



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: KWACH, OMOLO & SHAH, J.J.A.

CRIMINAL APPEAL NO. 42 OF 1999

BETWEEN

KENNEDY KAVAI ABDALLAHAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Hayanga & Waki JJ) dated 16th February,

1999

in

H.C.CR.A. NO. 144 OF 1997)

JUDGMENT OF THE COURT

This is a second appeal from the original conviction and sentence by Principal Magistrate J.R. Karanja Esquire. The appellant was, on 25th April, 1997, convicted of robbery with violence contrary to **section 296 (2) of the Penal Code** and sentenced to death. His first appeal to the superior court was dismissed on 16th February, 1998. He stood convicted of four counts of robbery with violence.

The appeal to this Court was argued primarily on the grounds that the identification of the appellant as one of the robbers was not satisfactory. Mr. Obura who appeared for the appellant urged that in the circumstances of the robbery the identification of the appellant could have been difficult. He said that when a group of people invaded a quiet supper party and bundled the diners into a room, identification of a particular person could well be mistaken; he also argued that identification of one individual by witnesses who are in a state of panic caused by the 'invasion' would be open to doubt.

Delmonte Oscar (P.W.2) stated in his evidence that after the invasion, bundling into one room of his colleagues and him and the robbery itself, he was able to identify only one of the attackers, that is, the appellant. He said he was able to identify him on account of there being adequate electric light.

Mr. Vellantini Graziano, (P.W.3) said in his evidence that he was able to identify the appellant on account of there being adequate electric light. The fourth prosecution witness, Valentine Francesco, was not able to identify any of the robbers. Similarly, the fifth prosecution witness Willieni Riccordero Andreani was unable to identify any of the robbers. It is possible that the witnesses, who were having a

leisurely supper when set upon by a gang of robbers and in a state of panic and more so if they are foreign tourists as was the case in this matter, could well be mistaken in the identification of the appellant.

However, in the appeal before us there is more than just the identification of the appellant. He was found in possession of air tickets, a driving licence, an identification card, money and a big bag which property had the hallmarks of not having belonged to the appellant but to the tourists who were attacked. The appellant was found in such possession some five days after the robbery and we agree with the learned judges of the High Court that the absence of any explanation from the appellant as to how he came to be in possession of the said items he ought to be treated either as a thief or a receiver. We cannot fault the learned judges for inferring that he was a robber or a thief.

It bears repetition to say that air tickets, passport and identification papers belonging to P.W.1 are personal items which when found on the appellant 5 days after the robbery in the absence of any explanation by the appellant as to how he came into possession thereof the only inference to be drawn is that he was either the thief or handler. His possession of Italian currency in the absence of any explanation also points to his being one of the robbers. Mr. Obura criticised the manner in which the identification parade was carried out. That is a justifiable criticism. There were seven persons on the parade. The minimum number should be eight persons excluding the suspect. We cannot rely on the evidence as regards the identification parade.

However, as pointed out earlier, there was sufficient evidence to connect the appellant with the robbery in question on account of his possession of the stolen items. Additionally there was also the evidence of the appellant leading the police to the place where a G.3 rifle allegedly used by the appellant was hidden. The learned magistrate and the learned judges both accepted, the fact that the G.3 rifle which was found was the weapon used in the robbery and that such evidence was properly regarded as circumstantial evidence of the appellant's guilt.

We dismiss this appeal and confirm the original sentence imposed by the learned magistrate, in respect of count one. There was no need to sentence him to death on the other counts. The usual practice in such a case is to impose a sentence only on one count and leave in abeyance the sentence on the other counts. The reason for this is that a man cannot be hanged twice over; again if there is a successful appeal on the count on which sentence has been imposed the appellate court can impose sentence on any of the remaining counts if the conviction thereon is upheld. We accordingly set aside the sentences imposed on counts 2, 3 and 4.

Dated and delivered at Mombasa this 27th day of July,1999.

R. O. KWACH

JUDGE OF APPEAL

R. S. C. OMOLO

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR