



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KOOME & OKWENGU, JJA)

CRIMINAL APPEAL NO. 693 OF 2010

BETWEEN

ALI SHABAN ALIAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Mombasa (Ojwang , J.) dated 9th November, 2009

in

H. C. Cr. A. No. 126 of 2007)

JUDGMENT OF THE COURT

The appellant herein ***Ali Shaban Ali***, was tried and convicted for the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The facts as stated by the two lower courts below were that, on 22nd November, 2005 at about 1.00pm at Mtopanga Village, Bamburi Location in Mombasa District within Coast Province jointly with others not before court while armed with an offensive weapon namely knife robbed George Omondi of one mobile phone make Nokia 8210 valued at Kshs.11,000/=, a poach containing Kshs.100/= and at immediately before or immediately after the time of such robbery threatened to use actual violence to the said George Omondi Oliech.

The prosecution called a total of four witnesses and after hearing their evidence as well as the sworn evidence of the appellant, the Learned Senior Resident Magistrate (T. Mwangi) at the Chief Magistrate Court in Mombasa found the appellant guilty of robbery with violence and sentenced him to death. He appealed to the High Court but by its judgement dated and delivered at Mombasa, on 9th December, 2009, the High Court (M. Ibrahim & J. B. Ojwang, JJ) dismissed his appeal. Being dissatisfied by the dismissal of his appeal by the High Court, the appellant now comes to this court by way of second and possibly final appeal. The appeal came up for hearing before us on 17th July, 2012, when Mr. J. S. Mushelle appeared for the appellant while Mr. Jacob Ondari (Assistant Deputy Public Prosecutor) appeared for the State.

The evidence adduced by the prosecution and as accepted by the two courts below, is that on 22nd November, 2005 at about 1.00pm, George Omondi Oliech (PW 1) (George) an electrical technician at Campaign Salvation Ministry Church in Mombasa, was proceeding on foot from his house at Kisauni Bhakarani to Mtopanga. When he reached Bachir Primary School compound, he saw three people ahead of him, two of them were seated while one was standing. On seeing George, the man who was standing started walking towards him, from a distance of about 15 metres, and when the man was two or three metres short of reaching George he drew a knife and ordered him to surrender everything he had. The knife was a kitchen knife which George identified in court. A struggle ensued between George and his attacker resulting in his thumb being cut. At that moment, the attacker's companions came along running and one of the two (deceased) removed a phone Nokia 8210 and a wallet from George's pocket. The wallet contained Kshs.100/= in 50/= notes. The three attackers ran away immediately after robbing him. George decided to go after his attackers, and screamed, thereby drawing members of the public who helped him in the chase. Two of Georges' attackers were arrested by the public, while one escaped. The appellant was found with the knife and George identified him as the one he was struggling with before the other attackers joined. George also told the court that the one who robbed him of his mobile phone and wallet was also arrested and was wearing two pairs of trousers. He was assaulted by members of the public and George learnt later that he died before being taken to hospital from the Police Station.

Mr. Osman Omkono Mkhoha (PW2) (Osman) testified that on 22nd November, 2005 he was asleep in his house when he heard noise from outside with people screaming "thieves, thieves". He woke up and proceeded to the scene where he found two escaping men being battered by members of the public. He managed to save one of the men (the appellant) from the angry mob and took him to the community policing. The other was searched and a mobile phone and wallet were recovered from his pocket trouser. He succumbed to the beating and later died. Osman testified that George was part of the crowd and that at that moment identified the appellant as the man who stabbed him. Osman called the police who then re-arrested the appellant herein and the deceased.

Mr. Abas Abdalla (PW 3) (Abas) a community policing officer based at the Chiefs office at Bakarani confirmed that a mobile phone was recovered from the attacker who was killed while a knife recovered from the man he rescued, the appellant. Abas also told the court that at the time of rescuing the appellant from the crowd George pointed the appellant as one of the suspects.

Police Constable Samuel Mwandogo (PW 4) (Samuel) testified that he was the investigating officer in this case. That on 22nd November, 2005 he was summoned to Mtopanga where information had been received that thugs had been arrested. Samuel confirmed that another suspect had since died after being assaulted by members of the public. He rearrested the appellant and took him to hospital. Samuel also collected exhibits in form of a kitchen knife, a cell phone (Nokia 8210) and a wallet containing Kshs.100/= in 50/= notes.

When put on his defence, the appellant made a sworn statement to the effect that on the material day at about 1:00 pm he had gone to the shop where he saw six people approach him. One of them was Omar Chai a leader of vigilante youth. The appellant told the court that he had differed with the said Omar who had threatened to teach him a lesson. He was assaulted by a mob and lost consciousness only recovering much later and finding himself in hospital. The appellant blamed the said Omar Chai for his arrest.

Being a second appeal, only points of law fall for the consideration of this Court – see **section 361 (1)** of the Criminal Procedure Code. ***Njoroge vs Republic (1982) KLR 388***, this at **page 389** held,

"...On this second appeal, we are only concerned with the points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence..". See M'Riungu vs Republic (1983) KLR 455.

Mr. Mushelle , learned Counsel for the appellant, submitted that the appellant was convicted based on reliance on a defective charge. In this regard he highlighted the case of ***Yongo vs R [1983] KLR pg. 319***. He also submitted that the appellant was arrested by the public not knowing whether he was the robber or a victim. He further contended that no identification parade was conducted and that there was

only doc identification. He also alleged that the knife recovered should have been taken to the government chemist for examination and submitted further that no witness saw the knife being recovered from the appellant. Mr. Mushelle argued that there was possibility of mistaken identity. He prayed that that appeal be allowed.

On the other hand, Mr. Ondari, learned State Counsel opposed the appeal and submitted that the appellant was arrested after robbing and attacking the complainant. The robbers were chased and the complainant did not lose sight of the appellant. Therefore the issue of identification does not arise and that the High Court had extensively scrutinized and addressed the same issue. He further submitted that there was no material conflict between the charge, and evidence adduced in court.

Based on the foregoing it is our opinion that the following issues arise for determination by this Court:

1. Was the identification of the appellant which formed the basis for his conviction proper and free from error?
2. Was there a link between the knife recovered and the appellant?
3. Was the charge fatal and incurably defective?

The issue of identification was extensively addressed by both the Magistrate's Court and the High Court. First it was clear that the incident took place during day time. The appellant confirmed this by saying he was arrested at about 1.00 p.m. The complainant, George was very categorical that the attacker who was standing and who first confronted him was wielding a kitchen knife which he used to cut his thumb was none other than the appellant. It was broad day light and the complainant had only three people in sight there being no crowd at that time. In describing what the appellant was wearing the High Court observed that:

“cross examination, the common law system's special device for getting at the truth, elicited from the complainant the evidence that he had identified the appellant by his white shirt with red stripes, and by the hat he was wearing”.

The High Court made further conclusions that it emerged from cross examination and from other evidence that the complainant wasted no time after his attackers took off, he went in hot pursuit, chasing and calling out to members of the public who intercepted and arrested two of the attackers including the appellant. It also emerged from cross-examination that members of the public arrested the attackers and even recovered the effects. The complainant caught up with them at Mtopanga Estate where he loudly identified the suspects as his attackers. The High Court after re-evaluation of the evidence concluded that the kitchen knife was recovered from the appellant, and the cell phone and wallet were recovered from the deceased. PW 3 was clear that the complainant had pointed out the appellant to members of the public as one of the suspects.

In conclusion the High Court observed that;

“All these instances make in our opinion, an unexceptionable case, with strong attributes of veracity, that PW 1 (complainant) did very well identify the appellant herein as one of the robbers who attacked him”

In view of the above conclusion by the High Court and although identification of the appellant was that of dock identification, we observe that the two courts below did believe the evidence of identification by George which even to us is clear and consistent. We find that neither of the two courts below erred in holding that the appellant was properly identified as the attacker.

The second issue relates to whether there was a link between the knife recovered and the appellant. The appellant in his ground of appeal and as argued by his advocate submitted that the alleged

knife was not taken to an expert to prove that the same was used to stab the complainant during the alleged incident. He highlighted **section 109** of the Evidence Act which states that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

We also find it imperative to address this question because the proof for the offence of robbery with violence as provided in **section 296 (2)** of the Penal Code are; that the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.... See ***Jothana Ndunge vs Republic, Cr.Appl. No.116 of 1995*** unreported.

The High Court in re-evaluating the evidence made various observations in this regard. First, it concluded that the complainant was certain that of the three men he met near Bachir Primary School he was very categorical that the one who first confronted him was **wielding a kitchen knife** which he used to cut him. Secondly, the complainant caught up with them at Mtopanga Estate and he loudly identified the suspect and **declaimed the hurt they had just caused him**. Thirdly, the High Court observed that the knife alleged to have been used was produced as an exhibit in court and was identified by the complainant. In the circumstances, and based on the foregoing, we are inclined to believe the concurrent findings of facts arrived at by the courts below and agree to be bound by them.

Finally, Mr. Mushelle argued that the charge was defective citing the case of ***Yongo vs Republic (1983) KLR 319***, he submitted that there were major contradictions between the evidence adduced in court, and the charge. He also argued that the charge of robbery with violence was not proved in the absence of verification of the knife allegedly used as the weapon.

Having examined the record, we find no material contradiction between the charge, and the evidence adduced in court. With regard to the ingredients that constitute the offence of robbery with violence, as we have stated on so many occasions in the past, there are three ingredients, any one of which is sufficient to constitute the offence of robbery with violence under **section 296 (2)** of the Penal Code. If the offender is armed with any dangerous or offensive weapon or instrument that would be sufficient to constitute the offence. Secondly, if one is in company with one or more other persons or persons that would constitute the offence too. And lastly if at or immediately before or immediately after the time of robbery he wounds, beats, strikes or uses any other violence to any person that would be yet another set to constitute the offence. In the present appeal evidence was adduced and accepted that the appellant wounded the complainant in the process of attacking him. That falls in the second and third categories stated above. Clearly the offence of robbery with violence was committed.

In view of the above, we are satisfied that the charge was not defective since the prosecution relied on the fact that the appellant was, at the time of robbery, in company with one or more other persons, and also that the appellant wounded the complainant during or immediately after the robbery. We must therefore reject Mr. Mushelle’s submission to the effect that the charge was defective.

Accordingly, and for reasons outlined, we find that there is no merit in this appeal, and the same is dismissed. In the absence of Okwengu, JA this judgment has been given pursuant to **Rule 32 (2)** of this Court’s Rules.

Dated and delivered at Mombasa this 24th day of January, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR