IN THE COURT OF APPEAL

AT NAIROBI
CRIMINAL APPEAL NO. 252 OF 2007

BETWEEN

ARTE ABDI WITO ……..……..……..…….. 1ST APPELLANT

ADEN SHARIF ABDI …..…..……..…..……..… 2ND APPELLANT

AND

REPUBLIC …….……..……..…... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Makhandia & Kimaru, JJ.) dated 25th June, 2004

in

H.C.CR.A. NOS. 1082 & 1083 OF 2000)

****

JUDGMENT OF THE COURT

The appellants, ***ARTE ABDI WITO*** and ***ADEN SHARIFF ABDI*** were jointly charged with others 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 *1st October, 1998* at Bulla Mzungu in Garissa Township jointly with others not before Court while armed with dangerous weapons to wit a firearm, robbed ***H.O.I*** of **KShs.132,945/=** cash, shop goods and personal property valued at **KShs. 10,000/=** and at or immediately before or immediately after the time of such robbery shot dead the said H.O.I. The appellants denied the charge but after a full trial before the Senior Resident Magistrate at Garissa (S.M.S. Soita, Esq.,), the appellants were found guilty as charged and convicted. They were sentenced to death as mandatorily provided by the law.

The facts as accepted by the two courts below were as follows: On the night of *1st October, 1998*, at about 3:00 p.m., ***A.A.O*** *(PW1)* then aged 13 years old was sleeping outside his grandfather's house. His grandfather was called H.O.I. ***A.A.O*** (PW1) was woken by noises and when he woke up he saw seven men outside the shop. The security lights had been put on which enabled A.A.O to recognize two of the seven men. One of the two men had a firearm. A.A.O saw these men break into his grandfather's shop. They broke the door using a hammer. A.A.O saw the men enter the shop and take out goods. He

then heard a gunshot. The two men that A.A.O recognized were the two appellants. According to the evidence of A.A.O during the trial, he recognized the two appellants as he had known them prior to this robbery incident. It was A.A.O's evidence that it was ***Arte Abdi Wito*** (1st appellant) who had the firearm which was used to shoot dead his grandfather. After the men had left with the stolen goods, A.A.O went into the house and saw that his grandfather H.O.I had been shot dead.

A.H.O *(PW2),* the son of the deceased H.O.I testified that on the material night he was sleeping in the room next to the shop when he was woken up by a bang on the door of the shop. He raised alarm but was ordered to keep quiet. He then heard a gunshot. He did not see any of the assailants. When he went into the shop ***A*** *(PW2)* found his father shot dead. The deceased had a bullet wound on the left side of the chest. The police were called and took away the body of the deceased. Later several items stolen from the shop as well as from the house were recovered and A was able to identify some of the items as belonging to the deceased, H.O.I.

H.A.M *(PW3) (H)* testified that on the material night, he had visited the deceased H.O.I. H was sleeping in a house opposite the shop where the deceased slept. He was woken up at night when he perceived that the latch to the door of the house he was sleeping in was being locked from the outside. He then heard the door of the shop being banged. He peeped out of the window and saw three men as there was security light. He was able to identify the 1st appellant who had a firearm and the 2nd appellant who was carrying a crow bar. When H raised alarm, gunshots were fired. He was ordered to keep quiet and he obeyed the order. He however continued peeping through the window and he saw goods being taken out from the shop. After the assailants had left H went into the shop and saw that the deceased H.O.I had been shot in the chest. Later H was able to identify the two appellants in identification parades.

In the course of his judgment delivered on *1st March, 1999*, the learned Senior Resident Magistrate stated inter alia:-

"I have carefully appraised the evidence on record. I will deal first with the evidence in respect of the first count which relates only the first and second accused persons. The evidence on record is that the robbery was committed by a gang of three or four persons. PW1 saw at least two persons while PW3 from his vantage point saw at least three persons. Both PW1 and PW3 identified the first and second accused persons at the scene of robbery and both were consistent in the evidence that the first accused was armed with a firearm. Both the first and second accused persons have charged in their defence that they were disadvantaged by the way the identification parade was being conducted. I don't believe this aspect. They were properly identified. The scene was illuminated with electric light and they spent quite sometime at the scene."

