed with dangerous weapons namely pistols, they robbed Ibrahim Nasoro of a motor vehicle Reg. No. KAN 098D Toyota, valued Sh.400,000/-, a Nokia cell phone, cash Sh.40,000/-, plus TSh. 3m and immediately before or after such robbery threatened to use violence on Nasoro.

After a trial the appellant was convicted and ordered to suffer death – the mandatory sentence for the offence. He lodged this appeal on the amended grounds that the charge was defective as per its particulars; the identification/recognition was open to error or mistake and that the learned trial magistrate relied on description by the witnesses which description did not fit the appellant.He added that the identification parade was faulty and what led to his arrest was not clearly established. And that the appellants defence was not properly considered. That it was in error the learned trial magistrate to find that the stolen motor vehicle was found near where the appellant lived and that the prosecution did not prove its case beyond a reasonable doubt.

Beginning with the ground of a defective charge the appellant submitted that it did not contain the specific time (see S.137 (iv) (f) Criminal Procedure Code) so as to indicate with reasonable clearness to the place, time thing or matter, act or omission referred to. The learned State Counsel was of the view that such an omission was curable under S.382 Criminal Procedure Code. We agree. The charge did not state that the offence took place at 6.40 a.m. That is what the complainant (PW. 2 Nasoro) and PW.1 (Atieno) told the learned trial magistrate. We do not have the impression that this omission did occasion a failure of justice in the case. That is curable under S.382 Criminal Procedure Code. The case was clear to the appellant and he cross-examined those witnesses fully.

As to variance in the items listed in the charge sheet (above) as having been stolen and the addition in evidence by Nasoro (PW.2) that also his wallet, notebook, calculator etc. were stolen from him, we again see no prejudice done to the appellant. He was convicted as charged and not by this additional bit.

Coming to identification at the scene this court was urged to see that the circumstances under which each eye witness identified the appellant were not such as to make that identification error-free. That Atieno (Pw.1) had come from a bar at the time she said she witnessed the incident and thus she was drunk. And that she even tried to run away when she realized an armed robbery was in the offing. Also the evidence of the complainant and Omar Islam (PW.3) another eye witness was put under challenge.

To deal with identification, which is usually very important in such cases, we examined the witnesses' evidence once again against the finding of the learned trial magistrate in her judgment. The robbery took place at 6.40 a.m. It was not dark at all. PW.1 denied that she was drunk but said that when she was about to run off and leave the scene into a nearby hotel, those inside, apparently also witnessing the armed robbery could not open for her. And in cross examination PW. 1 said:

> "*I had nowhere to run and that is why I stayed.*"

That she was quite close to the appellant. That she noticed his physique and that he wore a cap over his dread locks; he had pointed a gun to the complainant who was on the ground. That it was the appellant who shouted at the complainant to take out money and he the appellant himself, took out wads of this from the complainant's pockets. The thieves numbering five or so, then sped off in the complainant's car and PW.1 called the police.PW.1 added that she had in the past seen the appellant but she could not say exactly where. She did not know his

name. PW.1 also picked him out at an identification parade.

According to the complainant (PW.2) and his nephew Omar (PW.3), both lived in the same compound, the story of identifying, nay, recognizing the appellant did not pose any problem to the learned trial magistrate and neither to us. While Nasoro saw the appellant first as he stood by the car window and authoritatively barking out orders to get out, sit down and produce money, Omar (PW.3) came out to see what all this commotion was about. He was ordered to sit down and also produce money and a cell phone. Both witnesses, money changers at Mwembe Tayari bus stage told the lower court that the appellant is someone they used to see often at that stage with his dread-locks and apparently trading/consuming illicit drugs. They even knew his wife and that after the incident she approached Nasoro (PW.2) several times with a view to get him to drop his complaint.The appellant wore a cap on the day in question. Both witnesses added that since they recognized the appellant it was not necessary to go on an identification parade for the same purpose. After the incident PW.2 went to report and wrote a statement at Makupa Police Station and Atieno (PW.1) showed up also. The two were strangers to each other and got together because of the subject robbery.

PW.2 then went looking for the appellant and he spotted him 3 days later. He got the police to arrest him. Both PW.2 and 3 were cross examined at length by the appellant and as the lower court found, we too find that their identifying him was not open to error and they had no grudges or ill-will to lead to their (PW.2 & 3) fabricating the complaint against the appellant. The complainant would not have gone off to look for the appellant after his report to the police unless he told the police that he could find his assailant.

As for PW.3 being threatened and harassed with guns, that is not in doubt. But his recognizing as opposed to identifying the appellant was such as not to be faulted. The learned trial magistrate found that reliable and so do we. These 3 witnesses did identify the appellant at the scene. The identification parade was conducted by IP. Kweria (PW.7) on request of Cpl. Shegu (PW.6). Apparently there were no flaws because when the appellant was asked whether he was not satisfied with the parade, he is said to have answered that he was not but he gave no reasons for it. The parade form does not reflect this though. And in fact the appellant did not in cross-examining PW.7 bring out any aspect that the parade was improperly conducted.

He told us that he was the only light-skinned man on the parade but we thought this was a belated story. PW.1 picked out the appellant not because he was light skinned even if he may have been so. She did so because she had focused on his looks and appearance. All the eyewitnesses spoke of the appellant's dreadlocks and that he wore a cap/hat. On the parade the appellant was recorded to have told PW.7 that "sina wasi wasi" (I am not worried or scared of it) and that he did not want a friend of his lawyer to be present. Again this was not put to PW.7 and thus raising it now does not add to much. Whatever the case, if this parade was not conducted regularly it never came out in the lower court and we find it unacceptable to begin considering such now. A complaint against the identification has no basis. The appellant also submitted that the car was recovered from Tononoka while he lived at a place called Kaloleni. His position was that the two are a distance apart. All the evidence has is that after robbing the complainant the thieves fled in his car which the learned trial magistrate saw outside the court (registration No. KAN 098D White Toyota Corolla).It was recovered the same day at 11 a.m. at Tononoka.

That the appellant lived at Kaloleni we were unable to see what quarrel the appellant had with the motor vehicle being recovered at Tononoka while he lived at Kaloleni. Or whether their distance apart caused prejudice to him. The appellant was arrested some few days after the incident when the complainant traced him and led police to arrest him (P.C. Ngulu PW.5)

The last ground was on the burden of proof and the defence. The motor vehicle was produced before the learned trial magistrate. But it was not to prove that the appellant rode off in it after the robbery or for some other reason. The charge before the learned trial magistrate was not about his unlawfully riding in the complainant's car. It was about the robbery of it.

He gave an unsworn statement in defence and concentrated on the day of his arrest – 26-4-03. The offence took place on 23-4-03. The appellant told the learned trial magistrate that between 13th and 25th April 2003 he had been ill following an assault. That when he went to report it that is when he was arrested with the robbery - a thing he did not commit. That he was arrested because

: "The people who tipped me off the complainant were my enemies."

It cannot be properly claimed that the learned trial magistrate did not consider this defence. She did and found it not worth much. She said that the appellant had opportunity early on the material day to commit the offence and later go to report his assault. She added that there was no evidence of such an assault anyway. We conclude that the last ground too be dismissed.

In sum this appeal is dismissed in its entirety.

Judgment accordingly.

Delivered on 30th November, 2004.

J.W. MWERA

JUDGE

D. MARAGA

AG. JUDGE