



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

crim app 889 of 82

FRED WAFWANA APPELLANT

(Original Accused No 5)

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO 906 OF 1982

(From Original Conviction and Sentence in Criminal Case No 1720 of 1982 of the Chief Magistrate's Court at Nairobi, A Rauf Esq)

EDWARD MASESE APPELLANT

(Original accused No 1)

VERSUS

REPUBLIC RESPONDENT

CORAM: Aganyanya J

Appellant absent unrepresented

M B Mbai (State Counsel) for respondent

JUDGMENT

The appellants were charged with three other people with 2 counts of robbery contrary to section 296 (1) of the penal code. Brief facts of the case were that Ruth Mirembe (PW1) and Sam Sessanga (PW2) were on the night of 9th/10th July, 1982 sleeping in their separate but adjacent houses at Kangemi village when they were attacked by a group of people who broke into those houses and stole from there all the items stated in the charge sheet. That during the incident, appellant Fred Wafwana held a gun which he pointed at PW1 and ordered her to keep quiet. That it was this appellant who opened the main door of the house of PW1 to let in the other 4 people. That electric light from the room of Sessanga which came through an open door enabled the victims to identify Fred Wafwana and Edward Masete appellants herein. PW1 and PW2 said that the gang terrorized them and removed all personal effects from their houses before they left locking PW1 and PW2 in the houses.

Next morning the matter was reported to Kabete Police Station and on a Monday PW 1 went to the police station to check on the progress being made on her report while there she saw appellants, Edward Masete came there. She pointed him out as one of her assailants on the night of the incident. Edward was arrested.

PW1 accompanied by police were led by this appellant to his house. It was searched and Mirembe recovered there 2 pieces of her evening dress, an empty of her marstal bottle, other pieces and a shopping bag; all these items the complainant Mirembe said she identified as part of the property stolen from her house on the hight of 9th July, 1982.

From the house of appellant Edward took PW1 and police to another house where the appellant Fred was found amongst others. In that house an under part was recovered which Mirembe claimed to be amongst the property she was robbed of. Mirembe also identified Fred amongst others as one of the robbers. This appellant was arrested and taken together with Edward to Kabete police station where the charges subject to this appeal were preferred against them.

The appellants denied the charges in unsworn statements with appellant Edward Masete saying that though eh used to work as a shamba boy of the landlady, he did not commit the offence subject to this appeal. He further said that on 12th he heard that he was arrested by police and that when he went to check why, he was arrested.

Appellant Fred said he was arrested from his house and that he did not rob anybody as alleged.

The learned Chief Magistrate heard the evidence and while he acquitted the 3 other persons in the case he convicted appellants on the grounds that the appellants Masete was well known to the complainants as he used to work as a shamba boy of their landlady and therefore that there was no mistaken identity as regards this appellant.

As for the appellant Fred the learned Chief Magistrate said that the appellant was long enough with PW1 and her sister guarding them to enable them to identify him properly and satisfactorily. He sentenced each to 7 years imprisonment with 5 strokes of the cane, with prison terms to run concurrently. He also imposed on each appellant 5 years police supervision after their release from prison. So far so good.

Much as Mirembe (PW1) and Sessanya (PW2) said they saw appellants herein during the raid, it would have struck one that appellant Masete, well known to these witnesses would lead a gang of robbers to a well-limited room to risk being identified. And having done this he walks to the police station when he hears he is wanted by them – the police! Very strange happening, I should imagine!

Then there was evidence of Mirembe and Sessanya as to how they identified appellant Fred Wafwana. While Mirembe said this appellant had a gun, Sessanya said he had a gun and a knife. And though this appellant is said to have been long in the room one cannot tell whether it was that of PW1 or PW2 there is no indication as to how long he remained there to make his identity possible.

As far as the evidence went, PW1 and PW2 had separate room. And it appears the robbers first came into the room of Sessanga first. According to Sessanya's evidence the appellant Masete entered his room briefly and pointed him Sessanya to other robbers and then went out. He thus remained outside while the others carried looted property from the two rooms. At what stage then did this particular appellant enter the room of Mirembe to be identified? I do not find any answer to this question from the evidence in the lower court record.

Even though, the identity of the items PW1 purports to have recovered from the house of the appellant Masete left room for doubt. There was a woman's pant said to have been recovered in the house occupied by appellant Fred Wafwana and the 3 other persons who were acquitted by the lower court. It was not brought out by evidence who of the 4 persons occupying that house would have claimed it. At the same time, PW1 did not adequately identify those pants as hers apart from saying that there was no woman staying in the room where the pants were recovered. What kind of identification could this be? PW1 also

claimed to have recovered two pieces of similar material to her evening dress; an empty bottle with a label 282/50 written thereon in red, some other pieces similar to a material in her house and a shopping bag which she identified from its long handle from the house of the appellant Masete did not seem to have shown the lower court the materials from her house which were similar to the pieces recovered from the house of appellant Masete. And what was so special about label 282/50 written in a bottle in red ink or a bag with a long handle? There is no answer in the lower court record to those questions!

Considering all these matters and doing the best one could in the circumstances of this case it was lightly arguable that the prosecution had proved the case subject to this appeal beyond a reasonable doubt. In my view, the burden of proof required in a criminal trial was not discharged and that there was a reasonable doubt as to the guilt of the appellants herein benefit whereof ought to have been given to them. In view of the foregoing, I would allow these appeals, quash convictions and set the sentence aside, which I hereby do.

Unless otherwise lawfully held, appellants should be released from prison forthwith.

Dated at Nairobi this 28th day of March, 1983.

DKS AGANYANYA

JUDGE

28.3.1983