



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 155-157 of 2011

(From Original Conviction and Sentence in Criminal Case No. 2083 of 2009 of the Chief Magistrate's Court at Mombasa – M. K. Mwangi (SRM))

1. JUMA OMAR MWALEWA 1ST APPELLANT

2. DENA MWETA 2ND APPELLANT

3. BORA MGANDI 3RD APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

The three Appellants above mentioned were convicted and sentenced to suffer death for the offence of Robbery with Violence contrary Section 296(2) of the Penal Code.

The particulars are that on the 5th day of June 2009 at Mlima Estate Likoni – Mombasa County jointly with others not before the Court while armed with pangas and knives robbed Victor Matele Keli of one motor cycle make Skygo Registration number KBD 922Z and cash Kshs. 700/- all valued at Kshs. 75,700/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Victor Matele Keli.

There are numerous grounds of appeal but the main one is that of identification, validity of the identification parade, and whether the charge is defective or not.

At the outset we deem it fit and proper to give brief facts of the case. The complainant a boda boda operator was on the material day 5th June 2009 waiting for passengers at Ferry Terminus when he was approached by the first Appellant whom he knew before going by the name Juma Omar alias '**Kobe**'.

This said Juma wanted to be taken to Mlima Estate. On the way and upon reaching an area called Nairobi area, the 1st Appellant told him to stop and switch off the lights. The complainant complied but did not switch off the lights. Nearby was a house under construction, the Appellant had told him that he was to wake up some people inside. The Appellant No. 1 proceeded to the building entered and whistled and returned to where the complainant was sat at the pillion passenger seat and got hold of the complainant. A struggle ensued, at this point the 2nd and 3rd Appellants emerged while armed with pangas. The 3rd Appellant cut him on the head. He managed to slip away, the 1st Appellant told his colleagues to finish him lest he reported the matter to police. The 2nd Appellant cut him on the right arm.

The complainant managed to run and sought for help from the village elder. He was later taken to Ghorofani Hospital for treatment. He later got information that the motorbike had been recovered. The three Appellants were later arrested and he managed to identify them at an identification parade carried out for each.

In his defence the 1st Appellant does not deny having met the complainant at the Ferry Terminus and having paid Kshs. 50/- to be taken home but he maintains that on the way, the complainant was hit with a stone on the head and he lost control of the bike and he fell down. They were attacked by a group of people and they decided to run at different directions. The Appellant No. 1 further maintains that he went and hid in a nearby shed. Later he went to look for the complainant but he did not find him. He saw the motorbike lying on the ground and decided to take it to Likoni Police Station where he made a report. In the company of three police officers they visited the scene and he was ordered to go home. On the way he sighted the complainant who was inside a taxi. They contributed cash for his treatment expenses. Later on the 15th June 2009 while at motor cycle repairs shop he was arrested by police.

The 2nd Appellant denied having been at the scene stating that he was arrested on the 15th day of June 2009 by police because he did not have an identification card with him. 3rd Appellant also claimed his was a mistaken identity as he was nowhere near the scene of the attack on the material day.

What transpires from the evidence adduced before the lower Court is that the complainant was alone at the time of the attack. His identification if any is that of a single witness.

In the case of Maitanyi –Vs- Republic Criminal Appeal No. 6 of 1986 KLR the Court of Appeal set out principles applicable in identification by a single witness thus-

“(1) Although it is trite law that a fact may be

proved by the testimony of a single witness this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

(2) When testing the evidence of a single

witness a careful enquiry ought to be made into the nature of the light available, conditions and whether the witness was able to make a true impression and description.

(3) The Court must warn itself the danger of

relying on the evidence of a single identifying witness. It is not enough for the Court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

(4) Failure to undertake the inquiry of careful

testing is an error of law and such evidence cannot safely support a conviction.”

We have carefully analyzed the evidence adduced before the lower Court and the judgment rendered by the trial Magistrate and we are satisfied that he did appreciate the principles set out in the Maitanyi case. At page 46 line 16 this is what he states-

“I am alive to the danger associated with relying on a single witness evidence of identification, but having so warned myself I find that the testimony of PW1 is that of recognition and that the scene was well illuminated by the head light of the motorcycle such that in the circumstances of this case PW1 could not confuse any of the Accused persons with any other person.”

The trial Magistrate was satisfied that it was the 1st Appellant who grabbed complainant firmly holding him onto the motor cycle while the 2nd Accused emerged from a building under construction and stabbed him with a panga on the head and arm before he managed to escape and seek help from the village elder where he reported that he had been attacked by Kobe and his colleagues.

The village elder (PW2) Athman Mohamed Tengo did corroborate PW1's evidence as follows at page 12 line 6-

“On getting out I found the man had fallen down but crying saying Kobe, you have killed me.”

As regards the 1st Appellant we are satisfied that he was known to the complainant before. He had been clearly seen while negotiating at the Ferry Terminus to be taken to Mrima Estate.

The complainant was emphatic that they rode together till they arrived at a place called Nairobi area wherein he was instructed to stop and switch off the lights. He told the Court that he did stop but did not heed to the 2nd instruction which was that he switch off the lights.

It was while he was waiting for the 1st Appellant that he was attacked as the 1st Appellant held him. He did in his evidence at page 7 line 27 tell the Court-

“Then Accused No. 2 whom I knew came with a panga, (points at Accused No.2). I knew 2nd Accused too. Then Accused 3 came up also from the left and cut me on top of the head. I struggled to run and I escaped from the grip of Accused No. 1. As I ran 1st Accused told the others to finish me else I would tell police, I ran and Accused No. 2 threw a panga that cut my right arm and Accused No. 2 slapped me on upper arm. I ran to the village elders house, people came and repulsed the Accused persons.”

It is not in dispute that it is the 1st Appellant who took motorcycle Registration No. KBD 922Z to the Police Station. He admits this in his evidence but maintains that he was attacked whilst in the company of the complainant as they rode to his house. The complainant had been hit with a stone thereby losing control of his motorbike. He further told the Court that after the attack each fled to different directions. That afterwards he was not able to find him but later found the motorbike lying on the ground and he decided to take it to police station. This version of events as explained by the 1st Appellant was rejected by the trial Court and with good reason.

PW5 Sgt Sam Owuor was the Investigating Officer he did testify at page 18 line 27-

“On realizing that the complainant had ran away, Accused No. 1 later brought stolen motor cycle to the police station alleging that some other people cut complainant and complainant ran away. The Accused went underground and he could not be traced.

On 15th June 2009 we received information that Accused No. 1 had been sighted together with others, I pursued until I arrested him.”

In his defence the 1st Appellant did state that he had gone upcountry and upon return he was arrested. We are satisfied that the 1st Appellant lured the complainant into an area near a building under construction whereby he was attacked and a motorbike and Kshs. 700/- was stolen. The complainant did sustain injuries on his head and arms. The first Appellant was a prime participant in the commission of the offence.

As regards 2nd and 3rd Appellants, the complainant did testify that he knew them before but its intriguing that unlike the 1st Appellant whom he mentioned his name, he did not do so as regards the other two. Nowhere is it indicated that he described them to any of the prosecution witnesses. The arresting officer arrested the 3rd Accused when he was found in the company of the 1st Appellant. The 2nd

Appellant was arrested at Likoni Police Station when he allegedly went to visit the 1st Appellant. Nothing was recovered from the 2nd and 3rd Appellants.

The incident took place near a building under construction. This was not a well-lit area. The available light was from the motor cycle. The attackers could not have emerged from the front but most likely from the rear and from the sides. We do not think that the conditions so prevailing were favourable for identification of the 2nd and 3rd Appellants. We come to that conclusion being cognizant of the duties of a first Appellate Court. In **Peters –Vs- Sunday Post Ltd EALR 1958 E.A page 424** it was held-

“Whilst an Appellate Court has jurisdiction to review the evidence to determine whether the conclusions of the trial Judge should stand, this jurisdiction is exercised with caution. If there is no evidence to support a particular conclusion or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the Appellate Court will not hesitate so to decide.”

The upshot is that the appeal as against conviction and sentence for the first Appellant has no merit. The sentence is legal and it's upheld.

As against the 2nd and 3rd Appellants we are satisfied that the conviction was not safe. We quash it and set aside the sentence. The 2nd and 3rd Appellants are set at liberty unless otherwise lawfully held.

Dated and delivered at Mombasa this 3rd day of May, 2013.

**M. ODERO
JUDGE**

**M. MUYA
JUDGE**

Dated and delivered in open court in the presence of:-

Miss Okwengu for State

Appellants - present

Court clerk –

**M. ODERO
JUDGE**

**M. MUYA
JUDGE**