

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO. 478 OF 2000

(From Original Conviction and Sentence in Criminal Case No.1055 of 2000 of the Chief Magistrate's Court at Mombasa – R.M.Ndubi, Esq., R.M.)

PETER WAMBI OMBUORO.....APPELLANT

= V E R S U S =

REPUBLIC.....RESPONDENT

J U D G E M E N T

The Appellant was the First Accused before Mombasa Resident Magistrate charged with the offence of Robbery contrary to Section 296(1) of the Penal Code. Upon his trial he was convicted together with his co- Accused and they were both sentenced to serve 5 years imprisonment. The co-Accused has not apparently preferred any Appeal.

It had been alleged in the particulars of charge that the Appellant and his co-Accused with others not before court robbed one Joseph Gisemba Nyangau of his bicycle and a jacket all valued at Kshs.3,600/- and used or threatened to use violence. That was at about 5.10 a.m. on 23.3.00 at Soweto Village, Likoni.

The complainant was a Security Guard and he narrated how he was peddling to his place of work carrying one passenger at 5 a.m. that day when 4 people emerged from a kiosk on the road-side. He tried to dodge them but went into some mud. Two of those persons snatched his bicycle and he was threatened with a panga. He took off running and screaming. He was chased by one person wearing white gum-boots while his passenger was left behind being beaten by others. He identified the person who was chasing him as the Appellant and described what he was wearing. He returned to the scene with members of the public but did not find the bicycle or the assailants. He went to Likoni Police Station and reported the incident. He said he knew the attackers. They were his neighbours in the same Estate and were known to each other well. The two were arrested at 11 p.m. the same day from a group of other 6 persons standing outside the Appellant's house. The Appellant was wearing white gum-boots when he was arrested. The bicycle was not recovered.

That version of events was supported by the pillion passenger PW.2 who added that the four persons who emerged from a kiosk said they were Police Officers. They had a spotlight and ordered them to stop. When the bicycle went into the mud they both took off running in the same direction with two of the assailants in pursuit. He accompanied the complainant to the Police Station and was present when the arrest was made the same evening outside the Appellant's house. PW.2 however, said the Appellant was wearing white shoes and held a panga. He knew the Appellant by appearance. As to what the Appellant wore that night apart from white gumboots, the complainant said he had a white T-shirt and a grey Jeans trouser. They also said there was moonlight.

The arresting officer Pc. Elijah Ondera was simply led to Soweto Village by the complainant and PW.2 and he arrested the Appellant. He produced in evidence a pair of khaki gum-boots which he said the Appellant was wearing and also a panga which he said the Appellant was holding outside his house when they found him.

As for the investigating officer Pc. Benson Mutisya, PW.4, he received the report at 6 a.m. that day but did nothing more than sending PW.3 to arrest the Appellant and his co-Accused led by complainant and

PW.2.

The Appellant now complains in a Petition of Appeal drawn in person but argued by learned counsel Mr. Magolo that he was not at the scene of crime and was never identified by the complainant or PW.2. And he may well be right considering the paucity of the evidence on record and the conduct of the complainant.

On the evidence he and his pillion passenger were suddenly accosted by four men and soon after he went into a muddy patch trying to avoid them he took off running followed by his pillion passenger. The attackers had torches and therefore it must have been dark. Their screams attracted members of the public and they returned to the scene only to find the bicycle and the attackers had vanished. If at that point in time the complainant had recognized the appellant and knew his residence as he testified he had, it defeats logic that he would not lead the members of public accompanying him in hot pursuit. The Police Officer who received the report at 6 a.m. PW.4, was not told the name of the Appellant which the complainant knew. The complainant himself said he did not tell the Police that he had stayed in the same house with the Appellant for four years. This he said when he was re-called for further cross-examination. His colleague PW.2 on re-call for further cross-examination said the Appellant was a stammerer. Unhappily there is no support for that evidence even from the Investigating Officer who did nothing more than simply accepting the complainant's version of events.

This may well be a case of unconscious transference of the image of the Appellant as one of the assailants.

On the whole the matter was poorly investigated and there are sufficient doubts in the prosecution evidence to benefit the Appellant.

I allow the Appeal quash the conviction and set aside the sentence.

The Appellant shall be set at liberty unless he is otherwise lawfully detained.

Dated this 25th day of July, 2001.

P.N. WAKI

J U D G E