REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI APPELLATE SIDE

CRIMINAL APPEAL NO. 427 OF 1984

(From Original Conviction and Sentence in Criminal Case No 84 of 1984 of the Senior Resident Magistrate's Court at Nairobi, E O Bosire Esq)

JOSEPH MBIRITHI ……………………………………………APPELLANT

V e r s u s

REPUBLIC ……………………………………………………. RESPONDENT

CORAM: SACHDEVA J

PORTER J

Appellant present and unrepresented, J Njongoro (State Counsel) for Respondent

J U D G M E N T

The appellant was charged in the court below with capital robbery contrary to section 296(2) of the Penal Code, for that, he, on the 1st day of January 1984, at Industrial Area within Nairobi Area, jointly with others not before the court, being armed with dangerous weapons, to wit, simis and rungus, robbed Chandra Kant Shah of one Seiko wrist watch and Cash Kshs.3,500/- and at or immediately after the time of the robbery, used personal violence to the said Chandra Kant Shah.

The alleged robbery, took place at Jambo Flour Mills on New Year's Eve, during the night shift. The mill had broken down and two of the directors, the complainant being one, had gone to effect a repair. The complainant went upstairs to get a spare part, and discovered that robbers had entered, and called for help. He was attacked by a number of the robbers and his watch and some money was stolen. During the attack, the complainant was cut on his head and wrist by the robbers, who were armed with simis and swords. His brother also was attacked, when he went to help, but was overpowered and made to lie down. According to the evidence, these two witnesses, although one of them said he knew the appellant, did not identify the appellant amongst their attackers. P W 3 went to the assistance of the Directors and was himself attacked. He was assisted by P W 4. Both of these witnesses knew the appellant, as working at a tea kiosk near the factory. It was a good light, as one would expect on the factory floor and neither witness had the slightest doubt that it was the appellant who cut P W 3 with the simi, which was then dropped, because P W 4 hit his hand with an iron bar.

The robbers then escaped through the main gate and reports and statements were made to the police. The appellant was mentioned, and as the next day and the next were public holidays, nothing was done until 3.1.84, when the appellant was arrested. The appellant said that, he was at home asleep at the relevant time, and that he was called to the factory in order to be arrested.

The learned Senior Resident Magistrate rejected this defence in view of what he considered to be a good identification at the scene. Mr Mureithi criticized this decision from a number of viewpoints. First he said there were discrepancies between the witnesses. P W 1 and P W 2 had seen him before . On analysis of the evidence which Mr Mureithi put forward as showing this discrepancy, we are of the view that, it is clear that all these witnesses were describing 2 different scenes. One scene was upstairs and off the factory floor, which is where the two directors had trouble. The other was on the factory floor under the bright lights of the factory, which is the scene where P W 3 and P W 4 were involved, while trying to get up to help P W 1 and P W 2. We have no doubt that, at the time P W 3 was saying he was struggling with the appellant, P W 1 and P W 2 had problems of their own, and would have been taking little notice of what was happening to others, even if they could see all of them, which we find not to be the case. Mr. Mureithi pointed out that, P W 2 said that he had seen all the robbers, and asked why then he was unable to identify the appellant if he was there. The answer is that things were happening in two places at once, and P W 2 must have meant that he had seen all the robbers with which he was concerned.

Then Mr Mureithi said that, arising from the fact that no description of the appellant was given to the police at the time of report, and not until after the appellant had been arrested, there was a danger that, the witnesses had seen someone like the appellant and after discussing the matter, gave his description after he was arrested. The only trouble with that argument is that, the evidence of the police officer was that, although no full description may have been given, the appellant was described to him as someone who ran a tea kiosk near the factory, which turned out to be a very apt description of the appellant. If it was the result of any discussion, then it was arrived at very soon after the event, nand the identification was in the best of circumstances, as learned Senior Resident Magistrate rightly said. We are of the view that the learned Senior Resident Magistrate was right to have excluded the possibility of mistake. We would do the same on our own assessment of the record.

