



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 57 of 1996

(From Original Conviction and Sentence in Criminal Case No. 1566 of 1995 of the Principal Magistrate's Court at Malindi - J.R. Karanja Esq., - Principal Magistrate)

KAHINDI LUGO KONDE APPELLANT
Versus
REPUBLIC..... RESPONDENT

JUDGMENT

The Appellant was the Second Accused person before the Malindi Principal Magistrate where three of them were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. There was an Alternative Charge of Handling Stolen Goods contrary to Section 322(2) of the Penal Code.

On 17th October 1995 at about 8 p.m., a gang of about six people armed with pangas and rungs, burst into the residential premises of one FRANCO TONDIN (Franco) situated at Bofa Village in Kilifi. Franco is an Italian and was at the time away in Italy. But he had left a shamba-boy David Mwangale (Mwangale) (P.W.1) and HARRISON MWANONGO (Harrison) (P.W.2) a Cook-cum-caretaker, to be in charge of the property.

As the gang approached the compound Harrison who was outside his quarters saw them and immediately took off fleeing for his life. Not so Mwangale who was inside his house. The gang attacked him and tied him up with ropes. They then entered the house of Franco and stole various household items listed in the charge sheet including a Nissan Sunny motor vehicle Registration No. KAB 411S. They disappeared. Mwangale never saw or identified any of them. When he succeeded in untying himself he raised alarm and neighbours came. They escorted him to report the matter at Kilifi Police Station. Harrison also returned soon after the robbery but it was all over. He was unable to identify anyone of the robbers either. When the robbery report and the Registration number of the motor vehicle was made at 11 p.m. the details were circulated to other Police Stations and investigations were launched. The following day information was received by IP MARY KALAMBA of Central Police Station Mombasa through 999 Control room telephoned to the effect that some three robbery suspects had been arrested by members of the public at Ganjoni area, Mombasa. She and her colleagues proceeded to the scene and found three people beaten up by members of the public who were preparing to lynch them. The three had been found with a motor vehicle Registration No. KAB 411S Nissan Sunny with some pangas in it. IP Kalama took the car, the pangas and the three persons into her custody. It was later confirmed that the car was stolen and so the three persons, the car and the pangas were forwarded to Kilifi Police Station where the report on the theft originated. The three persons were the accused in the lower court. It turned out that one of the accused person was well known in the neighbourhood of the scene of the robbery as testified by Mwangale and Harrison while the Appellant was also normally seen in the neighbourhood by Mwangale,

In their defenses, one of the accused said he had been away from Mombasa on the day of the robbery. He had returned to his house the following day and while he was in his house he heard shouts of thief. He went out and found a mob which was about to lynch two people. When he tried to rescue them he was also

branded a thief and was beaten up. All were rescued by police. The other accused in the lower court said he was selling groundnuts as usual when a group of people confronted him and said he was a thief. He was beaten up and was rescued by police when he was about to be lynched.

As for the Appellant he said he was heading to work when he saw three people running away near a garage. One of them came and hit him. A group said he was a thief. They beat him up and when he was about to be lynched the police came to his rescue.

All that evidence was considered by the learned Principal Magistrate who came to the conclusion that the act of robbery was committed at the home of Franco and that the circumstantial evidence adduced pointed to the three accused persons as part of the gang of robbers. Nevertheless he found no support for a charge of robbery with violence under Section 296(2) and he convicted them on the lesser charge of simple robbery. Probation reports were recalled for in respect of the three convicts before sentencing but it was unfavorable for the Appellant. While one of the other two persons was placed on probation for 2 years and the other committed to a Borstal institution owing to his tender age, the Appellant was sent to prison for four and a half years with 8 strokes of the cane and was placed under police supervision for 5 years after completion of the sentence.

It is not clear whether any appeals were filed by the other two accused. But the Appellant now challenges both his conviction and sentence on 4 grounds in his Amended Petition of Appeal dated 9th October 1997. He drew them up in person - or more appropriately had them drawn for him as he professed illiteracy.

In summary he states:-

- (1) The lower court erred in believing the evidence of IP Kalama (P.W.4) which was shallow.
- (2) The learned trial Magistrate erred in accepting the evidence of P.W.2 that the appellant was a neighbour.
- (3) The learned Magistrate erred in finding that the appellant was part of the gang that wounded the complainant.
- (4) The learned trial Magistrate erred in failing to consider the appellant's unsworn statement.

The appellant made no elaboration of those grounds at the hearing of his appeal choosing to leave them as drawn for consideration by the court.

