



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: PLATT, GACHUHI & APALOO JJA.)

CRIMINAL APPEAL NO. 201 OF 1986

BETWEEN

HEMEDI SULEIMAN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Mombasa, Rauf J)

JUDGMENT OF THE COURT

The appellant, Hemedi Suleiman, was convicted on two counts of robbery contrary to section 296(1) of the Penal Code and sentenced to 10 years' imprisonment together with 10 strokes of corporal punishment as well as the compulsory 5 years' police supervision on the first count together with a concurrent sentence of 7 years' imprisonment on the second count which carried 5 strokes of corporal punishment and a further reporting order. The latter would run concurrently with the police supervision on the first count.

The essence of the case against this appellant, who was the second accused in the trial, was that he was arrested shortly after the robbery at noon on June 12, 1984. The complainant, Hussein Abdul Latiff, PW 1, was robbed of his Peugeot 504 station wagon (registration No KJW 145). He had parked his vehicle near a school in anticipation of collecting his children, when a number of young men came to his car, one of them having what appeared to be a gun, standing at the driver's door and the other putting his head through the window of the front passenger door with a long knife. He decided to leave the car.

While standing outside, the man with the pistol came and removed his watch. That man went to another motorist nearby and took from him money and medicine. Then the young men got into Mr Latiff's car and drove it away. The other complainant, Mohamed Khamis, PW 7, observed that 5 young men had surrounded Mr Latiff's car. The man with the pistol came to his car and pointing what he thought was a pistol at him demanded whatever he had. In the end he took a paper bag which had a bottle of medicine and Kshs 120 cash.

According to these witnesses the man with the gun was the fourth accused, and the man with the knife who threatened Mr Latiff was the first accused. It would thus appear that the present appellant, as the second accused, was not recognised as taking a particular part in these two offences. But as Mr Khamis observed, the gang was 5 in number who drove away in the stolen vehicle of Mr Latiff.

Mr Latiff went to a nearby house and telephoned the police reporting the robbery. He was told to go to Makupa Police Station and make a report. Mr Khamis gave him a lift in his car to Makupa Police Station which took them about 10 to 15 minutes. When they got to that police station, they were told that their car had already been recovered by the police and therefore they should go to the Central Police Station.

It happened that Inspector Kikuyu, PW 2, PC Benson Chari, PW 8, and Police Constable driver, George Otieno Owiso, PW 3, were on patrol duty along Jomo Kenyatta Avenue, when they received a radio call alerting them to the fact that Peugeot 504 station wagon registration No KJW 145 had just been stolen. Inspector Kikuyu and his team were recording this number when constable driver Owiso noticed that very car. This vehicle approached a certain round-about and the driver of the police vehicle was able to take a short-cut and follow the stolen car, the occupants of which were looking for a parking place. As the stolen vehicle reduced speed for that purpose, Police Constable Chari fired two bullets at the vehicle. The inspector also fired. As a result they broke the windscreen. The driver was surprised and jumped out as did his passenger. At this stage there were only two men in the vehicle. Inspector Kikuyu and Constable Owiso gave chase, the inspector chasing the man called the first accused, and constable Owiso chasing the second accused who is this appellant.

Constable Owiso chased the second accused towards the fire station along Biashara Street. He was helped by members of the public and two police officers in civilian clothes called Corporal Ali and Constable Mwachafu, who blocked the path of the appellant. He was thus arrested and when searched was found with a long knife covered with a newspaper which he had hidden inside his trousers. "Corporal Ali" and Police Constable Mwachafu helped to take the appellant back to the police vehicle, and the whole party together with the stolen vehicle went to the Central Police Station. In fact it was Corporal, Mohamed Said, PW9 and not Ali. When the stolen vehicle was examined a bottle of medicine was found, which Khamis recognized as the one stolen from his vehicle.

After the arrest of the appellant and the first accused they were interrogated by Inspector Dominic Ogalo Babu PW 4 at the anti-robbery office at the Central Police Station, who, together with Inspector Justus Wambugu Kwira PW 5 found pieces of broken glass in the hair of the arrested men. They took possession of these broken pieces of glass and after collecting some broken pieces of glass from the stolen vehicle, they sent the two sets to the Government Chemist for examination. It was Inspector Wambugu who prepared the sets of glass and took them to the Government Chemist and later collected the analyst's report. That revealed that the windscreen glass was of the same density and similar type of glass as that of the windscreen of the stolen car.

During the course of investigation on June 13, 1984 Inspector Tobias Miseda PW 6 recorded a caution statement from the appellant. In it, he explained his part in the affair confessing that he was one of the six persons who had robbed an Asian of the vehicle. He did not say anything about the second robbery relating to the medicine and the money and that incident did not figure in the general account. What they intended to do was to commit a robbery at a wholesale shop along Jomo Kenyatta Avenue owned by an Asian near the Lebanon round-about. They had stolen the vehicle and had driven to Kenyatta Avenue when their vehicle collided with the police vehicle, and as a result they had to run away. The appellant agreed that he had ran towards the Fire Station and was arrested by some police officers. He also accepted that he was carrying a knife.

The appellant explained in his defence, that he had been near the fire station when he heard an alarm of 'thief' being raised. He had joined the chase and he was arrested quite wrongly. On this evidence the trial court convicted the appellant; and in what can only be called a perfunctory consideration of the matter on first appeal, the High Court agreed with the trial magistrate. It is a pity that the High Court did not give the matter greater consideration in accordance with *Pandya v Reg* [1957] EA 336 because then this appeal might have been avoided.

This being a second appeal on matters of law, we have to consider whether any such issues have been raised before us. The appellant's general complaint is that the appellant was not identified by either complainant so that the only evidence against him was that given by police officers. The appellant complained in ground 1 of the memorandum that the High Court did not scrutinize the police evidence.

The complaint is fair. As far as this appellant is concerned, the High Court summed up the situation in three lines or so, saying that the 1st and 2nd appellant before the High Court

“were arrested within 10 minutes of the robbery with the stolen vehicle. The medicine stolen from PW 2 was found in that vehicle. The appellants were arrested after a shoot-out.”

The burden of this judgment is that Samwel Okwala or Okwara (who was then the 1st appellant and had been the 1st accused) and Hemedi Suleiman (who was then the 2nd appellant, and had been the 2nd accused, and is the present appellant) were in recent possession of the stolen vehicle and the bottle of medicine found in it. There was another appellant before the High Court, Joseph Mwamburi Nzai, also called Abororo, (who had been the 4th accused and had been in possession of the gun) was the one who had allegedly stolen the medicine and money.

Adopting the principles enunciated in *Pandya* above, the appellant was entitled to have the appellate court’s own consideration and view of the evidence as a whole and its own decision thereon. If the first appellate court misdirected itself as to its approach that is an error of law. In *Pandya’s case*, it was held that the first appellate court erred in that it had not treated the evidence to that fresh and exhaustive scrutiny which the appellant had been entitled to expect, and as a result affirmed a conviction resting on evidence which, had it been duly reviewed must have been seen to be so defective as to render the conviction manifestly unsafe.

There is no doubt that the High Court’s judgment does not take into account all the evidence in the case; and in particular the confession of the appellant, which has an important bearing on the second count. Generally it cannot be said to have been a fresh and exhaustive treatment of the evidence as a whole. Therefore there is involved in the appeal a complaint raising a matter of law.

It follows that it is the duty of this court to review the evidence to ascertain whether it was such that the convictions are safe; or to refer the matter back to the High Court. It is sufficient to deal with the appeal in this court.

On the first count, it is quite true that the complainants, Latiff and Khamis, did not identify this appellant in particular. Indeed neither Mr Latiff nor Mr Khamis identified on an identification parade on 14th June, neither the man with the gun nor the man with the knife, whom they said in court were the 4th accused and 1st accused. The appellant was not identified at all. Consequently the evidence against the appellant was that of the police officers who arrested him. That evidence was not substantially at variance, and must surely have been accepted. There is no reason to doubt that the police vehicle did intercept the stolen vehicle and that two men escaped from it, one of whom was the appellant. The appellant denied that he was one of those men. He said he had been carrying cabbages near the Fire Station, and falsely arrested when a thief had been chased. But there was evidence that the appellant had glass in his hair. It was examined and found to be of the same density and similar type as that of the broken windscreen of the stolen vehicle. The glass in the appellant’s hair corroborates the police evidence that the appellant had been in the stolen vehicle. He cannot have been merely carrying cabbages, but indeed he was arrested near the Fire Station. Again this evidence corroborates the appellant’s confession, (which he either retracted or repudiated) that he had stolen the vehicle as one of the gang armed with knives. Indeed, he was found with a knife wrapped in a newspaper concealed in his trousers. As a whole there is ample evidence upon which to rest the appellant’s conviction on ground 1.

