REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
CORAM: GICHERU, LAKHA & OWUOR JJ.A
CRIMINAL APPEAL NO. 38 OF 1999
BETWEEN
JOHN MWIKYA MUSYOKA...APPELLANT
AND
REPUBLIC...RESPONDENT
(Appeal from the Judgment of the High Court of Kenya at Mombasa (Mr. Justice Hayanga) dated 2nd October, 1999 in H.C.CR.A NO. 210 OF 1997)
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JUDGMENT OF THE COURT

John Mwikya Musyoka, the appellant, was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code Cap. 63 of the Laws of Kenya. He was tried, convicted and sentenced to death by Mrs Achode (SRM) on 30th June, 1997. He appealed to the superior court against the conviction and sentence. The appeal was heard by Hayanga and Waki JJ. who confirmed both the conviction and sentence. The appellant still being dissatisfied has appealed to this Court.

Philip Mutua Kithunga, was the complainant in the charge against the appellant. His testimony was corroborated by PW2 Mukuyu Makutu, one of the people that were in his company on the fateful night. His evidence was fairly straightforward.

He was a matatu conductor and lived at Magongo village in Changamwe. On the night of 5th April, 1996 he went to a village Bar known as Narok Bar. He was in a company of two of his friends. He bought them some beer. Mukuyu had apparently just delivered water in the same Bar. They all left at about 11.00 p.m. The complainant's two friends and PW2 were left talking to the watchmen at the verandah of the Bar while the complainant walked a little ahead of them. Hardly had he gone a distance of about fifty steps from the Bar when he was attacked by two people. They emerged from a "Mitumba stall" and attacked him without saying a word. He saw the two assailants clearly by means of electrical light coming from the bar, and recognised them as people he knew. The appellant was one of the two people. Both the eye witnesses knew him because he worked at the same Narok Bar, roasting meat. Both witnesses also knew and recognised the appellant's companion who has since disappeared. The appellant was armed with a club while the other man was armed with a stone. Upon being attacked the complainant screamed. PW2 and the other friends heard him and saw him being attacked. They ran to his rescue.

They too were threatened by the assailants. Both assailants beat up the complainant. He was knocked down, hit on the mouth and lost two teeth in the process. The attack lasted about four to five minutes. When the attackers left the complainant discovered that his 800/= was missing. PW2 helped him and took him to Changamwe Police Station where he made a report that he had been robbed by people that he and PW2 knew. P.C. Christopher Musyoki PW3 saw the injury that the complainant had suffered and gave him a P3 Form to go to the hospital which the complainant did.

In the process of reporting the robbery the complainant and his witness clearly stated that they knew the people that had robbed the complainant. This prompted the police to request them to look for the two people and if they found them to make a report at the police station. On the night of 10th of April 1996, when at the same Bar, they saw the appellant. They went and made a report at the Police Station. PW3 came and arrested him.

PW3 testified as to the reaction of the appellant upon his arrest who claimed that they had only fought with the complainant but he had not taken any money from him.

In his defence the appellant denied robbing the complainant of his money. He was arrested for no reason.

However there existed a grudge between him and the complainant because sometime ago, the appellant had ejected the complainant from Narok Bar where he worked, upon the instructions of his employer. The complainant was drunk and was causing trouble. Since that time the complainant and his brother Makuyu (PW2), who worked at the same Bar, had sworn to deal with him. In other words the whole of this robbery story was a frame-up against him by the complainant and his brother.

It was contended before us, and as was argued in the superior court, that the conviction of the appellant based on the identification of him by the two eye-witnesses under the circumstances they claim to have identified him was unsafe.

In that the robbery took place at night at 11.00 p.m. The complainant and his witness had been drinking in the bar and most likely drunk and therefore unable to identify his assailant. There was no evidence as to the state of lighting at the place that the robbery took place and how far it was from the Bar. All these factors, according to Mr. Tindika, made the identification worthless in the absence of an identification parade and therefore the learned Judge erred in finding that the appellant had been properly identified.

We have scanned through the record and considered the authorities cited. The principles upon which courts are guided in cases of visual identification and recognition as was the case herein are clearly laid down in the case of R vs TURNBULL AND OTHERS (1970) All ER 549 and followed by many other cases of this Court. We are satisfied that in the case before us the eye-witnesses knew the appellant well prior to the incident. They all lived in the same village and met at the local bar where PW2 and the appellant both worked. The attack took place at a spot near the bar that was well lit, and the actual struggle took a good four to five minutes.

There was no reason why the complainant would not have been able to see the appellant and recognise him. We see no ground upon which to interfere with the concurrent finding of both the lower court and the superior court in as far as the identification of the appellant was concerned.

We now come to what in our view is the appellant's important ground of appeal that was argued before us. This was ground 3 of his five grounds of appeal and read as follows:

> "3. The learned Honourable Judges errered in law in upholding the conviction and sentence when on the evidence on record there was no evidence at all or sufficient to sustain the charge of robbery and/or violence to prove the charge which faced the appellant."
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> Under section 295 of the Penal Code:
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> " Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

Section 296(2) provides that:

> If the offender is armed with any dangerous weapon or instrument, or is in company with other one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

The offender must steal something. Proof of theft is an essential ingredient of the charge of robbery with violence.

The only evidence in this case as pointed out by Mr Tindika and not seriously challenged by Mr Gacivih was that the complainant discovered after the attack that his 800/= was missing. There was no evidence whatsoever as to what stage the 800/= went missing. A genuine doubt existed at what stage his money went missing. There was no mention as to where it was taken from him. How much money the complainant had on that day, how much he had used at the bar buying drinks for his friends and if indeed he had any at the time he left the bar. Who knows if it could have dropped on the ground after the attack.

In our view in the absence of sufficient evidence to establish the theft of the Shs. 800/= the subject matter of the charge, the offence of robbery with violence contrary to section 296(2) cannot be said to have been proved against the appellant. That notwithstanding, however, we are satisfied that the appellant was one of the two people who accosted the complainant on the night in question , beat him up and injured him by knocking out his two upper teeth. The evidence as to the injury suffered by the complainant was not challenged. We would, however, in this regard find that there was sufficient evidence to convict the appellant on the lesser offence of assault causing actual bodily harm contrary to section 251 Penal which we hereby do and we sentence him to a period of imprisonment equivalent to the term he has already served. To this extent,his appeal is allowed and we order that he be set at liberty forthwith unless held for any other lawful cause.

Dated and delivered at Mombasa this 23rd day of July, 1999.

J.E. GICHERU
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JUDGE OF APPEAL

A.A. LAKHA
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JUDGE OF APPEAL

E. OWUOR
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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR .