



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT Mombasa

CRIMINAL APPEAL 245 OF 1999

KHALID SHABAN AZIZI.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(From Original Conviction and Sentence in criminal Case No.2615 of1996 of the Chief Magistrate's court at Mombasa; J. Siganga Esq.)

JUDGMENT

KHALID SHABAN AZIZI ("the Apellant") was convicted by theSenior Resident Magistrate Mombasa, on 21st May 1997, of theoffence of robbery with violence contrary to Section 296 (2) ofthe Penal Code. It was stated in the charge that on 21st of July1996 at about 7.45 a.m. along the Haile Sellasie Avenue, Mombasa hejointly with others not before the court robbed SUSUM IKEYA of hiscamera make Cantax, sun glasses, wrist watch, bus ticket and apurse containing Khs.400/= all to the total value of kshs.159,000/=and at or immediately before the time of such robbery wounded thesaid SUSUM IKEYA.

On the material day the complainant, SUSUM IKEYA (P.W.I), aJapanese national, was walking along the Haile Sellasie road at7.45 a.m. carrying two bags; a large one containing all histravelling accessories and small bag containing valuables andnecessaries. He was heading for the bus station when he wasaccosted by five robbers. After a struggle they managed to relievehim of the two bags, but not before inflicting cut wounds on himwith a knife on the right hand, right wrist and on the head. As the robbers escaped the complainant raised the alarm and a chaseby the complainant, assisted by members of public, ensued. Therobber carrying the large bag had to abandon it when it proved too heavy to take to flight with whilst the other with the small bagremoved the contents i.e. camera, watch, sun glasses and swiss armyknife and dropped the empty bag. These were retrieved and thechase continued. At some point, however, a police car came by andthe complainant was taken to the Centra] Police Station. Where andwhen exactly the complainant was picked up is not clear but what isclear is that the complainant was not present when the chase wassaid to have culminated in the arrest of the Appellant.

At the police station the complainant identified his largeluggage, the purse, the army knife and a key with its holderholding kshs.20/= note.

The complainant then appeared in court the following day andgave his evidence before being released to continue with histravels.

From the chase group, the prosecution called only one witness, a MAKORIO OSORO (P.W.3) who was a watchman guarding the premises occupied by Marshall's group. The record of the trial Court does not indicate the proximity of these premises to the scene of robbery. Nor does it show whether P.W.3 actually saw the robbery. He states:

"I live in Tibwani. I work for Waychan Security as a security guard. I recall on 4.7.96 at 7.30 a.m. I was on duty at Marshall's. I was with my colleague George. We heard noise people shouting thieves thieves. We rushed to see and we saw a police car driven towards the scene. The four people being chased on seeing the police car threw down the bag they were carrying and started running away. We all chased them. We caught another thief (sic) with the accused in the bushy area. He was almost lynched..... The thief (sic) we caught in the bush is the one in court (Accused identified). It is accused who was carrying the bag and threw it down on seeing the police vehicle. His three colleagues were not carrying anything."

The only other witnesses for the prosecution were the police officers. P.W.2. Ag. Ip. MBURU KIMEU of Tourist Police Unit went to Mbaraki Police Station, after being informed by the control room that a tourist had been attacked. There he found the Appellant and two of his accomplices all of whom had been rescued from mob justice by security guards. He re-arrested them and arranged for them to be sent to hospital for treatment, where from apparently the accomplices managed to escape from the watchful eyes of five officers assigned to them. P.W.2 took custody of the recovered properties and later charged the Appellant. He produced the recoveries as exhibits in the trial Court. Among the exhibits were two knives (Exh.1 and Exh.4) to which we shall address ourselves more in detail shortly. P.W.4, Pc James Kaluwa, booked in the Appellant and the accomplices before issuing the complainant with a P.3 form. The only noteworthy item in his testimony was that;

"a knife recovered from you was stolen (from) the police station".

In unsworn statement the Appellant, said that he was falsely accused of this crime over a Ksh.150/= debt against one of these security guards, who bought fish on credit from him previously. On the material day the mob chasing the robbers found him at Mbaraki Lines. He stated that this security guard (un-named and un-identified) used this opportunity to turn the mob against him.

As an appellate Court we have to scrutinise the record of the trial Court and see afresh whether it can safely support the final finding of that court. In offences relating to robbery and involving chases, the Courts have consistently held identification to be the essential ingredient. Not only should there be the evidence of the actual robbery but also of the sequel i.e. the chase up to the nabbing of the suspect. It is the law that should there be a break, evidentially, in the continuity between the robbery and the arrest finally after the chase, then in the absence of any corroboration such break may render identification insufficient to measure up to the expected standard of proof. The complainant in his evidence in-chief stated, inter-alia:

"We continued chasing the thieves. At last, one police car stopped on the street and police told me I board the vehicle saying two robbers (sic). In Court I can see one of the robbers who was arrested - accused identified...." In a succinct cross-examination the excerpt for which is reproduced here in extenso the complainant testified:

"It was at about 7.30 a.m. and there were not many people walking on the street. You removed the knife and slashed and cut and stabbed me with it. But you did not carry any of my properties. You were arrested alone one kilometer from the spot I was attacked. You ran through small alley. You were arrested by members of the public and the police. You were not found in possession of property but I was not present when you were arrested. I do not know what was recovered from you."

