



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO 1285 OF 1999

MOHAMMED ABDI NOOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO 1286 OF 1999

STEPHEN KIPLAGAT.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

These two appeals are consolidated. Both appellants were convicted of two counts of Robbery with violence c/s 296(2) of the Penal Code and sentenced to the mandatory sentence of death. These are appeals against both conviction and sentence.

Appellant Mohamed Abdi Noor was not represented by counsel at the hearing of the appeal while Mr. Kiage appeared for Stephen Kiplagat Tuwei.

Mr Kiage the learned counsel for the second appellant, Kiplagat, took the court through the record pointing out several shortcomings and contradictions relating to the evidence adduced vis a vis the two counts faced by the appellants.

In this judgment, we do not intend to, and shall not revisit the entire evidence adduced before the lower court, we have, however, as required of us, evaluated the said evidence and come to independent conclusions.

Several salient points emerge from the record before us.

The two complainants in both counts were said to be in possession of some money. However, no money was ever recovered from either of the appellants. Some kshs.1000/- was allegedly found in the possession of the appellant Mohamed Abdi Noor. That money was never produced before the learned trial magistrate.

The first complainant had in his possession, according to the charge sheet, Kshs.9,300/-. This was allegedly taken from him. There is no evidence however to support this.

According to pw2, money require for the Television was kshs.8000/-. He added that Pw1 carried Kshs.9,000 only. He is said to have paid for the taxi. What is the foundation of the money alleged to have been stolen.

There is evidence that pw2 did not have any money before yet he is alleged to have lost shs. 3,500/-. The charge sheet reads kshs 3,000/-.Where is the evidence of theft?

The two appellants were allegedly armed with pistols and threatened to shoot the two complainants. We observe that the fact of being armed was not established. No firearm was produced in court leave alone the threat to shoot being established.

Pw2 was said to have been injured but no medical evidence was produced to that effect, not even a P3 report was tendered. No actual violence was alleged in the two counts.

This was a joint charge and the prosecution was duty bound to prove common intention beyond any reasonable doubt. This, in our judgment, was never established.

The learned counsel for the Republic conceded the appeal by the second appellant Stephen Kiplagat Tuwei on the ground, as submitted by Mr Kiage, that the evidence adduced against him was purely circumstantial which did not show his participation in the robbery. With respect, we agree. There was no evidence that he was armed. He was away from the scene, sitting in a taxi. The prosecution evidence supported all this. With respect the conclusions arrived at by the learned trial magistrate were not based on the evidence adduced.

As regards the first appellant Mohamed Abdi Noor, it was submitted by the state that his identification was positive the same having taken place during daylight at 8.00a.m. Pw1 and Pw2 are also said to have talked to him before he (the first appellant) went away and returned with a gun. He asked for money he was seen clearly and was pointed out soon after the commission of the offence.

We observe that pw1 said he met police officers soon after he was robbed. However, he did not give a description of the alleged robbers to the police. If he identified the appellant, why did he not give his description to the police? The first appellant is said to have gone away and return with a gun. There is no evidence that he at any time gave out the gun to a third party. If he was pointed out soon after the commission of the offence, how come that no gun was ever recovered and produced in evidence? The other discrepancies we have pointed out herein above in the entire trial relate to the two appellants equally.

We are of the view that the convictions of the two appellants of the charges that call for a death sentence were most unsafe.

In view of the foregoing, we allow the appeals, quash the convictions and set aside the death sentences. We order that the two appellants shall be set free forthwith unless otherwise lawfully held.

Orders accordingly

Dated and delivered at Nairobi this 6th November, 2001

MBOGHOLI MSAGHA

JUDGE

G. MBITO

JUDGE