



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 30 OF 2000

ATHUMAN ALI KOMBOAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G E M E N T

The name of Athumani Ali Kombo – the appellant first appears in the record when the prosecution witness PC George Ngeti (PW4) gave evidence. He said that on 16-7-98 he was given information by a police informer that “a young man by the name Athumani Kombo was involved in violent robbery (not this one) and that he was armed with a pistol”. PW4 together with other police officers proceeded to his house which they were shown by the informer. They found a woman but also after searching the house they removed the man (appellant) from the ceiling of the same house. No pistol was found in his house. The appellant was taken to Nyali police station.

On 28-7-98 almost 8 months afterwards from the date of the robbery, namely; (7-12-97), there was an identification parade conducted by inspector Lucas Waithaka (PW7) for the appellant’s identification. The identification form exhibited shows that the witness was Mary Nyambura. The appellant was identified by the said MARY NYAMBURA out of 9 members of the parade.

His remarks were that “not satisfied”.

The evidence of Mary Nyambura shows that she is PW (6) and the wife of PW1 – Samuel Gichuki. Both of them were attacked by many robbers on the night of 7-12-97 at about 1.00am in the night. She said they were residing in a Swahili-type house. The corridor’s lights were on. No lights in their room. She heard commotion in the corridor. The door to their room was also being forced open although they were resisting. She could see 6 men in the corridor armed with iron bars, building blocks and bows and arrows.

One man was sitting at a table outside in the corridor who looked familiar to her. The other five were not familiar to her. She had not seen them before. The struggle took 30-46 minutes.

She goes on to say that she identified to the police the one thief she “knew from before”. Then she says accused (appellant) was one of the three attackers. “I did not know the accused before”. There is contradiction here. She also said she had identified the appellant at the identification parade (almost 8 months later) because she had known the face and appearance of the accused although she said she had

not given the police the appellants particulars of the same incident PW1 her husband says he heard a loud bang on the front door and on children's room. They were screaming and other neighbours were also screaming. He could hear people struggling to remove their door. The robbers ordered him to go under the bed which he agreed to do. He said he did not see the attackers as he was under the bed. He did not see the appellant in his house but that the appellant was arrested after "being named by others who were arrested". He also said the attack lasted for about 10 minutes. This evidence is in respect of Count 2.

PW2 Paulina Njeri gave evidence in respect of Count 1. On 7-12-97 she was in her house sleeping at 1.00am. The lights were off in her house but there was light outside, about five people entered her house (room). They demanded money they took 27,000/= and other items. She said she did not see the appellant at the time of the attack. PW3 met the first complainant Mr. Moses Mugaa who said he had been robbed.

As for PW5 Moses Mugaa, the first complainant, he was overwhelmed by the large number of robbers (15-20) he surrendered and ran to hide at the petrol station nearby. When he returned with the police robbers had already left the scene. Later he said he knew the accused as a customer. He was cut and was rushed to hospital.

We have examined the evidence on record. It is clear the attack was at night (1.00am) and there many robbers about 15-20 attacking several rooms in a Swahili house. There was confusion. The attack was sudden and the source of light was not clear. In the circumstances we find there was no possibility of positive identification on the scene. The witnesses say they recognized the appellant as a person they saw in the neighbourhood but it is surprising that they were not able to recognize him after the incident until they were called by police 7 months afterwards. It is quite possible that the identifying witness at the parade knew the appellant before the incident but it is also possible that the appellant was not at the scene of the crime as the circumstances for parties identification were unsatisfactory. There is doubt which must benefit the appellant.

The other grounds of appeal relating to the production of O.B and the conduct of the identification parade are not supported by evidence. Although the appellant marked on the identification parade report that he was not satisfied he did not give any reason why. The form indicates that the parade was carried out as required. Having found that the evidence of identification was flawed we therefore find that the case against the appellant was not proved beyond reasonable doubt.

We allow the appeal and order that the appellant should be set at liberty forthwith unless otherwise lawfully held.

Dated 17th September, 2002.

Hon. Justice L. P. Ouna
JUDGE

J. KHAMINWA

COMMISSIONER OF ASSIZE