It is clear therefore that the complainant had a break in the chain of events. He dropped out of the chase when the police car picked him up. P.W.3 was the only other important witness. While we have no doubt that he never lost sight of his quarry from the time he set his eyes on him we do not know whether he was at the scene of the robbery and if he saw the actual event. Reading the portion of his evidence set forth above it seems to us that it is possible that Marshall's happened to be along the flight plan taken by the

robbers and that accordingly P.W.3 joined the chase from where it reached him rather than him being at the starting line. At no time, therefore, can it be said that the Appellant was not lost sight of from the time and place of robbery to the time and place of the arrest. In this regard we respectfully disagree with the Senior State Counsel.

There cannot be said, in the circumstances, to have been a positive identification of the Appellant. What fortifies our view is the conflicting testimonies of the complainant and P.W.3. In his testimony in-chief the complainant says:

"One of the robbers who was carrying my big baggage forthe baggage was heavy so he threw it down. The thievecarrying the small baggage took my camera and lens watchsunglasses and Swiss army knife and carried my bag andthen went with these items. He threw down the empty bagon the street. I picked up the small bag. We alsopicked up the big luggage."

He does not say that the Appellant carried any of the two bags. In fact, in cross-examination he is emphatic in denial of this fact .

He says;

"But you did not carry any of my properties" On the other hand P.W.3 saw things differently. In-chief he says;

"It is the accused who was carrying the bag and threw itdown on seeing the police vehicle."

In cross-examination he confirms this statement;

"I saw you as you threw the bag down. Police officerspicked up the bag and placed it in the police car."

Prima facie the complainant's testimony is irreconci1iable with that of P.w.3. Yet it is plausible that at the beginning of thechase (which complainant witnessed but P.W.3 did not), theAppellant did not have the bag but it was passed on to him by hisaccomplices during the chase so that after the switch-over P.W.3saw what he testified. There is however no evidence of this and weneed not speculate further.

Another perplexing point in this appeal revolves around theknife used in the violence attending to this robbery. Thecomplaiantt says in-chief.

"I did not release my luggage and the thieves ran off,after one of them took my arm (sic) knife and slashed mewith it. The knife in court MF 1." 1ater. the thief carrying the small baggage took my camera andlens watch sunglasses swiss army knife from my bag andthen went with these items. He threw down the empty bagon the street I picked up the small bag."Then

"My army knife which is in Court MFI 4. It is in its case.In cross-examination

"You removed the knife and slashed and cut and stabbed me with it."

It appears to us from the above that the complainant was stating that he was injured by the Appellant using his (complainant's) own swiss army knife (Ex. 4). The only other eye witness, P.W.3 had nothing to say on this because obviously he did not witness thisportion of the event. P.W.2, however, who produced the exhibitspresented to the Court two knives Exh.1 and exh.4 Exh.4 was saidto be the swiss army knife. The relevant portion of his testimonyproduced here is as follows:

"The baggage I was given are in court MFI 2 and 3(identified) the police also handed over to me mymilitary knife and keys MFI 4 and 5 (identified). Theknife and keys were taken to the police station bymembers of public. I see the person I charged in courtwith this offence is in court. I now wish to produce theMFI 2, 3, 4 and 5 as exhibits (Marked Exh 2, 3, 4 and 5).I saw the big knife MFI 4 at the police station and thecomplainant said it was not his knife. He said it wasone used by the robbers to slash

him. I wish to produce this knife as an exhibit (MFI 1 is marked Exh.1. Apparently according to P.W.2 the complainant was cut and stabbed by Exh.1 which is not the swiss army knife (Exh.4)

Having considered the evidence in the trial Court in its totality and bearing in mind the break in visual tracking of the Appellant with its attendant unresolved discrepancy as to whether he was carrying the bag or not and given the inconsistency relating to knife or knives used, we are respectfully of the opinion that there are doubts as to the complicity of the Appellant in this crime. This being so the benefit must, of course, go to him. It is our view that it would be unsafe to sustain the conviction in these circumstances and the same is quashed and the sentence set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully detained.

Before parting with this appeal we would wish to request the trial magistrates to observe that the requirement under Section 197 of the criminal Procedure Code is not a dead letter. "Writing" perforce connotes a corresponding capacity of being readable. The manuscript record ought to be in a clear wholesome and legible form such that reference to it should not become a mind-racking exercise in deciphering the impossible. Needless to say the dangers created by such records could mean all the difference between miscarriage of justice and fair consideration on appeal.

Dated at Mombassa this 1st day of November 1999

Hon P.N WAKI

Judge

HON S. KASSIM SHAH

COMMISSIONER ASSIZE