REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO. 449 OF 2002
(From original conviction and Sentence in Criminal Case No. 2352 of 2002the Senior Resident Magistrate's Court at Kwale delivered on 6th November 2002 – Ms. L.N. Mbatia)

DAHALE TARASI ..…………..………………………..….. APPELLANT

VERSUS

REPUBLIC …………………………………………...…... RESPONDENT

J U D G M E N T

DAHALE TARASI the appellant was convicted of Robbery with Violence contrary to Section 296(2) of the Penal Code and was Sentenced to death on the 11th November 2002 by the Senior Resident Magistrate Kwale Miss L.N. Mbatia. He has now appealed against both Conviction and Sentence.

The appellant's first ground of appeal in the amended ground of Appeal is that the charge of Robbery with Violence contrary to Section 296(2) Penal Code as framed was defective as the weapons said to have been used by the robbers and some property stolen were omitted from the particulars of the charge.

We have read the original charge sheet, which was first read and explained to the appellant on the 20th November 2001. It is marked "C" on the record of appeal. We agree with him. The particulars of the original charge were:

> *' DAHALE TARASI : On the 10 th day of October 2001 at about 12.00 a.m. at K enol Petrol Station Tiwi Location in Kwale District within Coast Province, jointly with others not before court robbed Peter Wafula of KSh.20,000/ - and at or immediately before or immediately after the time of such robbery used actual violence to the said Peter Wafula."*

The legal position is that any person who steals anything, and at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, commits a felony termed robbery. (see Section 295 of the Penal Code.)

If, however, the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he commits what is termed capital robbery and shall be sentenced to death. (See Section 296 (2) of the Penal Code)

There are therefore several instances specified in sub-section (2) of Section 296 of the Penal Code

when capital robbery is deemed to have been committed. It is for the prosecution to draw up the charge, and in doing so, to state therein which particulars of those instances it wishes to rely on.

In the present appeal before us the prosecution's case was that the appellant was armed with dangerous or offensive weapons namely Somali swords and rungus but did not specify them in the original particulars of the charge. In fact the prosecution set out to prove several other things which were not stated in the said particulars. For instances, it set out to prove that the amount allegedly stolen from Peter Wafula was Sh.21,565/- but it had only stated Sh.20,000/-. It had also set out to prove that a mobile phone had been stolen but this too had not been stated in the particulars.

Realising these omissions the prosecution applied to amend the particulars of the charge on the 5th August 2002 on grounds that the original charge sheet was badly drafted. The learned trial magistrate obliged and allowed an amendment to be made. The following particulars were then substituted:-

> *"DAHALE TARAI . On the 10 th day of October 2001 at about 12.00 a.m. at KENOL PETROL STATION in TIWI LOCATION of KWALE DISTRICT with the Coast Province, jointly with others not before Court, armed with dangerous/offensive weapons, to wit, Somali Swords and Rungus robbed Peter Wafula of cash KSh.21,565/ - and Mobil Telephone and at or immediately before or immediately after the time of such robbery used actual violence to the said Peter Wafula."*

Whereas the learned trial magistrate was entitled to give the prosecution leave to amend the charge under the provisions of Section 214 of the Criminal Procedure Code, the mandatory requirements of the Proviso thereto had to be complied with, but were not. The Proviso to Section 214

(1) Criminal Procedure Code reads:

> *"Provided that –*
>
> *(i) Where a charge is so altered, the court shall thereupon call upon the accused to plead to the altered charge;*
>
> *(ii) Where a charge is altered under this sub - section the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and in the last mentioned event, the prosecution shall have the right to re - examine the witness on matters arising out of further cross - examination"*

In the appeal before us, the trial magistrate failed to explain these rights to the appellant. The result was that key prosecution witnesses, including the complainant Peter Wafula, who had given evidence before the amendment were not recalled, either to give fresh evidence or for crossexamination by the appellant. In our considered view this omission was fatal to the appellant's conviction for it vitiated the trial.

The appellant then raised the issue of identification and submitted that he was not positively identified as one of the security guards who had allegedlyrobbed the complainant; and that this is confirmed by the fact that the complainant did not name him in the first report to the police.

We have given this submission serious consideration and we find favour with it. It was the prosecution's case that the appellant was part of the security guards who were providing guard duties at Kenol Petrol Station where the complainant was a cashier. We would have expected the complainant to have known the appellant and have named him in his initial report to Diani Police Station if indeed he had necognised him, but he did not. This omission has created a doubt in our mind as to whether the complainant actually saw and recognized the person who robbed him. In fact the circumstances leading to the arrest of the appellant have not satisfactorily been explained.

The appellant has used the following authority in support of his submissions: ***TEKERALI AND OTHERS V. R. (1952) VOL.19 EACA 259*** where the facts were that five appellants were convicted of murder by the High Court of Tanganyika. The injured man, who later died of tetanus, was taken to the police Station at Arusha where his complaint was recorded. During the trial no evidence was put in as to what he had said at the police station, though whatever he had said would have been admissible in evidence as a dying declaration. The Court of Appeal held that evidence of first complaints to persons in authority are important as they often provide a good test by which the truth and accuracy of subsequent statements may be gauged and provide a safeguard against later embellishment or a made-up case.

For the above reasons we find that the conviction of the appellant was unsafe and we hereby quash it and set aside the sentence of death imposed. The appellant is to be released forthwith from prison custody unless he is otherwise lawfully held.

It is so ordered.

Dated and delivered at Mombasa this 28th Day of July, 2003.

A.G.A. ETYANG

JUDGE

P.M. TUTUI

COMMISSIONER OF ASSIZE