

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 60 OF 1999
**(From original Conviction and Sentence in Criminal Case No.1295 of
1998 of the Principal Magistrate's Court at Malindi – J. M. Matu –
P.M.)**

ABDIRAHMAN ALI ABDI APPELLANT

- VERSUS -

REPUBLIC RESPONDENT

J U D G E M E N T

The Appellant Abdirahman Ali Abdi was charged with and convicted on three counts. Count 1 was attempted Robbery Contrary to Section 296(2) of the Penal Code, Count II for Being in possession of a firearm without Firearm certificate Contrary to Section 4 (2) a of the Firearm Act and on Count III for being in possession of ammunition without a certificate contrary to Section 4 (2)(a) as read with Section 4 (3)(a) of the Firearm Act. His appeal is on both Conviction and Sentence on 5 grounds, 4 of which touch on the identification while the fifth one is on the exhibit. The State Counsel submitted that the Conviction was improper as there was no evidence to show there was adequate lighting at the scene.

The evidence before the Trial Court was that on the night of 9th and 10th July, 1998 GABRIEL CHANGAWA NZAI, PW1 and PAUL MUSHOKA MUNYASA, PW5 were on duty at the Glory Guest house Malindi when at around 4.00 a.m. two men walked in and enquired about Room rates from PW1. They also asked to see the said rooms first before deciding on which type to settle for. He, PW1 then proceeded to the reception area to collect the keys when he noticed one of the two men had followed him and stood behind him holding a gun. He was ordered to put his hands up but suddenly turned against his assailant with kicks and blows at the same time calling for help. PW2 who was sleeping in a room next to the reception heard the commotion and calls from PW1. He broke a window glass to scare the robbers. At this point the robbers fled but the one holding the gun tripped on some chairs and fell. He fled and left the pistol behind which they recovered and handed it over to the police. PW1, testified that the light was on and he saw the faces of the two people as they spoke to him through a service window.

On reporting the matter to the police, PW1 described the appearance of the two attackers and said he could identify them if he saw them again. Later he was called to the police station where an identification parade was conducted by IP. ISSA MANJE PW3 and he, PW1 picked out the appellant as being one of the robbers. On being cross examined by the Appellant, PW1 was firm that he had never seen him before the night of the attack and that it was him who had enquired about the room and later PW1 had beaten him when he turned against him with a pistol.

On 20.7.98 at around 6.00 p.m. PC. Njeru Mayangi and other officers from Malindi station received information that the appellant who was wanted in Connection with another Robbery had been seen at Majengo. On seeing the police the appellant ran away but the Police gave chase and arrested him. The officer said he had known the appellant before as he had been wanted in connection with other cases of Robbery.

PC. Leonard Kiplimo produced a Pistol and firearms which he recovered from PW1 and 2 and a firearms expert report confirming the pistol and firearms were genuine. In his Defence the appellant opted to saying nothing while in his appeal he submitted that it was not possible for PW1 to have identified his assailants since he was attacked with an iron bar and a pistol. However, we note that nowhere in the entire evidence is it said the attackers were also armed with iron bars. On the issue of the light, it is in evidence that PW1 stated the light was on and although we do agree the intensity was not described, PW1

was able to give a description of his attackers to the police and said he was in a position to identify them if he saw them again. It is also in evidence that PW1 was able to tell out of his two attackers who had spoken to him enquiring about rooms and again followed him and ordering him to put his hands up while holding a pistol.

Although the affidavit challenged the identification parade on the grounds that witness was asked to touch the shoulder of any one he identified it was not shown that the said procedure does indeed offend the Judges rules.

Having considered all the evidence, we find that the appellant was identified by PW1 and we have no reason to doubt the same. Contrary to the suggestion that PW1 could not possibly identify anyone, the evidence shows PW1 was consistent in his evidence. We have no doubt he had observed the attackers carefully.

We therefore find on the evidence, the Conviction on the evidence of identification by a single witness in this case was safe. Consequently the appeal is dismissed.

Dated at Mombasa this 19th day of November, 2001.

P.N. WAKI

JUDGE

P.M. TUTUI

COMMISSIONER OF ASSIZE