The first complaint is the treatment given to the evidence of IP Kalamba by the trial Magistrate. There is merit in the criticism that it was shallow in content and left out some details for example as to her source of information, the time of arrival at the scene, where exactly the Appellant and the other accused were, where the motor vehicle was, and the state of it or the members or member of public found at the scene. But I am of the view that such omissions did not occasion a miscarriage of justice. Whatever her source of information IP Kalamba found herself at Ganjoni at the scene where admittedly and on the evidence on record the three persons were being beaten up by members of the public and were on the verge of being lynched. She and the other police officers arrived in time to save them from summary execution. That there was no member of the public called to testify on this is understandable. For mob injustice is a criminal offence and such witnesses may incriminate themselves. It is clear from the evidence however which was accepted by the trial Magistrate, that the three persons, including the Appellant were found with the motor vehicle which was identified later to have been stolen from the complainant. I find no merit in the criticism levelled against the trial Magistrate on this ground.

Ground 2 & 3 may be considered together. The straight answer to Ground 2 is that there is nowhere in the record that P.W.2 stated that the Appellant was his neighbour. It was P.W.1, Mwangale who said he normally saw the appellant in the neighbourhood. There is no serious challenge to that assertion. Mwangale did not say that he recognised or identified the Appellant on the night of the robbery. It is clear from his evidence that he never saw any of the attackers and the trial Magistrate did not purport

to hold that the Appellant was so identified. In his judgment, the trial Magistrate clearly surmised, and rightly so, that the case rested on circumstantial evidence. He went further to find that the strongest circumstantial evidence was the finding of the motor vehicle only hours (or one day) after the robbery, which motor vehicle, on the evidence he also accepted, was in possession of the Appellant and two others. This the trial Magistrate concluded was more consistent with the guilt rather than the innocence of the Appellant and his co-accused. In his submissions on Appeal, State Counsel Mr. Nge'no stated that the doctrine of recent possession applies to import the fact that the Appellant was a principal offender in this crime. He also submitted, without making the suggestion for enhancement of the sentence, that the Appellant was lucky to have the charge reduced to the lesser offence under Section 296(1) Penal Code. In his view, the offence as charged under Section 296(2) had been proved since P.W.I was wounded before the items listed in the charge sheet were stolen. The view of the trial Magistrate was that the more serious offence was not proved to have been committed because the accused persons were not shown to have done the actual wounding. But this is a narrow view to take of the offence. The offence is committed as defined in the Section and as elaborated in NDUNGU Vs Republic CA 116/95 (UR) when either

- (1) the offender is armed with any dangerous or offensive weapon or instrument or
- (2) he is in company with one or more other person or persons or
- (3) at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person.

Those three need not exist at the same time. Proof of one without the others is sufficient to sustain a conviction. The trial Magistrate appears to have considered only the third and decided that the offence was not committed as allowed. In doing so he appears to have accepted the P3 report produced by a police officer without calling the maker. Again this was erroneous as has severally been held by the court of Appeal on the application of Section 77 of the Evidence Act. As recently as January 1998, the Court of Appeal stated:

"It was indeed wrong for Sgt. Mwangangi to produce the P3 form which he did not make unless the Doctor who authorised it had become incapable of giving evidence. It follows therefore that the P3 form produced by Sgt. Mwangangi was inadmissible in evidence. That being so opinion evidence contained in the said form was hearsay and was inadmissible in evidence on that ground".

- CA 86/97 RAJAB ABDALLA -Vs- REPUBLIC (UR)

It would follow therefore that there was no admissible evidence in this case that there was the wounding of Mwangale P.W.I. There was evidence nevertheless that the robbers were more than one and were armed with rungas and pangas. These are matters that the trial Magistrate did not consider but he did, at all events, reduce the charge to a lesser offence and convicted therefor. As a first Appellate court I am not at liberty to enhance the charge or sentence on the Authority of CA 34/97 Amos Oraro & 3 others - Vs- Republic (UR) because

". . . , in altering the finding in an appeal against conviction and substituting therefore a conviction for an offence other than that charged the High Court in its appellate jurisdiction can only act within the provisions of Sections 179 - 191 of the Criminal Procedure Code and . . . such alteration and substitution (are) only possible under Section 179 Criminal Procedure Code which does not permit a substituted conviction of a major offence from a minor offence.

The first appellate court in the appeal had no jurisdiction to substitute the appellant's conviction in the first and second counts referred to earlier in this judgment from that of simple robbery to that of capital robbery."

While I do not agree with the trial Magistrate therefore that the more serious offence was not proved, I am unable to convict for that offence or to enhance the sentence.

All in all I find no merits in the second and 3rd grounds of Appeal.

As for the fourth ground I am of the view that the trial magistrate did not ignore the evidence of the Appellant, It was in any event a brief general denial that the Appellant committed the offence as charged. This was not believed by the trial Magistrate and he was entitled to make such assessment as he saw and heard the Appellant in the witness box. He was better placed to assess his credibility than I am on appeal.

The appeal on conviction is dismissed.

As for sentence the maximum provided for under the law is 14 years together with corporal punishment not exceeding 28 strokes. The trial Magistrate was not hasty in considering the sentence but called for a Probation Officer's report before doing so. He had a discretion to exercise and I do not find that it was exercised in a capricious manner. The Appeal on sentence is also dismissed.

Dated at Mombasa this 6th day of March 1998.

P.N. Waki

JUDGE