



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

(Coram: Onyancha J & Khaminwa CA)

CRIMINAL APPEAL NO 406 OF 2000

JAMES MURIGU KARUMBA

SHALLY SHEHE CHAI

SEBASTIAN LWAYO NGALO.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENTS

(From Original Conviction and Sentence in Criminal Case No 1123 of 1999

of the Senior Resident Magistrate's Court at Kilifi –

P M Mutani, Esq, - S R M)

JUDGMENT

The three appellants were found guilty of robbery with violence contrary to section 296(2) of the Penal Code and each sentenced to mandatory death sentence. They all appealed to this Court on both conviction and sentence in Criminal Appeals Nos 235, 236, 237 and 406 of 2000. At the hearing the appeals were consolidated and argued under one appeal No 406 of 2000. Appellants numbers one and two were unrepresented by counsel while appellant number three was represented by Mr Omondi. On examination of what is referred to by each appellant as the

Memorandum Grounds of Appeal we noted that several grounds of appeal therein are similar and we extracted the grounds following as covering the total appeal of the appellants.

“1. That the learned trial magistrate erred in law and fact in convicting the appellants upon little, weak or unreliable identification evidence.

2. That the trial magistrate erred in law and fact in convicting the appellants in the absence of the evidence of investigations police officer(s) and in the absence of the evidence of an identification parade.

3. That the trial magistrate relied on medical evidence which was not tendered in Court nor proved.

4. That the trial magistrate erred in law and fact in relying on witnesses whose evidence contradicted each

other in material particulars.

5. That the trial magistrate failed to properly consider and take into account the appellant's defences."

The facts of the case as contained in the records are that on 29.1.1999 PW1 Sofia Njeri Omar was entertaining PW2, PW3 and PW5 at her home at Kaloleni Vishakani, at 7.45 pm. The latter had been sent by their boss, the husband of PW1, to deliver some fish. PW1's house is surrounded by a fence and within the compound they operate a shop. PW1 had gone out of the house leaving her visitors inside and was about to re-enter when she and her guests and workers in that home heard gunshots at the shop. Immediately, she saw about eight people run towards her at the house. One of them held the witness by the back and pushed her into the house where she was commanded by them to call her husband and switch on the lights. She switched on the electric lights but denied that her husband was present. She stated that the person she identified as the 1st appellant held a G3 gun while another she identified as the 2nd appellant held a knife which he used to cut PW1 on the right wrist twice. The appellants demanded money. In the meantime PW2, PW3 and PW5 were bundled together in the house as two of the three attackers who were in the house led PW1 upstairs to her room where she surrendered Kshs 10,000/-, two golden bangles, four gold rings, a wrist watch and an Olympic camera to the two attackers who still held her at gun-point. The two also carried away two Somali swords, a pair of keys, one bayonette and other items. The electric light was on as they took away these items and held her.

W1 stated that the robbery in the bedroom took about 15 minutes and she had good opportunity with the lights on, to see well the two robbers with her. The 2nd appellant who also held a *rungu* hit her with it on the head seriously. PW1 stated that after taking the above-mentioned items from the bedroom they took her downstairs to the sitting-room where the appellants bundled the witnesses into one of the rooms and locked them in. Apart from the three robbers who were in the house and identified as the three appellants by PW1, PW2, PW3 and PW5, the other robbers were outside the house guarding as the robbery progressed. When the attackers left the home, PW4 a worker of PW1 helped to break the door of the house room to free PW1 and the others locked therein. Police were informed and they came to the home. PW1 informed the police about the robbery. She and others were variously taken to hospital to receive medical treatment in relation to the various apparently serious injuries inflicted on them by the attackers. PW1 was taken to Mombasa Hospital and later to a Nairobi Hospital for treatment. PW2 was treated at St Luke's Kaloleni Hospital.

The 1st appellant was not arrested until eight months later. He was apparently arrested for a different offence and while he was in the dock in Court, PW1 noticed him and believed she identified him as one of her attackers on 29.1.1999. She informed PW2 and PW3 and PW5 of the same. They all looked at him in the dock and feeling satisfied that the 1st appellant was one of the attackers, reported to the police who arrested and charged him together with the other two appellants who already had been arrested earlier. The 2nd appellant was arrested at his home on 15.2.1999. The 3rd appellant was arrested on 7th February, 1999 as he left a wedding ceremony at night.

Two police witnesses testified in the lower court against the appellants. PW8 No 217432 Inspector James Mbaita who stated that he arrested the 2nd appellant of robbery on information from an informer. PW9 No 217692 Inspector Golo Duba testified of an identification parade he conducted at Mariakani Police Station on 26.2.98. He testified that Shally Shehe Chai the 2nd appellant was identified at the identification parade by one he calls Corporal Kenga Abdalla.

All the three appellants in their individual defences gave unsworn statements which could not be tested but which they were each entitled to give. We have examined and carefully considered the evidence on record and the manner in which the trial magistrate treated it and came to the conclusion he did of convicting the appellants. We are satisfied that 15 to 25 minutes which the process of the robbery in question lasted was long enough to give the witnesses PW1, PW2, PW3 and PW5 more than adequate time to register the identity of the attackers in their minds. We are also satisfied that the condition of lighting of the rooms in which the robbery took place being lighting by the electric bulbs was also adequate. The real question is whether other conditions prevailing in that house allowed the witnesses to properly and adequately identify the attackers. PW1, PW2, PW3 and PW5 were witnesses who also were

complainants since each one of them was robbed. Their evidence was supposed to be similar as they were describing similar events which occurred at PW1's house that evening of 29.1.1999. If each one of them's evidence is found to be reliable, each would also therefore be corroborative of the others.

All the five complainants agree that they were attacked by a group of robbers numbering about eight. Their evidence concurs that only three of the robbers entered PW1's house and that only the 1st appellant carried a gun which looked like G3 rifle. They concur on the fact that 2nd appellant assaulted PW1 by cutting her on the wrist with a knife and hitting her on the head with a *rungu*. They concur that two attackers forced PW1 to take them to her bedroom upstairs. While PW1 categorically stated that the two who took her to her room upstairs were the 1st and the 2nd appellants, PW2, PW3 and PW5 all firmly differed on that and asserted that it was the 2nd and 3rd appellant who accompanied PW1. The significance of this difference is that PW1 claimed to have stayed with the 1st and 2nd appellants in her room for about 15 minutes, long enough under adequate electric lighting to notice and identify them. It also means that PW1 may not have been operating under conditions which were favourable enough for her to identify the attackers. On the other hand it could also mean that she was not telling the truth or that she was justifiably confused considering that she had been seriously injured and that she was obviously under great

pain and fear of the attackers who were still subjecting her to more harassment.

PW2, PW3 and PW5 were elsewhere being subjected to fear and pain after being bundled together in the sitting room. According to the evidence of PW3, the attackers fired a shot at the wall inside the house and threatened the witnesses to come out from where they hid or the one firing would shoot at them. PW2, PW3 and PW5 came out and were ordered to lie down facing the floor. Their money and other items were taken out of their pockets as they faced down. It cannot be argued that the witnesses were not terrorized and frightened especially after they saw PW1 assaulted seriously, they witnessed PW3 kicked on the ribs and PW2 hit on the head with a metal. Or they would themselves be telling lies or were confused. The picture that emerges is that the witnesses were too terrified and shocked to concentrate on the physical features of the robbers. The trial magistrate was satisfied that the appellants were positively identified by PW1, PW2, PW3 and PW5. Nowhere in his judgment does he consider that the witnesses could have made a visual mistake considering what we have stated above. He did not even acknowledge the contradiction brought out as to who accompanied PW1 to her bedroom which in our opinion was a very material contradiction.

Furthermore there is no evidence on record that the witnesses, when they reported the incident to the police or when they recorded their statements, gave any description of the physical features of their attackers. If they did so, no police evidence was led on this point. Indeed the police officers who took the first or early reports about the incident were not called in evidence. Such early reports would have assisted the trial court to decide whether the complainants were truthful and/or consistent.

None of the four complainants except Corporal Abdalla PW2 were invited to any identification parade. The evidence about the identification parade was testified by PW9 No 217692 Inspector Golo Duba. Duba's evidence is sketchy and totally incredible. He does not state how he came to stage the parade and why. He does not state who were his witnesses and how and why the witnesses were summoned to the parade. He ended up stating that the suspect, the appellant Shally Shehe Chai, was pointed out by one Corporal Kenga Abdalla. It will be noted that Kenga is PW5 while Abdalla is PW 2. We would expect that in serious cases such as this, police officers especially one at the rank of an inspector, would take their duties seriously.

Little progress can be achieved in removing dangerous elements from our society if the police can take their duties so lightly, especially where the success or the failure of prosecuting these cases depend on whether laid down rules and law is followed or not.

No identification parade was staged when the 1st and 3rd appellants were arrested. No explanation is tendered in evidence as to why PW1, PW3 and PW5 were not invited to the parade which was attended by PW2.

The upshot of this is that we do not uphold the finding of the trial magistrate on the above discussed important issues on identification of the appellants. Furthermore the trial magistrate's reliance on the dock evidence alone especially as touching the 1st appellant cannot be supported by this Court.

We also further point out in respect of the 1st appellant, that he was arrested after a period of eight months after the robbery. It is unlikely that the witnesses were capable of retaining clear visual features of the attackers in their minds for such a long period especially when there is no indication on record that the witnesses knew the attackers before the said incident.

To prove that the accused in the lower court at, or immediately before or immediately after the robbery used violence, the prosecution should call and prove credible evidence of such violence having been used. In this case the prosecution failed to call medical witnesses who attended to and treated the complainants at the various hospitals. It was necessary to call such evidence to prove that the witnesses were indeed injured during the robbery. What comes out in respect of the police investigation of this case is that the police really left the investigations to be done by the complainants. The police thereafter tried to rearrange the disjointed pieces of evidence to make up the case that they later prosecuted. As we have said, the police should be more serious than what we see here.

The final upshot is that the prosecution did not discharge the burden of proof that lay upon it. The shortcomings pointed above should have been held in favour of the appellants. The learned trial magistrate erred in law in failing to hold the shortcomings in favour of the accused and therefore failed to appreciate that the prosecution had failed to discharge its burden of proof. We have the duty to do so now and we hereby do so. Consequently we allow the appeals of the 1st, 2nd and 3rd appellants. We quash their convictions and set aside their various sentences of death.

The appellants must immediately be set at liberty unless otherwise lawfully held.

Dated and delivered at Mombasa this 5th day of November, 2001

D.A.ONYANCHA

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JUDGE

J.N KHAMINWA

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JUDGE