IN THE COURT OF APPEAL

AT MOMBASA

CORAM: KWACH, OMOLO & SHAH JJ.A

CRIMINAL APPEAL NO. 44 OF 1999

BETWEEN

OMAR KAMANZA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Mombasa (Hon. Mr. Justice Ang'awa) dated 12th July, 1995

in

H.C.CR.A NO. 258 OF 1995)
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JUDGMENT OF THE COURT

Omar Kamanza, the appellant hereinafter, was tried and convicted on a charge of robbery with violence contrary to *section 296(2) of the Penal Code* . The particulars to that charge stated that on the 13th day of May, 1990 at about 3.45 a.m at Magandia village, Waa Location in Kwale District, jointly with others not before court, and while armed with dangerous weapons, namely a wheel-spanner, iron bar and sticks, the appellant and his confederates robbed Mrs Amu Khan of a bunch of keys and a Swiss pen-knife, all to the total of KShs. 2,200/= and at or immediately after the said robbery they wounded Mrs Amu Khan. The appellant was convicted on the charge on 31st August, 1990 and upon the conviction the Senior Resident Magistrate at Mombasa, Mr. J. K. Karanja, imposed upon him the mandatory sentence of death.The appellant appealed to the High Court but on the 12th July, 1996 Lady Justice Angawa and Mr Justice Waki dismissed his appeal. The appellant now appeals to our Court this being a second appeal.

That being so, only issues of law can be considered by us. The offence of robbery, whether under *section 296(1) or 296(2) of the Penal Code* must of necessity involve a theft during which actual force or threat to use force is a vital ingredient. Section 295 defines robbery as:-

> *"... stealing anything and, at or immed iately after the time of stealing it, uses or threatens to use actual violence ..."*

So that in this appeal the prosecution was bound to prove:-

(i)that the appellant stole a bunch of keys and a Swiss pen -knife from Mrs Amu Khan; and

(ii)that dur ing the stealing the appellants were armed with any dangerous weapons, or was in company with one or more other person or persons, or at or immediately after the time of the robbery, the appellant wounded, beat or struck or used any other personal violence to Mrs Khan."

The prosecution chose to prove that not only did the appellant steal a bunch of keys and a Swiss pen-knife from Mrs Khan but that they also wounded her.

On the theft of the bunch of keys and the Swiss penknife, the only evidence of their theft came from Mrs Khan herself and it was in one sentence towards the end of her evidence-in-chief. She stated:-

"... A bunch of keys and a Swiss pen -knife all valued at KShs. 2,200/= were robbed, from me. The other robber with the accused were (sic) not apprehended."

Mrs Khan did not say what she was doing with the bunch of keys and the pen-knife. Her husband who came out and shot the appellant on the eye did not say anything at all about anything having been stolen from them. Police constable Joseph Njue (P.W.5) went to the scene and arrested the appellant from a nearby bush. The only reference in this witness's evidence as regards theft was as follows:-

"On 13th May, 1990 at 3.45 a.m I was on duty at the Police Station when a robbery with v iolence was reported by Mr. Khan (P.W 2) who said that one of the culprits had been shot by a bullet and fled with serious injuries."

We know from the evidence that it was really not P.W 2 who reported the incident to the police, but it was his son who did so. We have no record of what the son of P.W 2 told the police had been stolen from her mother. As we have said P.W 5 merely said a report of robbery with violence was made at the station. We think the evidence of theft was rather tenuous for a serious charge like the one the appellant faced. The magistrate and the Judges on the first appeal appear to have assumed that because the appellant was found in the compound of the complainant at night he must have stolen something from there.

Next there was the issue of wounding Mrs Khan. As we have seen the prosecution chose to allege in the particulars of the charge that the appellant and his group wounded Mrs Khan. On that aspect of the matter, Mrs Khan's evidence was to this effect:-

"... I got out o f the house and proceeded to the verandah where I spotted the accused in the dock (identified) trying to hide against a wall pillar. I shouted the name of the watchman but the accused hurriedly held my hand and ordered me to shut up. He then held my neck tightly and scratched it very badly."

The wounding apparently consisted of holding the neck tightly and scratching it. We doubt whether that alone could constitute a "wounding" which is defined in "the Concise Oxford Dictionary, 8th Edition, as:-

"an injury done to living tissue by a cut or blow etc, esp. beyond the cutting or, piercing of the skin. ..."

Mrs Khan did not show the magistrate any wound(s) on her neck and there was no medical evidence to support it. It can, of course be said that the prosecution alleged and proved that the appellant was in the company of other people and that they were armed with offensive weapons which were set out as a wheel-spanner, an iron-bar and sticks. These items can of course be put to offensive use, but even if they were in fact put to such use that cannot carry the matter any further because as we have held earlier there was insufficient evidence to prove that the appellant and his group stole anything from the Khans.

We, however, do not subscribe to the appellant's contention that he was not at the home of the Khans

that early morning and that the wound on his eye was inflicted on him by some unnamed husband who caught him having sexual intercourse with his wife. The magistrate and the Judges of the High Court found as a fact that P.W 2 shot him in the eye and that P.W 5 and his group followed the trail of blood from the Khans' verandah to a near-by bush where he was found. There was ample evidence to support that finding and there cannot be any legal basis upon which we can intervene. We are satisfied it was proved beyond reasonable doubt that the appellant attacked Mrs Khan as was stated, but in the absence of cogent evidence that they stole anything from her, and in the absence of proof that they occasioned any actual bodily injury to Mrs Khan, we set aside the conviction for robbery with violence under section 296(2) of the Penal Code , and the sentence of death imposed thereon. In the place of robbery with violence under section 296(2) Penal Code , we substitute a conviction of simple assault under section 250 of the Penal Code .

The appellant has been in custody since his arrest on the 13th May, 1990; that is a period of some nine years now. In these circumstances we do not think it would be right for us to impose any sentence for the substituted offence under section 250 of the Penal Code. The sentence which commends itself to us and which we now impose is such a sentence as will result in the immediate release of the appellant from prison. These shall be our orders in the appeal.

Dated and delivered at Mombasa this 28th day of July, 1999.

R. O. KWACH
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JUDGE OF APPEAL

R. S. C. OMOLO
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JUDGE OF APPEAL

A. B. SHAH
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JUDGE OF APPEAL