



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
CRIMINAL APPEAL NO.41 OF 1997

BETWEEN

CORNEL OTIENO

NELSON O. OLOO APPELLANTS

AND

REPUBLIC RESPONDENT

**(Appeal from a judgment of the High Court of Kenya at Mombasa
(Hon. Lady Justice Ang'awa & Justice Waki) dated 12th
July, 1996,
in
H.C.CR.A. NO.250 &251 OF 1995)**

JUDGMENT OF THE COURT

The present second appeal is against the dismissal by the High Court (Ang'awa and Waki, JJ.) of the appeal by the appellants against their conviction in the subordinate court by J.R. Karanja, Esq. Ag. Senior Resident Magistrate, of the offence of robbery with violence and the sentence of death passed on them by the Ag. Senior Resident Magistrate.

The facts in brief, as alleged by the prosecution at the trial, were that on the night in question, the appellants and two others went to the house of M.B where she and two others, M.J and H.C, were seated on the verandah with the electric light on. After interrogating M.B, the first appellant then said that they wanted to search her house. The first and second appellants and one of those who had come with them, each produced a pistol and because they were also dressed in what looked like military clothing, M.B believed that they were really policemen and led the appellants into her house where the second appellant in the company of the first appellant, searched and took away M.B's Kshs.800/=, a gold bracelet, a pair of gold earrings and a gold ring which were never recovered. In the course of this, the appellants physically manhandled M.B and M.J and further ordered them to follow them to the police station. Some distance away from M.B's house, the four bogus policemen in turn raped M.B.

All this happened on 28th January, 1988, but it was not until 25th November, 1988, that at an identification parade held that day, both M.B and M.J identified the second appellant as one of those who had violently robbed M.B of her money and jewellery. On 2nd December, 1988, M.B and M.J at another identification parade held that day, each identified the first appellant as one of those who had robbed M.B. In his cross-examination of the police officer who conducted the identification parade, the first appellant suggested that M.B and M.J had before the identification parade was held, been brought to have

a look at him whilst he was in hospital. Whilst no evidence was given to show how the second appellant came to be arrested, evidence was given which would also explain how that appellant came to be in hospital, namely, that an informer had pointed out the first appellant to a policeman who when questioned by the policeman, had produced a pistol which he later threw down and fled but was caught by members of the public who, beat up the first appellant and who might have been killed if he had not been saved from the wrath of the mob by some KANU youthwingers. In his unsworn statement the first appellant merely denied any knowledge of the offence with which he had been charged. The second appellant on his part, stated that he was not in Mombasa on the day the offence was alleged to have taken place.

In his judgment, the Ag. Senior Resident Magistrate held that because of the time that the robbery took, and the fact that the electric lights were on, M.B and M.J were in a position to see the appellants well and whom they each identified at the identification parades that were subsequently held. He was also impressed by the demeanour of M.B and M.J and held that the evidence they gave was not only, true but also, overwhelmingly established the guilt of the appellants of the offence that they were charged with.

On their appeal to the High Court against the conviction and sentence of the subordinate court, both appellants attacked the reliability of their identification by M.B and M.J on the ground that this took place nearly a year after the alleged offence had been committed and when these witnesses said that they had first seen the appellants. The appellants also complained that the identification parade was not properly conducted. Lastly, the appellants submitted that there was no evidence to support the allegation that they had violently attacked M.B and M.J and had moreover, raped M.J.

In its judgment, the High Court was satisfied that there was light not only, at the verandah of M.B's house, but also in the house which enabled the first appellant in the company of the second appellant to remove not only, M.B's money but also, her jewellery, a thing which could not have been done without there being sufficient light to enable it to be done, which was also sufficient by which to see who committed the robbery. The High Court having accepted the evidence of M.B and M.J that the appellants had also been armed with pistols concluded that the offence of robbery with violence had been established against the appellants and dismissed their appeal. It is this which has prompted the present appeal before us.

Mr. Ngombo for the appellant has argued two main points namely, that the identification of the appellants by M.B and M.J was not safe because there was not sufficient light at M.B's house by which the appellants could be seen, and that for this reason, the identification parades could not be said to be reliable, and secondly, that the particulars of the offence as charged were different from that which was accepted by the High Court that M.B and M.J were threatened by the pistols that the appellants showed them.

It is necessary at this stage to consider the particulars of the charge that was preferred against the appellants. The pertinent facts were that the appellants:

"... jointly with another robbed M.B of two golden necklaces, one pair of golden earrings, one bracelet, one golden finger ring and cash Ksh.800/= ... and at or immediately before or immediately after the time of such robbery used personal violence to the said M.B."

Both the subordinate court and High Court accepted the evidence that the appellants who were in each others company before, during and after the robbery, had in their hands, dangerous weapons namely, pistols which obviously constituted a threat to use actual violence on M.B. This alone is sufficient under section 296(2) of the Penal Code, even if no personal violence was actually used, to sustain the conviction of the appellants of the offence of robbery with violence and the death sentence passed on them. And if we accept as we do, the foregoing evidence that the appellants were armed and were in each other's company at the time the offence was committed, then we cannot fault the findings of the High Court or the subordinate court on this issue, for the omission to state in the particulars of the charge that the appellants were armed with dangerous weapons namely, pistols, would in the particular circumstances of this case, not occasion a failure of justice. (See section 382 of the Criminal Procedure Act). Even if we are to confine ourselves only to the particulars as set out in the particulars of the charge, that the

appellants used personal violence, there is in the evidence of M.B which both the High Court and the subordinate court accepted and which we also do, the element that the appellants physically manhandled M.B as they searched her house and robbed her of her money and jewellery and thereafter when they ordered her to go with them to the police station.

And now to the crucial issue of identification. We see no reason to disagree with the findings of the High Court and the subordinate court that there was sufficient light and time at the house of M.B to enable her and M.J to have a good look at the appellants, and sufficient contact with the appellants which would enable them to recognize the appellants if they were to see them again, and which they did even though it was about eleven months later, at the identification parades conducted by the police. We also accept that upon the evidence adduced at the trial of the appellants, these identification parades were conducted properly.

In the result we dismiss the appeal.

Dated and delivered at Mombasa this 18th day of July, 1997.

J.E. GICHERU

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

G.S. PALL

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JUDGE OF APPEAL

I certify this is a true copy of the original.

DEPUTY REGISTRAR