



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT MOMBASA  
CRIMINAL APPEAL NO.433 OF 2000

SHIKOA BAMBA.....APPELLANT

=V E R S U S=

REPUBLIC.....RESPONENT

(From the Judgment of L. Achode, P.M. in Mombasa Criminal Case No.2617 of 2000)

J U D G M E N T

The Appellant was charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. He was convicted and sentenced to death. He appeals against the conviction and sentence.

The facts of the prosecution case are that on 2.8.2000 at 6 a.m. at Bomani Village in Likoni the appellant jointly with another who was never arrested, while armed with a knife, a dangerous weapon, attacked the complainant Mutinda Mbithuka, and robbed him of properties valued 6300/-, using violence. The complainant, accompanied by PW.2 were walking towards a place at Bomani in Likoni carrying a fridge repair tool box with spanners, screw drivers and other repair tools. The appellant and another attacked the complainant. They snatched his tool box and a cap he was wearing. They assaulted him during the process before running away. The complainant reported at Likoni Police Station immediately after the incident and returned to their employers workshop. About an hour later, the complainant who had left the workshop, noticed the appellant wearing the cap which had been stolen from him earlier. They arrested him. They claimed they knew him since they used to see him around before the incident. The place the appellant was arrested was near the workshop. He was taken to the workshop where the complainant claims to have identified the cap the appellant was wearing to be his. The cap's flap had been undone at the joint where it joins the cap and the complainant claimed to be the person who had undone it. The cap also had the words "BATMAN" which the complainant's cap had. The complainant claimed during the adducing of his evidence that he had not mistaken the identity of the appellant as one of the attackers because he had been seeing the appellant often before the incident. He claimed that the attacker who particularly boxed and kicked him was the appellant. He was the one who took the cap and the tool-box too. The companion of the appellant had the knife but he too assaulted the complainant. The appellant after the citizen arrest was handed over to the Likoni Police Station.

PW.2 Crispus Hare's evidence is similar to that of the complainant PW.1. He was walking in front of the complainant and saw the two persons attack him when he turned after hearing a commotion behind him. The attackers threatened them with being stabbed with a knife if they shouted. He identified both attackers because he had seen them before and knew them to be residing near their workshop. He confirmed complainant's story. Later they saw the appellant wearing the cap which resembled the one earlier stolen from the complainant. According to him, they identified the appellant there and then to be one of the two youths who had earlier attacked them. PW.2 claims that he informed his employer of the

fact that the youth later identified as the appellant was one of the attackers and according to him, the employer is the one who arrested the appellant and detained him at the workshop before informing the Police who came and arrested the appellant.

PW.3 was the employer of PW.1 and PW.2. He confirmed dispatching the two to go and make fridge repair on the material day, at about 8.30 a.m. The two came back at about 9 a.m. to report that they had been robbed of the tool-box. They took him to the spot of robbery, and later reported to the Likoni Police Station. He then in company of PW.2, went about their work in the estate when PW.2 spotted the appellant who was wearing PW.1's cap which had been stolen from them about an hour or so earlier. He informed his employer, PW.3 of the young man. They then arrested the young man and took him to his workshop where they detained him before fetching the Police who later arrested him. The tool box or any other stolen items were never recovered. PW.3 also testified to have seen the cap which was recovered from the appellant as belonging to PW.1 and also claimed to have seen the appellant at the village although he did not know him by name.

PW.4, Pc Joseph Kiprelo, was the Police Officer who in company of another officer, at about 11 a.m. on the material day proceeded to PW.3's workshop and arrested the appellant who had been detained there by the witnesses aforementioned. He took the appellant to Likoni Police Station where he charged him with the offence of Robbery with Violence. He received the PW.1's cap and kept it safe until he later produced it in evidence in court.

We have carefully considered the trial Magistrate's judgment, her approach to the evidence on the record, and her findings and the conviction upon the evidence. We find that the main link of the robbery to the appellant is the head cap that is said to have been worn by the complainant at the time of robbery which an hour or so later was found being worn by the appellant in the estate near the robbery scene. This is so because none of the stolen items enumerated in the charge were ever found. The evidence in relation to the said cap that will therefore matter most is that of the complainant. This will be so because he will be the witness who must know the source and description or identity of the cap that might stand scrutiny.

Pw.1's evidence touching the cap is found first on page 2 of the proceedings where he stated:-

*"I ran from them but one with a knife chased and caught up with me and snatched my cap. It had the name 'BAT MAN' emblazoned on it. Then they went away."*

And on page 3 the following is stated by PW.1:-

*"Presently they returned with one of the youths that robbed us. I identified him because he is a youth who is commonly seen in the area. He was arrested close to our workshop. When he was brought at our workshop he was wearing a cap. I know this is my cap because I am the one who cut this side badge and I am the one who undid the place where the flap joins the cap .....This is my cap which he was wearing – MFI.1."*

Under cross-examination, on the same page, the witness said:-

*"If you said this is your cap, you would be lying. There are many caps of this type on sale but this is mine because of the marks I made. You are the one who boxed and kicked me and took the cap and the tool box. Your colleague had a knife and he too, assaulted me."*

