



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 376 OF 2009

ABDI KADIR MOHAMED OMAR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from original conviction and sentence in the Chief Magistrate's Court at Milimani Cr. Case No. 1898 of 2008 delivered by S. Muketi, SPM on 3rd September 2009).

JUDGMENT

Background

1. The Appellant was charged with eight counts. These were five counts of robbery with violence, one count of kidnapping with intent to confine, a count on being in the country illegally and for failure to report to an immigration officer.
2. In the five counts of robbery with violence contrary to **Section 296(2) of the Penal Code**, the particulars were that on the 10th day of November 2008 at around 12.00 a.m at Elwak Guest House in Elwak township in Mandera Central District within North Eastern Province jointly with others not before court while armed with dangerous weapons namely AK 47 assault rifles robbed IDRIS MAYOW BULLE, ADAN SHUKRI SHEIKH, YUSUF MOHAMED OSMAN, HASSAN IBRAHIM MOHAMD and ABDIRAHMAN LUKMAN MAALIM respectively of the various goods as set out in the charge sheet and immediately before or after such robbery used actual violence against the said persons.
3. Count six was the offence of Kidnapping with intent to confine contrary to **Section 259 of the Penal Code** in that on the 10th day of November 2008 at around 1200 a.m at Catholic Residential Houses in Elwak township in Mandera Central District within North Eastern Province jointly with others not before court while armed with dangerous weapons namely AK 47 assault rifles abducted Geraudo Katarina aged 67 years and Olivaro Maria Teresa aged 68 years both of Italian decent in Kenya and drove them to Somalia.
4. Count seven was an offence of being unlawfully present in Kenya contrary to **Section 13(2) of the Immigration Act**. It was alleged that on the 10th day of November 2008 at around 12.00 a.m at Elwak township in Mandera Central District within North Eastern Province being a Somali National was found unlawfully present in Kenya without permit or pass authorizing him to be in Kenya.
5. In Count eight he was charged with failing to report to the nearest immigration officer contrary to **Section 3(1)** as read with **Section 3(6) of the Immigration Act CAP 172** in that on the 10th day of November 2008 at around 12.00 a.m at Elwak township in Mandera Central District within North Eastern Province being a Somali National was found to have failed to report to the nearest immigration officer in contravention of the Immigration Act.
6. The Appellant pleaded guilty to counts 7 and 8 and was sentenced to serve 3 months imprisonment on the eighth count and discharged on the seventh under **Section 35(1) of the Criminal Procedure Code (CPC)**. At the conclusion of the trial he was convicted of the five counts of robbery with violence and acquitted on the sixth charge under **Section 215 of the CPC** for lack of evidence. He was sentenced to suffer death as prescribed by law.
7. Dissatisfied with the conviction and sentence of the court, he preferred the present appeal. He based the appeal on the grounds that the trial magistrate; (i) failed to consider that he was arrested on suspicion of being an illegal immigrant (ii) failed to consider that no proof was adduced as to his possession of a rifle, or the vehicles; (iii) erred in law and fact in basing the conviction on contradictory evidence and (iv) erred in law and fact in rejecting the defence without proper reasons.

Submissions

8. The Appellant made oral submissions. He submitted that he entered the country from Somalia owing to the war in Somalia. He then stayed in a lodging for three days with the intention of proceeding to Hadgera Refugee Camp. On the material night, he stated that the lodging was attacked and the occupants were robbed of valuables. After the incident, the police went asking everyone to identify themselves. He could not understand the language and so did not comply with the directive. He noted that nothing was taken from him as he retained Ksh. 2400/, an amount of money he had before the robbery. He submitted that the watchman at the premises accused him of stealing his identity card and the money he had in his possession.

9. Miss Atina for the Respondent opposed the appeal in oral submissions. She argued that it was established that the Appellant was at the guest house on the material day having arrived there three days before the incident. On the material day, he brought in two other persons. She noted that only the complainant policeman who was escorting the examination papers linked him to the incident. Counsel added that PW2 interacted with the Appellant and sold him a voice and data communication voucher worth Ksh. 100/. She submitted that this allowed PW2 to increase his amount of money from Ksh. 2400/ up from Ksh. 2300/.

10. Miss Atina submitted that the incident as witnessed by PW2 began with an incessant knocking at the gate. That PW2 on hearing the breaking of the gate escaped and hid in a room where he could see what was happening. PW2 then witnessed the Appellant guiding the assailants to the rooms and they began with room number 11. She submitted that after the incident PW2 began to look for the occupants of room 6. She stated that after the incident, PW2 interrogated the Appellant and noted that he was in possession of money that was his. He identified it because it contained a hundred shilling note that was old and had been mended using sticky tape. This was the link that PW2 used to infer the participation of the Appellant in the robbery. She added that the Appellant could not explain the whereabouts of the two persons he shared a room with and the origin of the money. Miss Atina submitted that PW13 interacted with the Appellant during the day and there was solar lighting at night during the incident. She stated that there was therefore conducive environment for a positive identification. She submitted that all the elements of the offence of robbery with violence as described under Section 296 of the Penal Code were established and thus urged the court to uphold the conviction.

11. On sentence, counsel urged the court to impose an appropriate penalty based on the circumstances of the case.

Evidence

12. This being the first appellate court is its duty to evaluate the evidence and come up with an independent finding. (See **Okeno V R (1972) EA 32**). The summary of the prosecution case is that on the night of 10th November, 2008 at around 12.30 a.m., robbers struck the Elwak Guest House where they indiscriminately robbed the patrons who were sleeping in the guest rooms. Amongst the guests was the Appellant who had checked into room number 6 alongside two other guests. The room had three beds. All the guests were robbed of various goods as set out in the charge sheet. According to **PW2, Idris Mayow Bulle**, the watchman guarding the premises, the robbers went to the guest house in a vehicle. They incessantly knocked the main gate and he responded. It was after he opened for them that they immediately undertook the spree of robbing the patrons. He went and hid in a room after he had been robbed of Ksh. 2400/. The Appellant who remained in the Guest House after the robbery was linked to the robbery for allegedly being found in possession of the sum Ksh. 2400/ stolen from PW2. A sim card was also found in the toilet of the room the Appellant was using.

13. **PW1, 5,6,7,8,10,11 and 15** were all victims of the robbery. They all gave a similar account of how they were confronted by the robbers and ordered to give up their possessions. PW8 and PW11 were additionally ordered to give up keys of vehicles they had parked in the Guest House compound.

14. A similar robbery incident had just taken place at a neighboring Elwak Catholic Mission. Police from Elwak Police Station led by the OCS, **CIP Richard Kioo** who testified as **PW3** had responded to the robbery. It is then that they heard gun shots from Elwak Guest House. They proceeded to the scene but by the time they arrived the robbers had fled. The information given by PW2 led them to arrest the Appellant. Further investigations revealed that the Appellant was a Somali citizen and was unlawfully present in Kenya. He was charged accordingly.

15. At the close of the prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He gave an unsworn statement of defence and called no witness. He stated that he escaped from Mogadishu, Somalia because of war. He entered into Kenya through the Elwak border. He had with him USD 250. He changed USD 50 into Kenya currency which amounted to Ksh. 3500/. He checked into Elwak Guest House as he waited for further travel into Kenya Hagdera Refugee Camp.

16. It was on the night of 10th November, 2008 that the robbers struck in the Guest House. He stated that he too, like other patrons was a victim of the robbery. He stated that out of the money he had he had spent some. But he lost his bag to the robbers. The watchman searched his trouser which was on the hanging lines and when he found Ksh.2400/ he claimed it was the money he had lost to the robbers. He said that the watchman called the police who arrested him. He stated that the police and the watchman conversed in Kiswahili language which he did not understand.

17. The Appellant went on to state that he was initially charged at Mander Law Courts before being transferred to Nairobi. He alluded that police tortured him before he was charged. He reaffirmed he entered into the country illegally but the same was orchestrated by the war in Somalia.

Determination

18. I have carefully considered the evidence on the record and the respective rival submissions. The main issue for determination is whether the prosecution proved the case beyond a reasonable doubt. The most paramount question that must be considered is whether the Appellant was positively identified as one of the robbers. The Appellant was linked to the robbery by the evidence of two witnesses, namely PW2 and PW13. PW13 testified that amongst the robbers who confronted him was the Appellant who beat him up with a metal rod. His testimony was that he had earlier seen the Appellant in the lodging as he was paying for the accommodation.

19. It is noteworthy that the incidence took place in stark darkness when the conditions were not conducive for a positive identification. PW 13 failed to state what enabled him to identify the Appellant in total darkness. In fact his testimony was just but a sweeping statement that the Appellant beat him up with a metal rod. This is not sufficient evidence that would inform a court that an accused participated in a robbery. In noting that other witnesses testified that they could not identify any of the robbers, the sweeping statement of PW13 ought to have called for a thorough interrogation of how he identified the Appellant. In my view, this was a case in which an identification parade was not an option. It was the only means through which the police would have ascertained that the Appellant was identified beyond a reasonable doubt. The failure to conduct one meant that the identification of the Appellant was in doubt and hence difficult to pin point him as one of the robbers.

20. The second attempt to identify the Appellant was by PW2, who was the watchman of the lodging facility. He alleged that the Appellant was part of the assailants simply because he was found with monies that were of similar value to what he had. However, when he was shown the money in court for purposes of identifying, he denied it was the money robbed from him. He said that the money robbed from him had a Ksh. 100/ note that was torn and had been sealed with cello tape. This was the first pointer that the money in the Appellant's possession was not stolen from him.

21. Additionally, PW2 testified that the recovered sim card from a toilet belonged to the Appellant. This in my view was a conclusion made based on no expert evidence. The card was never established to have been used in his mobile phone. It was never tested by expert evidence. It begged how then it was linked to him. In any case, the fact that the circumstances through which it was lost were not explained seems not difficult, if not impossible, to assume that it was lost during the incident or that it belonged to **PW2** or any other patron in the lodging or one of the robbers.

22. The attempts by the witnesses to link the Appellant to the incidents therefore fails. In all, it is clear that the prosecution failed to establish any evidence that linked the Appellant to his culpability.

23. I add that the Appellant's defence was consistent with the account he gave of the balance of the money left in his pocket. The sum of Ksh.3500/was accounted for by the purchase voice and data communication voucher and accommodation. The total cost of money spent was Ksh. 1000/ leaving a balance of Ksh. 2500/. This money approximates the sum of Ksh. 2450/ that was found on him. This puts doubt in the assertion that the money found on him was stolen.

24. The evidence that has been submitted by the witnesses points to the innocence of the Appellant. It appears that the Appellant may have been a target of allegations that led untold suffering that the court can only sympathize with him. It is clear that he was not in any way involved. His conviction was no doubt not safe.

25. As for Count 8, the Appellant was charge under **Section 3(1)** as read with **Section 3(6) of the Immigration Act**. The former provision does not describe the offence charged and the latter is non-existent. The proper conviction ought to have been under **Rule 3(1) as read with Rule 3(6) of the Immigration Regulations** and sentenced under **Section 13(2) (b) of the Immigration Act**. Hence, the conviction and sentence in this count was unlawful. I make no order on it, as in any case, I shall vindicate him in the offences of robbery with violence.

26. The upshot of my findings is that I allow the appeal. I quash the conviction, set aside the sentence and order that the Appellant be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi This 14th Day of December, 2018.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. Ms. Nyauncho for the Respondent.