



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 218 OF 1999**

DUNCAN OBARE OUKO APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 219 OF 1999

MOHAMED RASHID CHAMBEA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 408 of 1999
of the Chief Magistrate's Court at Mombasa – L. Achode, SRM)

JUDGEMENT

The Appellants were charged before the Chief Magistrate's Court at Mombasa with the offence of robbery with violence contrary to section 296(2) of the Penal Code and convicted of the same. They now appeal against the conviction. Their appeals were consolidated on application by the state and there being no objection raised by the Appellants.

The Appellants have raised similar grounds of appeal save for MOHAMED RASHID CHAMBEA who has a separate ground citing preexisting grudge between him and PW.3. For ease of reference DUNCAN OBARE OUKO who was the 2nd accused in the original trial will be referred to as DUNCAN while MOHAMED RASHID CHAMBEA who was the 1st accused will be referred to as MOHAMED.

The facts of the case as we understand them from the record before us are that on the morning of 23.1.99 at around 5.00 a.m. SAMSON ORIMBA (PW.1) and BAKARI ABDALLA (PW.2) were riding their bicycles to work from Soweto in Likoni, when they were stopped by three people who flagged them down using spot lights in the same fashion used by police. The two witnesses assuming the three people were indeed police complied only to be attacked with pangas and knives. They dragged PW.1 from his bicycle and searched him taking with them his watch, bicycle and Kshs.9,000/= in cash. They in the process stabbed him on the face with a knife and cut him on the head with a panga. PW.2, meanwhile had jumped off his bicycle and stood some distance away shouting for help but not before they had taken Kshs.3,000/= cash from him. He saw the robbers stab and cut PW.1. Both witnesses said they were attacked in an area that was well lit by a security light from a building nearby which light enabled them to

recognize their attackers as people whom they had seen before within the estate PW.1 and PW.2 lived. The two then reported the matter to the police.

KENNEDY ODHIAMBO (PW.3) a shop attendant at Likoni was at the shop on 28.1.99 at 9.00 a.m. when MOHAMED who was in the company of DUNCAN and another took to him a bicycle and asked him if he could buy the same. PW.3, asked for documents pertaining to ownership but Mohamed said they had none. PW.3 then declined to purchase the same. Mohamed was known to PW.3 as he was a neighbour and frequented his shop to purchase items and had not known him to own a bicycle. He also noticed that Mohamed had his teeth missing and his gums were bleeding.

IP. Hesbon Nyaluchi (PW.4) received a report of the robbery from the complainants while at Likoni police station. On 28.1.99 the station received a report that one of the suspects intended to report an assault at Inuka police station. He and other officers laid an ambush and arrested MOHAMED. An identification parade was carried out by PW.6 IP. GERALD SHIVANDA and Mohamed was identified by PW.1. On 4.2.99 while on patrol he arrested DUNCAN. None of the stolen items were recovered.

DR. MICHAEL PETER MWITA, PW.5 examined PW.1 who went to the hospital with a history of assault. He produced the P3 form at the hearing.

Both the Appellants gave unsworn statements in their defence. Mohamed said PW.3 had beaten him causing loss of his teeth because he Mohamed had failed to pay back money borrowed from PW.3. Duncan on his part says he was arrested on his way to work when police stopped him and asked him if he was known as "Dan Mrefu". He confirmed he was known as "Dan" and was arrested and later charged with the offence he knew nothing about.

The State Counsel M/s Kwena supported the conviction on the ground that there was proper identification.

We have read the record before us. There is no doubt PW.1 and PW.2 were robbed on the morning of 23.1.99 by three people. The evidence of both is that they were stopped at a place where there was a light from a bright security light from a building next to the road. PW.1 in cross-examination by DUNCAN estimated the light to have been from an 100 watts bulb. While PW.2 stated in his evidence in chief that the light was so bright that it illuminated the area adjacent including the road. The trial court found that the light was bright enough for purposes of identification.

Both PW.1 and PW.2 said they had recognized their attackers as people who lived within their estate. PW.1 said he had recognized two of the robbers. In cross-examination by both he said he knew them save for their names. He said it was DUNCAN who took his watch and stabbed him on the face at the same time telling him not to look at him. He said the attack had lasted for about 10 minutes. PW.2, had gone to the police station when he saw DUNCAN walking around and he reported to the police that, Duncan was one of them.

In both cases, identification was by recognition. PW.2 admitted he had not given the description of his attackers to the police. PW.1 does not say whether he on his part he had give n the description to the police. However from the evidence of PW.4, it is clear the police knew who to look for and that is why they laid an ambush to arrest Mohamed and when they met Duncan while on patrol, they did not hesitate to arrest him.

The trial court did take all the issues on identification into consideration and found that the evidence of PW.1 and PW.2 on the issue of the light corroborated each other. It found that the Appellants were properly identified and we on our part find no reason to warrant an interference with the same. The upshot of these appeals are that they are dismissed.

Dated at Mombasa this 31st day of July 2001.

P.N. WAKI

JUDGE

P.M. TUTUI

COMMISSIONER OF ASSIZE