Mr Mureithi points out that, the appellant says that when he was arrested he was called to the factory by P W 2 and went willingly. He says that the appellant would not have done that, if he was involved and that the learned Senior Resident Magistrate should have considered that matter. While that is so, learned Senior Resident Magistrate as it is before us, clearly considered the identification the appellant as the main matter to decide. Mr Mureithi’s suggestion that there is a danger here is based upon the difference in the evidence of P W 1 and P W 2 who said that the appellant was arrested by workers in the mill, and P W 3 and P W 4 who said that he was arrested and brought to the factory. We consider that Mr Mureithi’s distinction is based on a misunderstanding of what the record means. Looking at the evidence of P W 2, it is quite clear that the specifically denied the account of the appellant as to his arrest, and added that he was not there when the appellant was arrested. We have more than suspicion that the phrase “arrested by workers in the mill” does not mean that he was arrested in the mill, but that those who arrested him were people who worked in the mill which was true. We consider that this alleged discrepancy was not specifically dealt with by the learned Senior Resident Magistrate because, in his mind, it did not exist, for the reasons we have above given. Therefore, the appellant did not surrender himself on the findings of the learned Senior Resident Magistrate, and on our own assessment of the file, but was arrested as described by P W 3 and P W 4.

In the evidence of P W 4, it was said that, he hit the appellant with an iron bar on the hand to get his to release the knife which he had. No evidence was led as to injury to the appellant, and that was another pointer that the appellant was not involved which should have been considered. With respect, we do not feel that the evidence given necessarily implies a visible injury as Mr Mureithi suggests, and that there is no weakness in the decision here.

So far as fingerprints were concerned, the evidence is that, fingerprints could not be lifted from the available surfaces. The explanation appears sensible, and appears to have satisfied the learned Senior Resident Magistrate, as he does not mention the lack of evidence on that subject. Having considered the whole of the record ourselves, we are satisfied that the decision of the learned Senior Resident Magistrate on the central issue, that of identification, was safe, and not weakened by any of the matters Mr Mureithi has put before us. On our own assessment of the record, we have come to the same conclusions.

We are only concerned in this matter about the lack of evidence as to injuries. There is very little

difference, in fact, between the working of the two sub-sections of simple robbery and capital where actual violence is used. A practice has grown up of looking at the circumstances of the case to decide under which subsection to charge. The usual desideratum, is to proceed on the basis of the seriousness of the injuries suffered. In those circumstances, the decision rest mainly with the prosecution as to whether the accused will be on trial for his life or not. If that is the situation, then we are of the view that it is in the interests of justice that the prosecution demonstrate in the most rigorous fashion, that the circumstances are such that the death sentence is appropriate.

In this case, although there is evidence as to injuries from those involved, and it is possible to guess that those injuries were serious, there is n o medical evidence to that effect. We ourselves would rather not have to guess on such a serious issue. We are

satisfied that any magistrate could also look at the circumstances, and convict on the lesser subsection, if he thought right to do so. Where the decision involves the life or death of the accused, we are of the view that, the learned Senior Resident Magistrate is entitled to ask for the best evidence of the facts upon which he is to base his decision, and an assessment by a doctor of the injuries easily obtained and called, would represent that best evidence, giving a chance to both sides to question the doctor and his assessment of the injuries.

In default of such evidence, we would not be happy to convict on capital robbery as it was not been demonstrated for all to see, that this is a suitable case. There must, after all, be some discernible difference in sentence.

Accordingly, we would allow this appeal to the extent that a conviction under Section 296(1) is substituted. The mandatory sentence of death under Section 296(2) is set aside, and we substitute a sentence of 3 years imprisonment with 1 stroke.

S K SACHDEVA

JUDGE

DAVID C PORTER JUDGE

5th October 1984