



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO 706 OF 1982

(From original conviction and sentence in criminal case No 199 of 1982 of the Chief Magistrate's court at Nairobi).

MOSES OBUTE SHIKUKU.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant was convicted by the learned Senior Resident Magistrate, Nairobi, of the offence of preparation to commit a felony contrary to section 308 (1) of the Penal Code (cap 63) and was sentenced to 3 years' imprisonment.

Section 308(1) of the Penal code (cap 63) provides for a mandatory statutory minimum sentence of 10 years imprisonment together with corporal punishment and under section 344(A) of the Criminal Procedure Code (cap 75) it is provided that if a person is convicted of an offence under any of the sections 278, 296, 297, 303 or 322 of the Penal Code, he shall be subject to police supervision for a period of 5 years from the date of his release from prison. The learned Senior Resident Magistrate seems to have overlooked both these mandatory provisions in the law.

Briefly the facts of the case are that at about 9.00 a m on 22nd January this year, 6 gangsters who were armed with 3 pangas, an iron bar, a big piece of wood, chilli powder and a rope entered P W 2's house in Nairobi South C. There they attacked her house servant (P W 1) who was in the kitchen downstairs while she herself was in the bathroom upstairs. The house servant raised alarm. The appellant was one of the gangsters and he was the one who actually attacked P W 1 had managed to wrestle the panga from his hand. As a result of P W 1's shouts for help, the appellant's 5 companions ran away while he and P W 1 prevented him from doing so with the help of P W 3 who worked as a house servant in P W 2's neighbour's house. The matter was then reported to the police who came to the scene, and collected the appellant together with the 3 pangas, the piece of wood, the rope, chilli powder, the iron bar and the pair of sandals which the appellant and his companions had been carrying (exhibits 2 to 7).

The appellant made a short unsworn statement in his defence. He stated as follows:

“I am Stephen Obute Shikuku. All these allegations are untrue. I leave it to the court to decide. That is all.”

Now the incident took place around 9.00 a m in broad day light. The appellant was identified by P W

1 as a member of an armed gang of 6 men who attacked him inside his employer's house. According to him, the appellant was the one who actually attacked him with a panga and a piece of wood and when the other members of the gang ran away he managed to prevent him from escaping with the help of a neighbour's house servant (p w 3). P W 2 saw the appellant fighting with P W 1. She heard his cries for help and she saw him arresting the appellant with the assistance of P W 3. She also saw 3 young men jumping over her fence. P W 3 actually assisted P W 1 in preventing the appellant's escape. I am satisfied that there was no mistake as to the identity of the appellant and that he was one of the members of the armed gang that attacked him.

The learned Senior Resident Magistrate was satisfied that the charge against the appellant had been proved and she was also satisfied that the appellant and his companions had gone into the complainant's (P W 2) house with intent to commit robbery.

Upon my own evaluation of the evidence before the Senior Resident Magistrate, I am satisfied that she arrived at a correct decision when she convicted the appellant as charged. The appellant's appeals against conviction is entirely without merit and it is accordingly dismissed.

As to the sentence I have stated earlier that the learned magistrate overlooked the mandatory provisions of minimum statutory sentence under section 308(1) of the Penal Code and supporting Order under section 344(A) of the Criminal Procedure Code. The compliance with the mandatory provisions of the law can in my view be effected without the necessity of serving a notice of enhancement on the appellant. Accordingly I set aside the illegal sentence of 3 years' imprisonment imposed by the learned magistrate and in lieu thereof I sentence the appellant to the minimum statutory sentence of 10 years' imprisonment with one stroke of corporal punishment. He shall be subject to police supervision for a period of 5 years from the date of his release from prison.

Delivered at Nairobi this 5th day of November, 1982.

P S BRAR

JUDGE

(CORAM: BRAR J)

(Appellant absent, not wishing to be present and unrepresented,

B M Mbai (State Counsel) for Respondent