REPUBLIC OF KENYA

Mutemi v Republic

High Court, at Mombasa

April 14, 1992

Wambilyanga, Omolo JJ

Criminal Appeal No. 399 of 1991

April 14, 1992, **Wambilyanga, Omolo JJ**, delivered the following Judgment.

The appellant was convicted by the Resident Magistrate Kilifi on the charge of Robbery contrary to S. 296(1) of the Penal code and was ordered to serve term of 5 years imprisonment with 5 strokes of cane. He appeals to this court against the conviction and sentence.

At the outset we find it pertinent to point out that with regard to the sentence the trial magistrate failed to order that the appellant should be under Police supervision for five years after completing the imprisonment term. That failure amounted to non-compliance with the mandatory provision in S. 344A(1) of the Criminal Procedure Code.

The facts of the case are that at 2 a.m. on 11th December 1990 Mohammed Arif Aloo (P.W.1) and his family were asleep in their Mtwapa farm house which was being guarded by a night watchman (P.W.3) when a gang of 12 intruders raided the homestead.According to the watchman the intruders who were armed with an iron pick, stones and metal bar divided themselves into smaller groups: some attacked him and grabbed him; they beat him and tied his hand with wire bands. Another group did likewise to the farm hand, Yusuf Kalume (P.W.4), who had come out of his house in response to the screams or noise made by P.W.3: He (P.W.4) was also beaten and tied with a wire band. Then the house of P.W.1 was broken into and about 9-10 people entered the house and threateningly demanded to be given money. P.W.1 told them to help themselves to whatever they wanted, and according to his evidence they robbed him of various golden rings, diamond rings, watches, golden chains and such like items. In the course of it they injured one Khan who had paid a visit to P.W.1.

It is the evidence of P.W.2 who lives in a neighbouring compound that at the same time he was awoken by noise of barking dogs and an alarm from P.W.1's compound. He armed himself with his loaded gun and proceeded to the scene. He initially fired two shots in the air with the intention of scaring the attackers. Indeed those who were inside the house started on an endeavour to flee away from the scene, and so they forced P.W.1 to surrender to them the ignition key to his car with which they escaped from the scene. It is not in dispute at all that the appellant was not one of the intruders who had stormed into the house. P.W.1. Nor is it disputed that he was shot by P.W.2 and was injured. The question is whether he was a member of the intruders who had stormed into the house of P.W.1. or was he an innocent passerby who was mistaken for a robber. When he crossexamined P.W.2 the appellant said that he had been coming from the ocean when he was shot for no reason.But later in his unsworn statement he said that at those wee hours of that morning he had just left the house of his cousin, David Mulwa, so that he could catch "a matatu to go to the market to purchase vegetables," and that on his way his attention was drawn to the house whence the noise came and that as he was there a man came and shot him. It is significant to observe here that there is a clear amount of inconsistency in the defence: was the appellant coming from the Ocean or was he coming from his cousin's house at that early morning? According to the watchman (P.W.3) the assailants had divided themselves in various groups. Some pelted stones at whoever could have attempted to foil the robbery while the others went into the house itself. It is then in the evidence of P.W.2 to the effect the man whom he shot had severally pelted stones at him despite being shot at. When considered in the contest of the whole case the evidence of both P.W.3 and P.W.2 is altogether cogent and thus discounts the suggestion and impression made by the appellant tht he was

merely injured by a man who was shooting wildly or aimlessly.On the contrary, it is clear to us that P.W.2 was largely more interested in frightening the assailants rather than in hurting them. This view is plainly attested to by the fact that when he was compelled to shoot at the appellant he only aimed at his limbs rather than the more vital areas of the body, and also by the fact that he never tried to shoot at the vehicle when it was commandeered by the intruders out of the P.W.1's compound. We also find that if the appellant had really been anxious to get to a bus/matatu stage so that he would do the business for which he had been compelled to rise from bed that much early, he would have had absolutely no reason for pelting P.W. 2 with stones. We therefore find the evidence the evidence given by the prosecution witnesses to have compellingly established that the offence of robbery had been committed as charged; and upon the clear and credible evidence of the prosecution which we have evaluated and considered in relation to the defence, we feel able to say that the inference drawn by the trial court that the appellant was a member of the gang and had thus taken part in the commission of the robbery (within the provision of S.21 of the Penal Code) was rightly done and can not be validly criticised. We therefore dismiss the appeal conviction.

In regard to sentence we find it to be reasonable and to have been warranted by the serious offence which had been committed upon the complainants.

We dismiss it save that we order that the appellant to be under police supervision for five years after completion of the imprisonment term.