



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KWACH, PALL, J.J.A. & BOSIRE AG. J.A.)

CRIMINAL APPEAL NO. 92 OF 1996

BETWEEN

TSUMA NYANYE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Lady Justice Ang'awa & Justice Waki) dated 12th July, 1996

in

H.C.CR.A. NO. 280 OF 1995)

JUDGMENT OF THE COURT

Tsuma Nyenye (the appellant), was convicted by the Senior Resident Magistrate, Mombasa of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. The particulars of the offence were that on 10.8.89, at about 7 p.m., at Manda shopping centre, in Kwale District of the Coast Province, jointly with another not before the court robbed Shida Zuma of the radio cassette, a bicycle, 22 pairs of lessos, 25 pairs of kangas, shs.3000/- in cash and other goods all valued at shs.12,000/- and at or immediately before or immediately after the time of such robbery fatally wounded Mutio Kyalo with a shot gun. The appellant's appeal against both conviction and sentence was dismissed by Ang'awa & Waki JJ on 12.7.96, giving rise to the present appeal.

According to the complainant, Shida Zuma (P.W.1) he was in his grocery shop at Manda with Mutio Kyalo and one Sofia Sada (P.W.2) when, at 7 p.m., two people came and ordered them to lie down. He said he saw these people with the aid of light from a lantern lamp. He said he recognised the appellant whom he had known for many years and was not a stranger to him. He also noticed that the appellant was carrying a pistol and a few moments later shots rang out and he heard Kyalo crying saying that he was dying. While the robbers were busy removing goods from the shop, Zuma escaped and proceeded to Lunga Lunga Police Station where he made a report and named the appellant as the robber. He then returned to the scene with police officers. The appellant escaped to Tanzania where he was arrested and found in possession of some of the stolen property. The complainant's account of what happened on 12.7.96 is as follows: On 12.7.96 the complainant reported to him that he had spotted the appellant and he led Olita to the place where the appellant was and Olita arrested him. He did not specify the place of arrest. According to the

complainant, the appellant was arrested in Tanzania. Tsuma Rua (P.W.3) also said the appellant was arrested in Tanzania but his evidence is not credible. We cannot place any reliance on the evidence of a witness who claims to have seen the appellant a few hours before the robbery going armed and yet took no steps to report the matter to the authorities. He also claims to have seen the appellant selling stolen goods and even that did not make him suspicious. Those two pieces of evidence are incredible and the only inference we can draw is that it was fabricated.

The issues of law in this appeal are whether the appellant was positively identified as the robber and whether he was found in recent possession of the goods stolen from the complainant. The evidence of identification, which was accepted by both courts, was that the appellant was seen by the complainant and Sofia Sada with the aid of light from a lantern. There is no evidence on the position of the lamp or the intensity of the light. In the absence of any evidence on these vital points, the claim by the complainant that he knew the appellant well does not improve the quality of the evidence of identification. Although this is more a case of recognition than identification we are not satisfied that the appellant's identification was free from the possibility of error. The complainant claims to have reported the incident immediately to the police at Lunga Lunga but there is no evidence from the police that such a report was ever made. The only report made appears to have been made some six months later on 25.2.90 at Kwale Police Station.

It was the prosecution's case that the appellant was found in possession of a number of items which had been stolen from the complainant. There is no direct evidence regarding their recovery although it was suggested that they were found at the place where the appellant was arrested in Tanzania. Nor is there clear evidence that the items which were recovered were properly identified as those of Zuma.

The evidence regarding the place of apprehension is inconclusive because police witnesses say he was arrested in Kenya and civilian witnesses on the other hand say he was arrested in Tanzania. All these matters raise a degree of doubt the benefit of which must go to the appellant. We are as much concerned as Mr. Gacivih about the need to stamp out cross-border crime, but as a court we can only assist in the effort if prosecutions are efficiently conducted.

In the end, we allow this appeal, quash the conviction and set aside the sentence and order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 23rd day of January, 1997.

R. O. KWACH

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

S.E.O. BOSIRE

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR