REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO 55 OF 1988

ABDALLA NDURYA MWERO.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

JUDGMENT

(Appeal from the original conviction and sentence of the Resident Magistrate's Court at Mombasa, (I. Indeche Esq SRM) in Criminal Case No 1027 of 1987)

October 1989, Bosire J delivered the following Judgment.

The appellant, Abdalla Ndurya Mwero, was the second of two accused persons who were jointly charged, tried and convicted of three counts, namely, robbery contrary to S 296 (1) of the Penal Code, grievous harm contrary to S 234 of the Penal Code, and assault causing actual bodily harm, contrary to S 251 of the Penal Code. He, like his co-accused, was sentenced to concurrent imprisonment terms, together with corporal punishment, and thereafter to be under police supervision for 5 years. The appellant appealed, on the main, challenging his convictions on the basis that they were had on insufficient, unbelievable, contradictory and inadequately evaluated evidence.

There were three complainants in the case. The first one was Said Mwero Mwamboi, (PW1) who was allegedly robbed of his bicycle on 11th March, 1987, at 8 p.m. at Mwangulu village, in Kwale District. The second and third complainants were Masoud Mwaduka (PW 2) and Mwaka Mwaduka (PW 5).

The prosecution case in the court below was that PW1 was returning home on the material date when at about 8 p.m he was stopped by two people. The two people immediately started beating him. He had a bicycle on which was loaded some maize. The bicycle fell to the side. He screamed for help. PW2 and PW 5 were among the first people to respond. They went to the scene and tried to help the complainant. His assailants, however, were unhappy about that. They set on the two, namely PW2 and PW5, and landed several blows on them. As they did so PW1 escaped from the scene, and went to the area Chief. He was given administrative policemen with whom he returned to the scene. They were, however, not in time, as the two assailants had escaped. Both PW 2 and PW5 were still at the scene, or near it. They were bleeding from injuries they sustained during the attack on them by the complainant's attackers.

PW1, PW2, and PW5, all testified that they recognised their assailants. The appellant was one of them. He was a person they knew well before. PW1 testified that he had known the appellant and his confederate since their childhood. PW2 testisfied that before he was assaulted there was an argument between the appellant and his accomplice on the one hand and himself on the other. It is in evidence that the appellant and his companion took PW1's bicycle. It was later recovered near the house of the appellant's co-accused in the court below.

PW2 and PW5 were later treated and medically examined. PW2 was found to have suffered grievous harm, while PW5 suffered harm. The appellant and his co-accused were later looked for, arrested and charged. The prosecution contended that the appellant and his co-accused in attacking PW1 had intended to and did rob him of his bicycle. The appellant denied the three counts. His evidence was that he was nowhere near the scene of the alleged offences. He recalled that on 6th June, 1987, he had met PW1 with

his wife. The time was not stated. He saw and heard them quarreling between them. He did not interfere. Later PW1 came with two people and pointed him out as “the one”. He did not understand why he was being pointed out. He was arrested, detained in police custody and later charged.

The offences were allegedly committed at night time, under poor light, moon light, and along a public road. The crucial issue which was before the trial court and before me is identification.

The appellant was well known by the three complainants. He hailed from the same area as they. They were together for sometime in the course of the complained of attack. The complainants had, therefore, ample time to study their attackers. There was some light although it was not sufficient which to some extent aided their recognition of their attackers. Coupled with that in the fact that there was an argument between the appellant and his companion on the one hand and PW2 on the other. That does appear to have also helped the complainants, particularly PW1 and PW2, to recognize the appellant and his confederate by voice. There was, therefore, ample evidence before the trial court which facilitate a correct identification of the appellant.

There is also the live question whether there was a robbery. The 1st accused talked about an existing dispute between him and PW1 over some coconut trees. That could have been the motive for the attack against him. The intention to rob did not crystallize from the evidence which was tendered. The finding of the bicycle near the home of the appellant’s co-accused did not suggest that there was an intention on the part of the accused persons to permanently deprive PW1 of his bicycle. Robbery is an aggravated form of theft. Its elements are those for the theft offence with an additional element of use of force or threatened force. On the robbery count there is evidence that force was threatened, and actually applied on PW1. No medical evidence was adduced to prove injury. There is however clear and uncontroverted evidence that PW2 and PW5 suffered bodily injuries. The injuries were inflicted by the appellant and another.

The question which immediately follows is whether the two counts of assault could properly be separately charged in light of the fact that there was a count of robbery. The use of force or threatening force may be extended either before, during or after the time of the robbery to satisfy the requirements of S 296 (1) of the Penal Code. There is no requirement that where the force applied affects more than one person then assault of the second and subsequent persons should be made the subject matter of separate counts. The mens rea in the acts of assault is for the offence of robbery, and if the assault counts are treated independently of the robbery count it is my view that the accused is likely to be exposed to double jeorpardy. Consequently, I hold that the appellant and his co-accused were improperly additionally charged with two assault counts as separate and independent counts. The counts, if anything, could be charged in the alternative. They are not the sort of counts which are contemplated by the provisions of S 135 CPC or the type which would be made the subject matter of a prosecution subsequent to the determination of a robbery charged pursuant to the provisions of S 139 CPC. I have already held that the intention of the both accused was not to rob.

The conviction for robbery will not therefore stand. It is quashed. Although the appellant had been improperly charged with the two counts of assault separately, his convictions in them could be affirmed for the simple reason that they are lesser and cognate offences to the offence of robbery. Consequently, I uphold the appellant’s convictions in the 2nd and 3rd counts, and affirm the sentences which were imposed on him as to my mind they were well merited. I however set aside the sentences which were imposed on the 1st count, and the order for police supervision. I have agonized on whether a conviction for the lesser offence of common assault could be had in the first count. PW1 testified that he was beaten up by the both accused in the court below. That was before PW2 and PW5 arrived. PW2 confirmed he heard screams. Screams for help could not be made without pain being inflicted or being threatened. The evidence supports a charge of common assault. In place of the conviction in the first count, which I have quashed I substitute a conviction for common assault contrary to S 250 of the Penal Code. I impose a sentence of 6 months imprisonment which will run concurrently with the other two. The appellant’s appeal succeeds only to the extent indicated above. Otherwise it is dismissed. Order accordingly.

Dated and delivered at Mombasa October 1989

S E.O BOSIRE

JUDGE