



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 828 & 829 OF 1993 (CONSOLIDATED)

1. SAMUEL THIURA MAINGI.....1ST APPELLANT

2. PATRICK MUTINDA MAKAU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No 82 of 1993 of the Principal Magistrate's Court at Nairobi: F A Mabele Esq)

JUDGMENT

These appeals have been consolidated.

The 1st appellant, Samuel Thiura Maingi (original A1) and the 2nd appellant, Patrick Mutinda Makau (original A2), were jointly charged before the learned Principal Magistrate, Nairobi with the offence of robbery with violence contrary to sec 296 (2) of the Penal Code. They denied the charge but were convicted after trial and sentenced to death. Their appeals to this Court are against conviction and sentence.

Briefly, the prosecution case was that on the 27th of December, 1992 at about 2.30 pm, the complainant, Alice Muoka (PW1) went to buy some chicken and chips at the Ambasadour Hotel, Nairobi. After she had bought the same, she decided to go to the ladies and in front of her were two men heading to the ladies toilets. She asked them why they were heading to the ladies and they turned on her demanding to be given some money and threatened to kill her. One of the said men whom she says was the 2nd appellant then drew out a knife and stabbed her above the right eye, while the 1st appellant took her bag in which she had Shs 120/-. The said men then pushed her into the ladies toilets and locked the door from outside before they started to run away. She screamed. Her screams were heard by William Munyao (PW4) who was then working in the hotel kitchen. He rushed towards the ladies toilets where the screams were coming from. He met with some two men, the appellants herein coming out of the toilet and he blocked their way. He called other customers to come. One of the said men attempted to jump above the wall using a wire and he got hold of him while the other was held by the other customers. One of the appellants had a bag (Ex 1) which the complainant identified as belonging to her. It had Shs 120 (Ex 2). The other man had a knife (Ex 3). Members of the public who were customers in the hotel threatened to lynch them but PC Ndungu Kamau (PW2) who was on patrol duties along Moi Avenue came to the scene, re-arrested them and took possession of the exhibits ie the bag, the money and the knife (Exhs 1, 2 & 3). They were then taken to Central Police Station where they were later charged.

On the 31st of December, 1992, the complainant (PW1) was examined by Dr Kamau (PW3) who is a police surgeon and he found that she had a wound on the left side of her head and a bruise on the base of her left thumb. The said injuries were approximately 4 days old. He assessed to degree of injury as harm and was of the opinion that a sharp object had been used. He completed the P3 form which was produced in evidence (Ex 5).

Both appellants denied any involvement in the said robbery. The 1st appellant stated that he had been innocently arrested on the material day when a group of people who were running about met with him as he and his brother were walking towards the Country Bus Station and they ordered him to sit down. One of the said men who stated that he was a police officer then took him to Central Police Station where he was charged after 3 days with the offence of robbery.

The 2nd appellant similarly denied the offence saying that he had been caught by some people who were running while he had temporarily stopped by the road side to see some newspapers and books at a road site stall. They took the money which he had together with his identity card and KANU card. They started to drag him alleging that he was a trouble maker when a police officer came and rescued him. He was then taken to Central Police Station where after 3 days, was charged with the offence of robbery which he had never committed.

The appellants challenged their conviction by the learned trial magistrate on the main grounds that:-

- 1) The learned trial magistrate erred in fact and in law in convicting the appellants on contradictory and inconsistent evidence adduced by the prosecution witnesses and in particular, the discrepancies in the evidence of PW1 and PW4, PW1 and PW3; and PW2 and PW4.
- 2) That the learned trial magistrate erred in law in failing to critically evaluate the evidence adduced by the prosecution witnesses and to appreciate that the complainant (PW1) and Munyao (PW4) were referring to two different instances.
- 3) That the learned magistrate erred in making prejudicial conclusions on the evidence adduced and failed to give reasons for his judgment; and
- 4) That the conviction of the appellants was based upon insufficient evidence.

There is no dispute on the evidence that was before the Court that the complainant was attacked and robbed of her bag containing Shs 120/- as she left the hotel where she had gone to buy some chicken and chips for

the ladies toilets behind the hotel kitchen. The incident happened in broad day light at about 2.30 pm according to the evidence of the complainant and Munyao, the hotel employee who first came to her rescue at the scene of robbery. The incident happened in an enclosed area surrounded by a wall with a wire-mesh door which was not in use. There was therefore nothing that could cause any obstruction. We are satisfied that there existed favourable circumstances for accurate and positive identification.

It was the contention of the complainant (PW1) that it was the 1st and 2nd appellants who had attacked her and robbed her of her bag containing Shs 120/- before pushing her into the ladies toilets at the said hotel. Munyao (PW4) who responded to the alarm of the complainant testified as much. In fact he says that on hearing of the screams of the complainant from the direction of the ladies toilets, he rushed there and confronted the 2 appellants as they came out of the toilets where the complainant was screaming and tried to block their way as he also called for help from other customers. He got hold of one of them who was trying to climb the wall while the other customers got hold of the other man. Thus according to the evidence of PW1 and PW4, the two men (appellants) were arrested red handed within the enclosed area of the hotel where the toilets were located. This has been confirmed by the police officer (PW3) who heard of the commotion while on patrol along Moi Avenue and went to the scene where he found the two men (appellants) who had been arrested made to sit down by members of the public who wanted to set fire on them and he rescued them. Further evidence of corroboration comes from the fact of recovery of

the complainant's stolen bag (Ex 1) containing her money (Ex 2) which had been robbed of. According to her evidence, she had been stabbed with a knife during the incident above the right eye and upon their arrest, one of the said appellants was found with a knife (Ex 3), however, the evidence was not clear as to who between the two men was found with the bag and the knife.

In our view, the defence of the appellants that they had been innocently arrested by members of the public was rightly disbelieved by the learned trial magistrate in view of the clear evidence by the complainant (PW1), PW2 and PW4 who all testified that they were arrested right within the hotel premises near the toilets.

Learned counsel for the appellants dwelt so much on certain discrepancies in the evidence of the prosecution witnesses eg whether the ladies toilet door was locked from outside after the robbery after the complainant had been pushed inside as she stated or whether it was locked from inside as stated by Munyao (PW4); secondly whether the complainant had been

stabbed above the right eye as she stated or on the left side of the head as stated by the doctor (PW3); etc. These discrepancies merits our attention in as much as we are satisfied that there was undisputed evidence on record to show that the men who had robbed the complainant as she was going to the ladies toilets pushed her into the toilets and locked the door as she was raising an alarm and that the said men had then stabbed her with a knife. Munyao (PW4) testified that he confronted the said men as they came out of the toilets and they were arrested. He then saw the complainant bleeding from a wound on the head. It does not really matter exactly where the blood was flowing from, whether it be from above the right eye or the left side of the head.

Learned counsel for the appellant tried to impress upon us that the complainant and Munyao must have been referring to two different incidents but we are unable to share his views. The evidence is clear. The witnesses were all talking of the same incident. It was one incident in which the appellants were arrested near the hotel toilets and the complainant's bag containing her money (Ex 1 & 2) recovered in their possession. The knife which they had used to stab the complainant was also recovered.

We have assessed the recorded evidence and upon our own evaluation such evidence, we believe that the same supported the offence of simple robbery contrary to section 296(1) of the Penal Code. Had the complainant not been attacked and injured, we would still have held that the offence committed amounts to no more than the offence of stealing from person contrary to section 279(a) of the Penal Code. Certainly the offence of robbery with violence contrary to section 296(2) could not be sustained but under section 179(2) of the Criminal Procedure Code (cap 75, Laws of Kenya) which permits a trial magistrate to convict on a minor offence if proved by the facts although not charged, the learned trial magistrate, in the particular circumstances of this case ought have entered a conviction under sub-section 1 of section 296 of the Penal Code.

For the reasons given, we allow the appeal against conviction under section 296(2) of the Penal Code which we hereby set aside together with the death penalty that was imposed. We substitute thereof conviction for robbery contrary to section 296(1) of the Penal Code and impose on each appellant a sentence of five (5) years imprisonment with 3 strokes corporal punishment to run from 15th of July, 1993 when they were convicted and sentenced. We further order that each of them would undergo the mandatory police supervision for a period of 5 years upon completion of sentence.

Dated and Delivered at Nairobi this 23rd day of March 1994.

E.M.GITHINJI

S.O.OGUK

JUDGE

JUDGE