



IN THE COURT OF APPEAL

AT MOMBASA

Coram: Chesoni, C.J., Kwach & Tunoi, JJ.A

CRIMINAL APPEAL NO. 80 OF 1997

BETWEEN

PATRICK NABISWA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Mombasa (Ang'awa & Waki, JJ.) dated 17th July, 1996

in

H.C. CR. A. NO. 318 OF 1995)

JUDGMENT OF THE COURT:

A series of robberies took place at Bokole Village of Changamwe Estate in Mombasa District between the night of 21st and morning of 22nd January, 1991. The evidence adduced in the trial court indicates that the said robberies were committed by a group of persons who acted with excessive violence. One of the victims died from the injuries inflicted on him during one of the robberies. Nine suspects, who included the appellant were arrested and charged jointly with four counts of robbery with violence, one count of attempted robbery with violence and one count of assault causing actual bodily harm contrary to sections 296(2), 296(1) and 251 of the Penal Code respectively. The appellant was further charged alone with three alternative counts of handling stolen property contrary to section 322(1) of the Penal Code.

The trial magistrate acquitted seven of the suspects and convicted the appellant, Patrick Nabiswa and Bernard Mbithi alias Karanja of two counts of robbery with violence. These were count 1 relating to the robbery of two sewing machine heads alleged to belong to Bengi Lugwe (deceased) and count III which charged the robbery of Moses Isaya's Toshiba Radio Cassette Serial No. 8401200001690. The appellant was alone further found guilty of robbing Masai Thomas of a Sharp Radio Cassette Serial No. 811448198. The magistrate reduced the third charge of the robbery of Moses Isaya's Toshiba Radio Cassette to simple robbery contrary to section 296(1) of the Penal Code. The appellant and Karanja were sentenced to suffer death for the robbery of the two sewing machine heads; serve six years imprisonment plus four strokes of corporal punishment for each robbery of Moses Isaya's Toshiba Radio Cassette and Masai Thomas's Sharp Radio Cassette. They were to be under police supervision (we presume if they survived the death sentence for count one) for five years.

The High Court allowed Karanja's appeal, on Counts I and III quashed the conviction, set aside the sentence and ordered his release. The two learned Judges (Ang'awa J and Waki, J.) observed that the magistrate, although he had sentenced the appellant and Karanja for Count IV he had not convicted them and so they set the sentence aside. With respect, in his judgment the magistrate found that the appellant was found with Masai Thomas's Sharp Radio Cassette and he (appellant) was therefore guilty of the robbery charged. The learned Judges therefore set aside the sentence for Count IV without quashing the conviction. In his appeal to this Court the appellant has not asked us to quash the conviction on that count.

The appellant (Patrick Nabiswa) has now appealed to this Court against the High Court decision dismissing his appeal against conviction and sentence for the robbery of two sewing machine heads and Moses Isaya's Toshiba Radio Cassette. Mr. Ngombo who appeared for the appellant adopted the appellant's Memorandum of Appeal.

Although the Memorandum lists eleven grounds of appeal Mr. Ngombo argued them together, and he raised the following points:

- (a) There was no evidence to link the two sewing machine heads recovered from a house the police broke into and the sewing machines alleged to have been found with heads missing in the house of Bengi Lugwe;
- (b) the appellant was not present when the police broke into and searched the house where the two sewing machine heads and other items were found and which was alleged to be the appellant's house; and
- (c) the visual identification of the appellant was unreliable.

Mr. Gacivih for the Republic submitted that the two sewing machine heads were recovered from the former house of the appellant. As to identification Mr. Gacivih argued that this was not a case of identification but recognition as the appellant was known to JULIUS WERE OPONDO (P.W.11).

The magistrate made a finding that a Sharp Radio Cassette Exhibit 4 was found in the appellant's house and that that radio cassette belonged to Masai Thomas. He (the magistrate), however, convicted the appellant for robbery of Moses Isaya's Toshiba Radio Cassette, which was not found. In view of the discrepancy between the Radio Cassette alleged to have been found in the appellant's house and the one referred to in Count III of the charge sheet Mr. Gacivih did not support the conviction in Count III.

There was no reason given why the police failed to arrange and conduct an identification parade. They relied on visual identification which Mr. Gacivih sought to support by saying that it was recognition. The two witnesses on whose evidence of the alleged recognition is relied were THOMAS MASAI who said that it was the third accused (appellant) who hit him with a stone, but in cross-examination said that he did not know the appellant, and JULIUS WERE OPONDO who said he knew the appellant very well and he saw him under a lantern light.

Although the appeal against conviction and sentence against Count I (robbery of sewing machine heads) can be disposed of without dealing with the question of identification of the appellant, we will briefly consider the issue of Patrick Nabiswa's identification because it was argued before us.

This case reveals the problems posed by visual identification of suspects. This mode of identification is unreliable for the following reasons which are discussed in BLACKSTONE'S CRIMINAL PRACTICE 1997, Section F18:

- (a) some persons may have difficulty in distinguishing between different persons of only moderately similar appearance, and many witnesses to crimes are able to see the perpetrators only fleetingly, often in very stressful circumstances;
- (b) visual memory may fade with the passage of time; and

(c) As is in the process of unconscious transference, a witness may confuse a face he recognised from the scene of the crime (it may be of an innocent person) with that of the offender.

In this case what was disputed was the accuracy of the alleged visual identification as opposed to the truthfulness of the witnesses. Had the police arranged for and held an identification parade they would have preempted the dispute. Where the police arrest a suspect on the basis of other evidence, and there are witnesses who might be called to identify the suspect it is prudent to arrange for and hold an identification parade.

This appeal is in the upshot of what we have said above against the conviction and sentence on Count I, that is the robbery of two sewing machine heads for which Patrick Nabiswa was sentenced to death. The two items were in a bag which was recovered from a house into which the police broke and carried out a search therein in the presence of no other persons but themselves. No search warrant was applied for and obtained, as required by section 118 of the Criminal Procedure Code, before the building was broken into and searched. The police could have stationed some officers to guard the building while a search warrant was being processed by magistrate's court. There was no evidence connecting the appellant with the building where the two heads of sewing machines were found. Further there was no evidence to connect the two machine heads with the sewing machines in the house of Bengi Lugwe. The finding of the appellant's possession of the two sewing machine heads was mere speculation which could not support a conviction in a criminal case. The appellant's conviction on Count I cannot therefore be supported in law.

Mr. Gacivih requested that in the event of the appeal being allowed, the court do order a retrial. Where this Court allows an appeal against conviction, a retrial may be ordered if it appears to the court that it is in the interests of justice to do so. The offence took place in 1991 and there is no evidence to support any of the convictions. It will not be in the interests of justice for us to order a retrial in this case.

The upshot of what we have said here is that the appellant's appeal on both counts I and III, is allowed. We quash the conviction and set aside the sentence on those counts. We also quash the conviction of the appellant on Count IV in respect of which the High Court has already set aside the sentence. The appellant, unless otherwise lawfully held, shall be set free forthwith.

Dated and delivered at Mombasa this 21st day of January, 1998.

Z.R. CHESONI

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CHIEF JUSTICE

R.O. KWACH

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR