



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: O’KUBASU, WAKI & ONYANGO OTIENO, J.J.A.)

CRIMINAL APPEAL NO. 98 OF 2009

BETWEEN

FANUEL OTIENO OMIDOAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from the High Court of Kenya at Mombasa (Sergon, J.) dated 12th May, 2009

in

H.C.CR. APP. NO. 311 OF 2004)

JUDGMENT OF THE COURT

This is second and last appeal. The appellant, *Fanuel Otieno Omido*, was together with another, arraigned before the Senior Resident Magistrate’s Court at Kwale, with two offences of robbery with violence contrary to **section 296 (2)** of the Penal Code, one count of burglary contrary to **section 304 (2)** and stealing contrary to **section 279 (b)** both of the Penal Code, and three counts of assault causing actual bodily harm contrary to **section 251** of the Penal Code. He pleaded not guilty to all the counts, but after full trial, the learned Senior Resident Magistrate (L.N. Mbatia) found him guilty and convicted him of the two counts of robbery with violence and of the count of burglary contrary to **section 304 (2)** and stealing contrary to **section 279 (b)** of the Penal Code. He was sentenced to death in respect of each of the two offences of robbery; was discharged in respect of the burglary charge and was acquitted in respect of all the three assault charges. His co-accused escaped before the trial commenced and as far as the record shows, has not been apprehended and prosecuted for the offences.

The particulars of the first count, which was a robbery charge, were as follows:-

“On the night of 15th/16th February 2003, at Mazeras trading centre, Kasemeni location in Kwale District within the Coast Province, jointly with others not before Court being armed with dangerous weapons namely pangas, stones, iron sheets, bows and arrows robbed off (sic) William Mwangi mobile No. 0722482931, remote control and Ksh.4,000/- all to the total value of Ksh.20,000/- and at or immediately before or immediately after the time of such robbery wounded the said William Mwangi.”

The particulars of the second robbery charge were that:-

“On the night of 15th/16th February 2003, at Mazeras trading centre Kasemeni location in Kwale District within Coast Province, jointly with others not before court, being armed with dangerous weapons namely pangas, stones, iron bars and arrows robbed off (sic) ABDI MOHAMED one wrist watch make SEIKO valued at Kshs.800/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Abdi Mohamed.”

In respect of the burglary and stealing charge, the particulars were as follows:-

“On the night of 15th /16th February 2003 at Mazeras trading centre Kasemeni location in Kwale District within Coast Province, jointly with others not before court, broke and entered a dwelling house of Nganasa Mona Bwingo with intent to steal from therein and did steal cash Kshs. 66,600/= and a torch all to the total value of Kshs.66,715/=, the property of the said Nganasa Mona Bwingo.”

As the appellant was acquitted of the assault charges, we will not reproduce particulars of those charges in this judgment as they are not the subject of this judgment.

In convicting him of the three charges, the learned Magistrate stated inter alia:-

“The accused was in a gang of robbers that was armed with crude and dangerous weapons and that attacked and injured people in the cause of robbery. The ingredients of S. 296 (2) Penal Code have therefore been satisfied.

I find him guilty of (sic) charged of the two counts of robbery with violence contrary to section 296 (2) of the Penal Code (count one and two).

I do not know why the Public (sic) chose to charge the accused with burglary and stealing in regard to the robbery from the shop yet the ingredients of S. 296 (2) have also been satisfied in respect of that offence. It is during the breaking to the shop that they attacked PW2, PW3 and PW4 with stones and arrows. However, I find the accused guilty as charged of that count and convict him accordingly.”

The appellant was not satisfied with the convictions and death sentences. He moved to the superior court vide High Court Criminal Appeal No. 311 of 2004. That appeal was also dismissed with only one small variation as to the sentence. The sentence of death on the second count was left in abeyance. The superior court stated:-

“The upshot is that the case against appellant on the counts upon which he was convicted was proved beyond reasonable doubt and he was properly convicted.”

That is the decision that has prompted this appeal before us.

On the night of 15th and 16th February 2003, at about 1.00 a.m. William Mwangi Njoroge (PW1) then a teacher at Mnyenzi Primary School, was in his house, in the bedroom. Abdi Mohamed (PW8) was also in his house. Njoroge was awake. At that same time, his neighbour in the same plot, Ousmane Hussein (PW2) who worked in a slaughter house was outside his house as he had not slept. He was joined outside the house by Omar Ndegwa (PW3) – a taxi driver who lived nearby and had a hotel in the vicinity and Rumba Mkusi (PW4), a watchman guarding a shop which was owned by one Hawae and which shop was also in the same area. Those three outside the house were chatting. As they were there talking to each other, each of them said they saw about fifteen (15) people approaching the plot where they were. Those people came from Mazeras side. They ordered Hussein, Ndegwa and Mkusi to lie down, but the three refused. They started breaking into the shop while at the same time they threw stones at the three witnesses who responded by throwing stones at them also. Guni Badi (PW10) a youth-winger who also doubled as a watchman guarding the area, shot at the intruders with arrows and hit one of them. They ran back but re-grouped and made a fresh attack at the shop and during that time some of them, after breaking the shop went into the house of Njoroge and some to the house of Abdi Mohamed Gurachu. That left some of the gang outside breaking into the shop still and engaging the members of the public which included Nyale Luganje (PW5) in stone throwing and beating. Njoroge, who could not sleep that night because he was being disturbed by safari ants, heard noises outside. He went to check what was happening but as soon as he realized the noise was not normal, he went back into the house and into his

bedroom and locked himself there. He heard people shouting and saying “*Kill and place the corpses aside.*” He heard someone telling another to jump over the gate and open the gate. Some of them went inside; Njoroge’s door and started cutting the metal grill door with axes and hammers. They entered the sitting room and went to the children’s bedroom. After sometime, they hit the door to the bedroom with a hammer and they entered the bedroom where Njoroge was; ordered him to lie down. He obeyed and one of the attackers stepped on him as others were ransacking his boxes. One said Njoroge should be killed but as the other raised a panga to kill him, his wife screamed. They demanded money and he was robbed of Ksh.46,000/= which was in the box and a cell phone worth Ksh.3,600/=; a remote control and a TV. Before they did more harm to Njoroge, one of them said there was a problem and all those in Njoroge’s house ran out. About that time, Njoroge heard a gun shot and somebody outside asked Njoroge if he was well to which Njoroge answered positively. Thereafter, Njoroge went outside his door and found the man who had stepped on his head and who had a hammer had been shot dead and was lying at the door. Abdi Mohamed (PW8) had been outside chewing miraa, but just as he returned to his house within that same area at about 1.30 a.m., he heard many footsteps. He opened the door and saw many people. He thought they were youth wingers (which he called sungu sungu). He asked what the problem was but already those people were on him. One pointed an arrow at him and ordered him to stop, go back into the house and shut up. One of them accused Mohamed of having a gun and on that basis sent for another robber who had a hammer to report there and kill him. Son of a neighbour of Mohamed came running there and the thugs chased him away. As they did so, Mohamed seized the opportunity and ran into his children’s room but that was after his Seiko 5 watch had been stolen by the attackers. They followed him into the house but Mohamed’s son told them Mohamed had ran out and they did not find him. He heard a lot of commotion outside and he heard gun shots. He then went outside as he knew police had come when he heard gun shots. He found one of the thugs had been shot dead. Another had been apprehended by members of the public who lynched him. When a part of the gang of thugs was robbing Njoroge and the other part set on Mohamed, another part was breaking the shop and beating up members of the public. Ousmane Hussein was one such victim. As we have stated above, he was outside his house at the material time with others. He observed Guni Badi shoot at the thugs with arrows and observed the thugs running off but regrouping again and confronting them together with Guni Badi. He and Guni ran to the Administration Police Camp which was about 100 metres away and reported the incident to APC Peter Jumma (PW6) and his colleague APC Fumo Omar Hiribae (PW7). Together with those two administration police constables who were armed, Hussein and Guni returned to the scene. They found the thugs still in the act of robbery and some were still in Njoroge’s house as the other group was in Mohamed’s house. APC Jumma said in evidence that as they approached the scene, they saw many people who had very strong torches breaking into a shop. Some had pangas and some had bows and arrows. The thugs started shooting at the police constables, Hussein and Guni. In response APC Jumma and APC Fumo Omar Hiribae opened fire. APC Jumma fired six rounds of ammunition while APC Fumo fired thirteen bullets, killing one of the attackers on the spot while one was injured but ran away with injuries. The thugs ran away to different directions. One however ran back into the building and went into Hussein’s house. Members of the public together with Administration Police Officers went into the house and flushed him out. That man was arrested by the police. Members of the public wanted to kill him as well but the police officers saved his life. He was identified by Njoroge, Hussein, Omar Ndegwa, Mkusi, Liganje, Abdi Mohamed and Guni Badi as the appellant. There were contradictions as to where he was actually found whether at the door of Hussein’s house or hiding in a room within the building and whether he was found with a panga or not, but one fact was certain and confirmed by the appellant in his defence during his cross-examination of witnesses when he raised the question of his having been only a good Samaritan and in his main defence when he said he had gone there in search of a medicine man, and that fact is that he was found at the scene of the robbery that night. After his arrest, he was taken to Mariakani Police Station and later charged in court as stated earlier in this judgment.

At the hearing of his case, the appellant in his extensive cross-examination of all material witnesses raised the issue as to whether or not he went to the scene in response to the alarm raised by the victims to assist them - what is known as a good Samaritan. However in his unsworn defence he stated that his sister had been sick at his rural home and he was sent to one Mzee Kachima Mwiyo who lives in Mwezeni Mombasa to collect medicine for her. He travelled from Nairobi to Mazaras arriving there at 10.30 p.m. and went to Mwiyo’s sons house, in an attempt to trace Mwiyo, but he was told he had gone to Kasemeni. He then proceeded to Kasemeni. As he neared Kasemeni he heard people shouting and three

of those people approached him and spoke to him in Kiswahili. Those people then called him “*mtu wa bara*” (a man from upcountry) and started beating him. They took him to an empty room and left him there. He heard gunshots. After a while police officers opened that door and one member of the public hit him on the head. People gathered there and wanted to lynch him but police prevented them from doing so. He was taken to hospital and eventually to Taru Police Station and was charged in court with the offences he knew nothing about.

The above are the salient facts of the entire case albeit in a summary. We do not apologise for the length of the summary of those facts as we deem it necessary for the proper understanding of the appeal before us.

Mr. Ojode, the appellant’s learned counsel, in his submissions before us said he relied on the supplementary grounds of appeal filed on 16th July 2010 but abandoned the second ground of those grounds. Those grounds are difficult to comprehend as the drafting of them left a lot to be desired. They were altogether four but as the second was abandoned, the remaining three were as follows:-

“1. *The learned Judge erred in law to note and consider that no proof of actual violence was committed during the alleged robbery.*

2. (Abandoned).

3. *The learned Judge erred in law to note and consider that the weapons marked for identification were not actually found at the scene of the alleged crime.*

4. *The learned Judges erred in law in failing to note that there was contradictory evidence of prosecution witness (sic).”*

In his address to us, Mr. Ojode’s main contention was that the first appellate court did not analyse and evaluate the evidence adduced before trial court a fresh with the result that it did not consider issues on identification which was lacking in this case; and did not consider that exhibits, though identified during the hearing of the case, were not produced; did not consider that alleged violence visited on the complainant was not proved, and lastly that there were several contradictions in the evidence of the prosecution witnesses particularly as to whether the appellant was found with a panga or not and where exactly he was found within that building. Mr. Ondari, the learned Assistant Deputy Prosecution Counsel, on the other hand supported the conviction and sentence. He referred us to the evidence of the first, second, third, fourth and fifth witnesses which, according to him, proved that the appellant was among the attackers. He conceded that exhibits were marked for identification but were not produced as the proceedings ended prematurely when the court refused adjournment, but submitted that even in the absence of the exhibits, the ingredients of robbery with violence under **section 296 (2)** of the Penal Code were proved as the attackers were more than one. Finally, Mr. Ondari referred us to the judgment of the first appellate court (found at pages 69 to 72 of the record) and submitted that the superior court properly analysed and evaluated the available evidence and that it did consider contradictions in the prosecution’s evidence at the trial but found that notwithstanding the contradictions, there was still sufficient evidence upon which conviction was properly entered.

In our considered view, the resolution lies on the understanding of the ingredients of **section 296 (2)** of the Penal Code as read with **section 295** of the same Code, together with a finding on whether or not the appellant was proved to have been one of the robbers some of whom attacked and robbed Njoroge as others robbed Abdi Mohamed while some broke into the house of Nganasa Moma Bemwingo.

Although this Court has stated it many times that all the ingredients of the offences of robbery with violence contrary to **section 296 (2)** need not be proved in order to convict a suspect of the offences, and that proof of any one of the ingredients is enough for a conviction to ensue, we do not find it odd to repeat it here as Mr. Ojode did raise certain matters in the supplementary grounds and during his address that indicated that such repetition may very well be necessary. **Sections 295 and 296 (2)** of the Penal Code state as follows:-

“295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained is guilty of the felony termed robbery.

296 (1) not relevant

296 (2) If 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, he shall be sentenced to death.”

Thus for purposes of **section 296 (2)**, if the offender under **section 295** is:-

(a) Armed with dangerous or offensive weapon or

(b) Is in company with one or more other person or persons, or

(c) Immediately before or immediately after the time of robbery he wounds, beats, strikes or uses any other personal violence to any person,

he would be convicted under **section 296 (2)** of the Penal Code once any one of the ingredients is proved and there is no need to prove all the ingredients. In the case of ***Johana Ndungu vs. Republic, Criminal Appeal No. 116 of 1995***, this Court stated in details what proof was necessary for conviction in cases of robbery with violence under **section 296 (2)** of the Penal Code. It stated:-

“In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s. 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s. 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

(1) If the offender is armed with any dangerous or offensive weapon or instrument, or

(2) If he is in company with one or more other person or persons, or

(3) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”

We have gone to this length because Mr. Ojode’s contention was that as exhibits were not produced though marked and as there was no proof of injury to the victims, the offence as charged was not proved. In our view, it was clearly demonstrated by almost all witnesses that the attackers were more than one. Some witnesses put the number at 15. Njoroge’s house and Abdi Mohamed’s house were certainly invaded by more than two robbers. That alone was enough to prove the offences and even if exhibits were not there, the fact that Njoroge and Abdi were invaded by more than one person and their properties stolen in the course of that invasion was enough to prove the case under **section 296 (2)** of the Penal Code. Again whether the injuries were proved or not, the mere number of the robbers being more than one was in itself enough ingredient to prove the offence.

The next question to deal with is this: the court having found that on the fateful night more than one person attacked Njoroge and Abdi Mohamed and stole their various properties, was the appellant in company with the other persons? In short, was he one of the robbers? That is now a matter of identification. As we have stated above, the appellant, in his cross-examination suggested through his questions to the witnesses that, he was there but as a good Samaritan only and not as a robber. In his unsworn statement, his version was considerably altered and this time he was there or near that place in

search of son of a medicine man who was to give him medicine for his sister suffering up country. Either way he admitted he was there. The witnesses flashed him from one of the rooms in the building soon after the other robbers ran away. Hussein said the appellant was found in his (Hussein) house. There was no evidence that he permitted him to be in his house. The neighbours of Njoroge and of Hussein did not know him. He was found there immediately after the robbers were forced to flee. His explanation was rejected by the trial court and the first appellate court, after analyzing it and evaluating it confirmed the finding of the trial court on that aspect. It is a matter of fact whether he went there as a good samaritan or in search of a medicine man. Under the provisions of **section 361 (1)** of the Criminal Procedure Code, we have no jurisdiction to interfere with findings of fact unless it is demonstrated that there were no reasons whatsoever to sustain such a finding. Here the learned Magistrate carefully analysed what the appellant suggested through his cross-examination and compared it to his defence and made a finding that his stories could not be believed. The superior court also came to the same conclusion after full analysis and evaluation of the evidence. We do not have any reasons to interfere with those findings. The time of robbery was about 1.30 a.m. He was accompanying the robbers. What for? Obviously he was one of them and thus would be, in law held guilty of whatever any of them did in furtherance to the robbery.

There was also a complaint that contradictions were not analysed and evaluated. We do agree that there were contradictions on whether the appellant had a panga or not at the time he was found. There was also contradiction as to where he was found in the premises. Upon our full perusal of the judgment of the superior court, we, with respect do not agree with Mr. Ojode on this point. At page 73 of the superior courts judgment, that court states in part:-

“Two of them were killed and he participated in flashing out the appellant. His evidence was somewhat in conflict with that of PW4, Rumba Mkusi, with respect to whether the appellant was armed with a panga or not and whether PW5 snatched the panga from the appellant both of which PW5 denied. We have appreciated that conflict and have come to the conclusion that the conflict did not weaken the case presented by the prosecution against the appellant. The conflict did not also negate the evidence that the appellant was flashed out of PW2’s house.”

That was certainly analysis and evaluation of conflicting evidence. We agree that whether the appellant had a panga or not was neither here nor there as he was in company with other robbers two of whom were killed in the act. Further whether he was found in a room in which he alleges he was locked or in Hussein’s house or even at the door of one of the rooms is also of no consequences in so far as he was one of the robbers and that was proved, in our view beyond reasonable doubt. We also hold that the burglary and stealing charge was also proved as it was done by a gang of which he was a member. We think however, that those charges ought to have been dismissed as they arose in consequence of the main charges of robbery with violence. We now set aside the conviction of those counts and now do so.

The totality of all the above, is that we find no reason to interfere with the decisions made by the trial court and confirmed by the first appellate court save to the extent stated above. The sentence was properly corrected by the superior court and we say no more on that. This appeal cannot stand. It is dismissed.

Dated and delivered at Mombasa this 4th day of March, 2011.

E. O. O’KUBASU

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR