



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT MOMBASA

(CORAM: WAKI, ONYANGO OTIENO & VISRAM, J.J.A)

CRIMINAL APPEAL NO. 365 OF 2010

BETWEEN

HAMISI IDD MWATABU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(An appeal from a Judgment of the High Court of Kenya at Mombasa (Azangalala & Odero, J.) dated 13<sup>th</sup> September, 2010*

*in*

*H. C. Cr. A. No. 63 of 2008)*

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JUDGMENT OF THE COURT

*Hamisi Idd Mwatabu*, the appellant herein, was charged before the Senior Resident Magistrate's Court at Kwale with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of the offence were that on the 21<sup>st</sup> day of September, 2006 at about 7.00 p.m., at Mrururni village of Diani Location Kwale District within Coast Province, with others not before court while armed with a dangerous weapon namely a knife he robbed OMAR BARAZA, a mountain bike valued at Kshs.4,900/= and at or immediately before or immediately after the time of such robbery used actual violence to the said OMAR BARAZA.

The prosecution called three witnesses, and after hearing their evidence as well as the unsworn evidence of the appellant, the learned Senior Resident Magistrate (Mr. Ogembo, D.O.), found the appellant guilty of the offence charged, and sentenced him to death. His first appeal to the High Court (Azangalala, Odero, JJ) was dismissed, hence this 2<sup>nd</sup> and final appeal. The appeal, as the law requires, may only raise issues of law – **see section 361**, Criminal Procedure Code.

The evidence adduced by the complainant, Omar Baraza (PW 1) was that on 21<sup>st</sup> September, 2006 at around 7.00 pm he was headed home on foot, pushing his bicycle along, as he walked. Somewhere near Mwaroni Primary School, he was accosted by eight men, one of whom brandished a knife, threatening him with the same. As the other men surrounded him, the man holding the knife ordered him to leave his bicycle and run. He did exactly that. He immediately reported the matter to the Chief, and identified the

appellant, a person he said he knew from before, as the person who had accosted him with the knife. With the help of the Chief, and his Administration Police Officers, the appellant was arrested the same night, and later handed over to the police, where the complainant recorded a statement, again naming the appellant as the person who had accosted him. Upon his arrest, the appellant agreed to lead the police to his house, from where a bicycle, identified by the complainant as his, was recovered.

In his unsworn defence, the appellant denied the charges. His defence was simply that he was picked up from a restaurant, and did not know why.

The appellant filed a home-made memorandum of appeal outlining five grounds of appeal. However, his learned counsel, Ms. R. R. Abir, filed a supplementary memorandum of appeal, relying on two grounds only, namely that the High Court had erred; (i) in not analyzing and re-evaluating the evidence adduced in the lower court and reaching its own conclusion, and (ii) in affirming the conviction which was based on contradictory evidence. In her submissions before us, Ms. Abir argued that the incident took place at 7.00 pm; that the only source of light was moonlight; and that this was insufficient to positively identify the appellant. She also pointed out certain contradictions in the evidence of the complainant and the investigating officer relating to what the knife looked like, and the precise location of the bicycle recovered from the appellant's house.

Mr. J. N. Ondari, learned Assistant Deputy Public Prosecutor, for the respondent, submitted that the evidence regarding identification was watertight, as it was based on "recognition" of the appellant; and that the appellant was found in possession of the stolen bicycle moments after his arrest.

Both the courts below were alive to the fact that the prosecution case stood or fell on the evidence relating to identification of the appellant. In this case it was not that of a stranger, but of a person previously known and, therefore, it was identification by recognition. As this Court stated before in Anjononi v Republic [1980] KLR 59 at page 60:

***"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya vs. Republic (unreported)."***

In considering the issue of identification, the learned Magistrate stated as follows:

***"From the evidence on record, it is clear that the complainant knew accused well even by name as Hamisi. The complainant mentioned accused's name both to the Administration Police Officers including PW 2 APC Hamisi Suleiman, and to PW 3 PC Mark Otieno of Diani Police Station. Even his statement with the police confirmed that he knew accused by his name as Hamisi. And the complainant gave an account of how he knows accused, having met him many times before this date. I have no doubt in my mind that complainant indeed knew accused well and identified him properly as the one who had robbed him of his bicycle while armed with a knife. In fact, it is the complainant's proper identification of accused that led to the arrest of the accused and the recovery of the knife."***

The High Court went through similar analysis of evidence before stating as follows:

***"The next ground of appeal raised was that of identification. Mr. Mwaboza submitted that the identification of the Appellant by the complainant was not adequate. The incident occurred at 7.00 pm. It was dark. The complainant in his evidence tells the court that he was able to identify the Appellant with the aid of moonlight. At page 9 line 18 he states***

***"There was enough light"***

***Aside from this visual identification the complainant told the court that he recognized the Appellant***

whom he knew before. At page 9 line 1 he states

*'I identified 1 man in the group. The one I identified is the accused. He is the one who produced the knife before taking my bicycle. The others urged him to do [sic] fast. I used to see him at Palatino Garden where there is a shop and a restaurant. I knew him by name as Hamisi. I know him as I have seen him at football matches where I know he supports Black Pastor F.C. He often fights at the matches. I identified him as it was not too dark. There was enough moonlight and he was the only tall man among the group.'*

*From this detailed description there can be no doubt that the complainant was positive as to whom (sic) he had seen. He described the role which the Appellant played in the robbery and he even gave the Appellant's name 'HAMISI'. It has been held that evidence of recognition is far much more reliable than mere identification alone."*

There are, therefore, concurrent findings made by two courts below that the appellant was properly identified as the robber. We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt that the complainant knew the appellant by name from before, that as per his testimony, he used to see him at Palatino Garden, that he had seen him at football matches in the past, where he often fought with other people. The complainant mentioned the name of the appellant as the robber to the Chief almost immediately after the robbery, and later to the police. There were no allegations that there was any grudge between the two, or that there had been an attempt to "frame" the appellant.

Finally, we concur with the submission of the learned Assistant Deputy Public Prosecutor that the doctrine of recent possession was properly invoked. The bicycle stolen from the complainant was recovered in possession of the appellant moments after the incident. The appellant gave absolutely no explanation about how he came to be in possession of the same. In the absence of any explanation, the inevitable inference is that he was the thief.

Accordingly, and for reasons outlined, we find no merit in this appeal, and dismiss the same.

**Dated and delivered at Mombasa this 6<sup>th</sup> day of October, 2011.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**