On the second count, the situation is different. There is no doubt that this appellant did not take part in the robbery concerning Khamis. The only way that he can be connected with it is by a finding that he had common intent with the man with the gun, who actually carried out that robbery. Part of that evidence is that the appellant was alleged to be in possession of the stolen bottle of medicine. The appellant’s confession makes it quite clear, that the aim of the gang was to steal the Peugeot 504 station wagon near the Mombasa polytechnic, and then later take that vehicle to Kenyatta Avenue and park it there, in order to carry out the main robbery at a wholesale shop. The robbery of Mr Khamis’ property was not envisaged.

In these circumstances the question arises whether the stolen medicine bottle was actually in the appellant's possession? No doubt the man with the gun took the money and left the bottle in the stolen car. He had also taken Mr Latiff's watch as well. That had nothing to do with the appellant. By leaving the bottle of medicine behind in the Peugeot did he implicate the appellant as a passenger or the driver?

Inspector Kikuyu's evidence, PW 2, was to the effect that after the stolen vehicle had been taken to Central Police Station, it was searched and a bottle of medicine was found down on the mat near the rear seat. It is not clear whether the passenger in the front passenger seat (that is the appellant as the trial court found) had anything to do with the bottle of medicine; neither because of original possession nor sight or contact with the bottle behind him, while he was in the car. It is unlikely that the driver of the stolen vehicle had any knowledge of its being there, so far away from him. In what way then did the lower courts find that the appellant was in possession of the bottle of medicine?

The answer is that it was simply the presence of the bottle of medicine in the car. The trial court observed:-

"I am equally satisfied that after the 1st complainant PW 1 had been forced out of his vehicle at gun point and robbed of his wrist watch, a number (ie member) of the same gang went and robbed another motorist".

There is no finding that the appellant was involved in that second robbery. There is no finding of common intent or on what basis common intent could be inferred. There is no consideration whether the bottle of medicine no doubt left in the car by the 4th accused was left in the joint possession of the driver and the appellant. There is no consideration of the confession which shows that the plan was to steal the Peugeot and then rob the wholesale dealer. These were non-directions by the trial court not considered by the High Court. As such they are matters of law for this court.

Had the lower courts considered all these matters it is very unlikely that they would have found this appellant guilty of the second offence. At least, it cannot now be said that they would certainly have found the evidence sufficient to convict. It would be unsafe to uphold the conviction of the appellant on the second count.

Consequently we dismiss the appeal against conviction on count 1 concerning the robbery of the vehicle of Mr Latiff, but we quash the conviction of the appellant on count 2 concerning Mr Khamis. The sentences imposed on each count were in themselves lawful, but we set aside the sentence on count 2 which will have the effect of reducing the strokes of corporal punishment to 10 strokes as ordered on count 1. The appellant will continue to serve 10 years together with the 5 years' reporting order, because the severity of the sentence is not a matter which this court can deal with in view of section 361 of the Criminal Procedure Code.

Before we leave this judgment we were asked by the learned Principal State Counsel to remark on the alleged practice by certain trial courts of finding accused persons guilty of the lesser type of robbery under section 296(2) though charged with aggravated robbery under section 296(2) of the Penal Code.

In the present case, the charge was quite correctly reduced from capital robbery contrary to section 296(2) of the Penal Code. That is because the gang in this case threatened to use violence, and did not wound, beat, strike or use any other personal violence. Moreover, the alleged pistol was not a real weapon but a toy. Consequently section 296(2) of the Penal Code was not proved. In principle, we must agree with the learned Principal Counsel that if capital robbery is charged under section 296(2), and the evidence supports the charge, it is the duty of the trial court to uphold the law, and not to reduce the charge on so-called humanitarian reasons. It could be very embarrassing if the trial court did reduce the charge of its own accord, only to find when coming to sentence that the prisoner had previous convictions of simple robbery and that the charge of capital robbery had been properly laid.

Dated and delivered at Mombasa this 21st day of July, 1987.

H.G. PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

F.K. APALOO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.