The complainant testified that he knew his cap because he had cut the side badge on it and had undone the place where the flap joined the cap. He admitted that such caps are commonly bought around but insisted that he identified the particular cap because of the marks he had himself made and which he described. Further to this, it is in evidence that he was wearing it the morning it was snatched from him and it was recovered from the appellant within an hour or so. There is no much dispute that the complainant was robbed of various items inclusive of the cap that morning. There is some confusion in the evidence as to whether it was the appellant who snatched the cap or whether it was his companion who is only identified by the fact that he was carrying a knife during the robbery. The trial Magistrate did

not think much of that discrepancy. Nor do we. While the complainant under cross-examination suggests that the appellant was the one who boxed and kicked him and took the cap, he had earlier in his statement stated that the man who held a knife is the one who chased him and snatched the cap. This version of that particular piece of evidence is supported by PW.2 Crispus Hare who was accompanying the complainant at the material time. We accept this version as the correct version. We note further that PW.1 and PW.2 had seen the appellant and his colleague many times before the incident. The robbery took place during day-light. The incident, although taking only a few minutes, occurred after the attackers had engaged the complainant in some conversation and the complainant was looking at their familiar faces since he had seen them several times before. The appellant was arrested not far from the scene of crime which occurred only an hour or so earlier. We are conscious of the fact that it was the appellant's companion who may have snatched the cap but it is not far fetched to accept the fact that he could have passed it to appellant after escaping since there is clear evidence that the two were acting together and clearly with a common intention as provided by S.21 of the Penal Code. What is most important, however, is that the appellant was found in possession of the cap which was a property stolen recently from the complainant. The evidence of PW.2, Crispus Hare supports and clearly corroborated that of the complainant in several material particulars. This includes the facts that the appellant and his companion in the robbery were youths from the same locality known and seen commonly by the complainant and PW.2, although not known by their names PW.2 saw the whole incident and he confirmed it in his evidence. He was the person responsible in identifying the appellant first by the cap he was wearing and by the familiar face before encorging his employer to arrest the appellant. Thereafter, the complainant saw the appellant when he was taken to the workshop and also without difficulty not only identified the appellant by both recognition as a youth he knew before but also that he was one of his attackers. Accordingly, we are totally satisfied that the trial Magistrate made no error in fact and law to accept and fully rely on the identification evidence. The conditions under which the same had been done by the two witnesses were very favourable. The attack was not so sudden as the appellant argued since they engaged the complainant in a conversation before they started to rob from them. We are satisfied that the trial Magistrate was conscious of the legal principles concerning identification and she properly applied them following the case of GABRIEL KAMAU NJOROGE VS R C A No.146 of 1986 Nairobi which case considered and adopted the case of R. -v- TURNBULL, [1976] 3 All E.R. at page 549.

We also note that the trial Magistrate appreciated the fact that in this case there was no purpose for staging an identification parade since the appellant was arrested by the witnesses themselves an hour or so after the robbery. She also did not rely only on the 'cap' evidence but took account of the fact that the witnesses knew the physical face appearance of the appellant before the robbery and that the identification by recognition of the appellant was done very soon after the incident. In our view, the "cap" evidence alone was enough upon which the trial Magistrate could convict although she was not sure of it in law. The most important issue after accepting the 'cap' evidence by the trial Magistrate, was to look in the defence evidence to find whether there was an explanation from the accused capable of raising a possible doubt that the accused came into possession of the cap lawfully. She found that his explanation about it was that the cap was his. This was not accepted by her considering the other evidence of the robbery and of recognition of the appellant by the two prosecution witnesses. She accordingly disbelieved the appellant's explanation and proceeded to convict on the totality of the evidence. The Magistrate should have clearly come out to state that she was in that process was conscious of and considering the legal principle of "recent possession". We are however, of the opinion that her failure to state so did not prejudice the appellant in practical terms and have no legal ground to disturb her findings on the conviction in general.

Having accepted however, that there was adequate evidence upon which she could convict on robbery, we are however worried as to whether robbery with violence contrary to Section 296(2) was actually proved.

There is evidence that the attackers snatched away the tool box and the cap and ran away. The knife said to be held by the companion of the appellant was never described itself or how it was used during the incident. The evidence of the knife in the record first appears on page 2 of the proceedings. It states:-

*"The one with a knife did not use it on me but the other kicked and boxed me. The one with a*

*knife did not use it on me but used his bear hands to assault me. I ran from them but one with a knife chased and caught me and snatched my cap.”*

And in cross-examination PW.1 states:-

*“Your colleague had a knife and he too assaulted me.”*

Then PW.2, Crispus Hare said this about the attack:-

*“The accused is the one who snatched the cap and tool box. He assaulted Mutinda with his bear hands.”*

We have considered this piece of evidence with caution and anxiety.

Both the complainant and his witnesses clearly state that the assault that there was, was with bear hands. They stressed that point and the court should accept the stress. If the companion had a knife as the lower and this court has no reason to doubt, it was never used at any time. Although PW.2, stated on page 4 of the proceedings that they did not scream because they were warned not to or else the attacker would stab them, we do not believe that version which in any case contradicts the behaviour of the attackers as per the witnesses' version about the knife aforequoted. Furthermore, the witnesses did not introduce the same during their evidence in chief to confirm that they acted or reacted in the manner they had done due to any threat of being attacked with the knife. In particular the threat came after the robbery had been completed without the knife being practically used in the threat. We hold accordingly that as the violence intended to be proved under S.296(2) was not proved in the circumstances of this case the conviction under the section should not be left to stand.

Having reached that conclusion, we hereby quash the trial Magistrate's conviction under Section 296(2) of the Penal Code and set aside the sentence of death. We however, hereby proceed to convict the appellant of simple robbery under Section 296(1) of the Penal Code and sentence him to a prison sentence of 12 years with 12 strokes of the cane.

Dated and delivered at Mombasa this 10th day of September, 2002.

D. A. ONYANCHA

J U D G E

J. KHAMINWA

COMMISSIONER OF ASSIZE

The Right of Appeal is explained.

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