



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: CHESONI, C.J., KWACH & TUNOI, JJ.A)

CRIMINAL APPEAL NO. 86 OF 1997

BETWEEN

RAJAB SAID ABDALLAHAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a conviction and Judgment of the High Court of Kenya at Mombasa (Justices Ang'awa & Waki) dated 7th May, 1996

In

H.C.CR.A NO. 416 of 1994)

JUDGMENT OF THE COURT

The appellant, Rajab Said Abdallah, was after trial by the Principal Magistrate, Malindi, convicted of robbery with violence contrary to section 296(2) of the Penal Code and was sentenced to death. His first appeal was dismissed by the High Court of Kenya at Mombasa (Ang'awa and Waki, JJ) on 7th May, 1996.

The facts giving rise to his second appeal according to the prosecution are that on 24th August, 1994 at about 1 p.m. the complainant, an American lady tourist, and her friend were walking along a road between the Scorpio and Silversands Villas at the coastal resort town of Malindi when a person, subsequently identified as the appellant, pounced upon the complainant and attempted to snatch her bag. She put up a resistance but all in vain as the appellant pushed her on to the ground and slashed her right hand with a knife. She loosened the grip on the bag which the appellant snatched and ran away with it. The two visitors screamed for help and the members of the public responded. They gave chase and apprehended the appellant upon whom they administered a thorough beating. Two police officers, Sgt. Mwangangi (PW3) and P.C. Cheboi (PW4), who were on patrol duties in the area were attracted by the commotion. They intervened, rescued and arrested the appellant who was still holding the complainant's bag. A search on the appellant's body revealed a knife hidden under his clothes. The bag contained the complainant's personal effects which included a towel, a book, a driving licence, a passport and cash both in U.S. dollars and Kenya shillings. In the meanwhile the complainant was rushed to the hospital where she was treated and discharged. Two days afterwards on the 26th August, 1994, the appellant was

arraigned before the Principal Magistrate's Court at Malindi on a charge of robbery with violence contrary to section 296 (2) of the Penal Code. He pleaded not guilty. The record of the proceedings shows that the Magistrate ordered the testimony of the complainant and her companion to be taken forthwith as they were about to leave the country. This was done and further trial was adjourned to about a month afterwards.

At the trial Sgt. Mwangangi testified that after the arrest of the appellant he proceeded to the Hospital where he found the complainant and issued her with a P3 form which was duly filled by a doctor. Sgt. Mwangangi (PW3) then collected it and retained it. During the trial he told the Court:

"I now wish to produce it (P3 form) as an exhibit"

The Court without any hesitation accepted the P3 form as an exhibit.

In a very terse statement the appellant denied the charge, but, the magistrate in his judgment found the case against the appellant proved beyond all reasonable doubt and convicted him as charged and sentenced him to death.

The first appellate court made short findings. It said that the identity of the appellant was not in doubt and sustained the conviction and sentence.

Naturally, the appellant appealed to this Court against that judgment. As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect. See *Pandya v R* [1957] EA 336, *Ruwalla v r* [1957] EA 570.) If the High Court has not carried out its task, it becomes a matter of law on second appeal whether there was any evidence to support the conviction.

The appellant prepared home-made grounds of appeal on which his learned counsel, Mr. Ng'ombo, addressed us fully. Mr. Ng'ombo referred us to various portions of the evidence from which he argued that the appellant's conviction was wrong. Most of these were actually factual matters but they also echoed the only point of law raised before us. It was that the first appellate court erred in not properly appreciating as to what acts constituted an offence under section 296 (2) of the Penal Code. Mr. Ng'ombo argued that some members of the public who apprehended the appellant should have been called to testify whether the appellant was armed with a knife or any dangerous or offensive weapon or instrument. He further contended that there was no evidence to suggest that the complainant did suffer any injuries at all and that the P3 form was irregularly and improperly produced by Sgt. Mwangangi in contravention of section 33(b) of the Evidence Act. The appellant was not afforded the opportunity to cross-examine the maker of the document.

It was indeed wrong for Sgt. Mwangangi to produce the P3 form which he did not make unless the doctor who authored 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. In the circumstances there was no evidence before the trial court on which it could properly hold that the injury sustained by the complainant was caused by a knife.

The two police officers only arrived after the event and did not witness the alleged attack. None of the members of the public volunteered to testify that the appellant had a knife when they caught him.

It is an essential ingredient of the offence of robbery with violence for the offender to be armed with any dangerous or offensive weapon or instrument. If the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon is proved, then he is guilty of the offence under section

296(2) of the Penal Code. But, in this particular case there was no proof of the appellant being armed with any dangerous or offensive weapon or instrument. And in the absence of such evidence, the trial court should have convicted the appellant of the lesser charge under section 296(1) of the Penal code.

It would in our view be unsafe to allow the conviction for robbery with violence under section 296(2) of the Penal Code to stand. Accordingly we allow the appeal, quash the conviction thereunder and set aside the sentence of death. We accordingly substitute a conviction under section 296(1) of the Penal Code and sentence the appellant to 5 years' imprisonment with a 4 strokes of the cane together with the mandatory police supervision period of 5 years.

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

Z.R.CHESONI

CHIEF JUSTICE

R.O. KWACH

JUDGE OF APPEAL

P.K. TUNOI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR