



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 436 of 1995

STEPHEN MBONDOL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH CRIMINAL APPEAL NO.437 OF 1997

FANUEL JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH CRIMINAL APPEAL NO.441 OF 1995

FRANCIS WAWERU..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

CONSOLIDATED WITH CRIMINAL APPEAL NO.438 OF 1995

ALI OUMA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(All from Original Conviction and Sentence in Criminal Case No.897 of 1994 of the Chief Magistrate's Court at Mombasa - Jo-Anne Siganga, Miss - S.R.M.)

JUDGMENT

This judgment relates to Appeals 436, 437, 438 and 441 of 1995. They were all consolidated at the request of the State Counsel and without objection from the Appellants, being appeals from the same trial.

Stephen Bondola in Criminal Appeal No. 436 is 1st Appellant. Fanuel Juma in Criminal Appeal No. 437 is the 2nd Appellant. Ali Juma in Criminal Appeal No. 438 is the 3rd Appellant. Francis Waweru in Criminal Appeal No. 441 is the 4th Appellant.

The Appellants were charged with Robbery with Violence Contrary to Section 296(2) of the Penal Code. A second count was for Causing Grievous Harm contrary to Section 234 of the Penal Code. They were all convicted of the two counts and sentenced to death on 1st Count and to imprisonment on the 2nd Count.

The prosecution case is that on the night of 28.1.94 the complainant, PW.1 ZACHARIA LULAI MWAMBI was asleep in his house in Bombolulu Village when at 1.00 a.m. he heard his watchman raise alarm. He woke up and dressed intending to go out and rescue him. As he was about to open the door he heard a stone crash against the door and people were shouting that he should open the door. He resisted and raised an alarm. He resisted the force to break the door for a period of 30 minutes but finally the door collapsed and opened. The robbers entered and he was shot with three arrows on the left thigh, chest and right ribs. He fell down on the veranda as he pleaded with the attackers not to kill him but to take whatever they wanted. At that time some attackers were in the house removing things and others were on the veranda. He saw Ouma 3rd Appellant who shot him with arrows. The complainant told him "neighbour, do not kill me" after this the complainant lost consciousness and did not speak further but he had seen 3rd and 5th Accused removing his items from his house. He said he did not see the 1st Appellant (2nd Accused).

The complainant was taken to Hospital where he remained for one week. After he left the hospital he was told by Police that 2 suspects had already been arrested. Of the stolen items only a knife was found in the house of Fanuel Juma.

From the evidence, Ali Ouma, Francis Waweru, and Fanuel Juma broke into the complainant's house. The complainant was able to see them because there was bright moonlight and he had a tin lamp. The circumstances of identification were satisfactory. The incident took at least 30 minutes, probably more. The trial Magistrate considered these factors in her judgment.

Ali Ouma was known to the complainant as he had employed him one time to do some work for him. Stephen Mbondola was also known to the complainant as he was employed by him in the construction of his house.

Fanuel Juma was also well known to the complainant as they used to sell stones together. The Appellants were also identified by the watchman, PW.2, who was attacked and injured. He described each of them as he had seen them. Ouma had a bow and arrows. This evidence corroborates the complainant who said that Ouma is the one who shot him with arrows. Ouma was also a neighbour of the watchman.

Stephen Bondola had also visited the complainant's house earlier in the evening asking for the complainant and the watchman could recognise him. The watchman also knew Francis Waweru whom he said used to pass by the gate.

At this stage it will be noted that the watchman struggled with the attackers for 30 minutes. There was bright moonlight and the attackers had torches.

The crucial issue in this appeal is that of identification.

There is no doubt that the 3rd Appellant Ali Ouma was identified by the complainant and PW.3 Lucas Bwayo Wanyaire. The watchman also identified him as the man with bow and arrows. Later he was seen running into his house by PW.5, P.C. Mwakele Mwandone and when the police followed him into the

house Ali Ouma ran away through the back door. It was his wife who was arrested and when Ouma went to the Police Station to check on her he was arrested. This he admits himself.

As for the 1st Appellant Stephen Bondola, the complainant did not see him at the scene. There were about 10 robbers and some were outside. However, PW.2 says he saw him twice that night. The first time at 7.00 p.m. when he had come to the place and requested to see the complainant and second time when the robbery was taking place. He was on both occasions wearing a cap which was later recovered at the scene. He cut the witness with a panga after the 3rd Appellant pointed an arrow at him. He was also known to PW.2 before. There was bright moonlight and the robbery took quite some time at least 30 minutes during which PW.2 was able to see who he was.

Regarding Appellant No.4, Francis Waweru, the complainant said he saw him removing his goods from the house. Complainant said he did not know this Appellant. The evidence of PW.2 on this Appellant seems confused. He was said to be armed with a knife Exh.3. The knife was said to have been recovered at this Appellant's house. However, the evidence of Police Officer PW.4, who searched this Appellant's house said he recovered the knife from the house of Fanuel Juma the 2nd Appellant. Even the

complainant said so. There is no evidence that the witness, PW.2, was present when the knife was recovered. This evidence is unreliable.

With regard to Appellant No.2, Fanuel Juma, the complainant said he saw him removing household goods from his house. The knife Exh.3 belonging to the complainant was recovered in the house of this Appellant. This is confirmed by PW.4 who searched the house. It is also beyond dispute that both complainant and this Appellant knew each other well. The evidence of PW.2 only states that "the robbers were many so may be you were one of them." No other evidence touches on this Appellant. The conclusion to be drawn from the above is that there was evidence against Ali Ouma, and his defence is not truthful. He participated in the robbery and he was seen later running away from Police. It is only when his wife was arrested then he went to check on her at Police Station. His appeal is therefore dismissed.

Regarding Appellant No.4, Francis Waweru, the evidence of identification by PW.2 is not reliable. The complainant said he did not know him and it is clear that evidence of identification is not satisfactory. His appeal therefore succeeds and he is hereby set free forthwith unless held for other lawful reasons.

Regarding Appellant No.1, Stephen Bondola, the evidence of PW.2 is reliable and consistent. The complainant said he did not see him at the scene but it is true that there were many robbers and that was why the complainant may not have seen this Appellant. His defence was a simple denial and unreliable in the face of specific evidence against him.

Finally, the evidence against Fanuel Juma, the 2nd Appellant is given by the complainant and is supported by the recovery of the complainant's knife in his house. No other evidence touches on him. In his evidence this Appellant did not mention anything about the robbery. He did not even refute the evidence that the knife was found in his house. He simply made a denial and alleged illwill between him and the complainant. The trial Magistrate rightly found that this defence was meant to shield the truth from the court.

His appeal has no merit and the same is hereby dismissed.

In the circumstances the convictions and sentence against 1st Appellant, 2nd Appellant and 3rd Appellant are hereby upheld. The conviction and sentence against 4th Appellant is quashed and sentence set aside on both counts. Dated at Mombasa this 24th day of May, 2000.

P.N. WAKI

JUDGE

KHAMINWA

COMMISSIONER OF ASSIZE