In their judgment delivered on *25th June, 2004*, the learned judges of the superior court (Makhandia & Kimaru, JJ.) stated inter alia:-

"In the instant case, the points for determination by this Court is whether or not the Appellants were properly identified at the scene of the robbery. The second issue for determination is whether or not the goods recovered sufficiently connects the Appellants to the robbery."

And considering the evidence of the young A.A.O (PW1), the learned judges stated:-

"He was able to identify the two appellants from among the group of men breaking into his grandfather's shop. He knew prior to the robbery incident *(sic).* ***His evidence was thus of recognition. He testified that the 1st appellant was armed with a firearm. He testified that the 2nd appellant chased him from the scene. PW1 then heard a gun shot. He saw the appellants with their colleagues carry away the goods from the shop and the house."***

On the issue of identification of the two appellants the learned judges of the superior court stated:-

"As stated earlier the evidence of PW1 was that of recognition. PW1 knew the appellants prior to the

robbery incident. His evidence was corroborated by that of PW3, who apart from testifying that he had identified the appellants at the scene of the robbery was able to point them out in an identification parade mounted by the police. There was no doubt that the two witnesses identified the appellants at the scene of the robbery. The evidence of identification was further supported by the evidence of the goods recovered. PW4 testified that a search party was organized immediately after the robbery. The search party, which included PW4 was able to follow the footprints of the robbers from the scene of the crime to a Manyatta called Bulla Gugud. There they were able to recover some items of clothing from the house where the 1st appellant resided, that belonged to the deceased. PW2 identified the said items of clothing as belonging to the deceased."

Having considered other aspects of the case, the learned judges of the superior court concluded their judgment thus:-

"In premises therefore, after considering the totality of the evidence adduced by the prosecution and also the evidence adduced by the defence, we do find that the case against the appellants was proved beyond reasonable doubt. The charge of robbery with violence was proved; the appellants were armed with dangerous weapons, namely a firearm and a crowbar and in the course of the robbery, fatally injured the owner of the shop, H.O.I. The appellants robbed the said H.O.I of his property some of which were later recovered and identified as belonging to the deceased.

We therefore find no merit in the appeals filed by the appellants. The same are hereby dismissed. The conviction and sentences imposed by the trial Court is hereby confirmed."

Being aggrieved by the foregoing, the appellants now come to this Court by way of second and final appeal. That being so only matters of law may be considered - see ***section 361(1)*** of the Criminal Procedure Code.

When the appeal came up for hearing on *2nd June, 2010*, Miss C.B. Masaka appeared for both appellants, while Mr. V.S. Monda (Senior State Counsel) appeared for the State. In her submissions Miss Masaka argued that on the issue of identification although witnesses talked of security light on the front door that light was, in her view, not enough for the witness to identify or recognize the appellants. Miss Masaka pointed out that PW1 was a minor who was asleep. It was Miss Masaka's contention that there was contradiction in the evidence of PW1 and PW3.

On the second ground of the supplementary memorandum of appeal, it was submitted that the conviction which was based on the basis of circumstantial evidence was weak and that the evidence of recovery of stolen items did not link the appellants with the robbery.

On the third ground of appeal it was argued that the defence raised by each appellant was not considered.

Lastly, Miss Masaka submitted that the superior court failed in its duty of subjecting the evidence to a fresh scrutiny. She gave the example in the confusion as regards the date when a confession was recorded.

In reply to the foregoing submissions Mr. Monda stated that the appellants were convicted on evidence of recognition under conditions which were favourable for identification. Mr. Monda further submitted that the learned judges of the superior court re-evaluated the evidence and came to the correct findings. Mr. Monda referred to the charge and caution statement given by 1st appellant in which he gave a detailed account on how the robbery was planned and executed.

Finally, Mr. Monda submitted that the defence of each appellant was considered and properly rejected. He therefore asked us dismiss this appeal.

We have carefully considered what has been urged before us and from the findings of the two courts below the appellants were recognized as being part of a group of several men who attacked the

shop of the deceased H.O.I, took away shop goods and in the process shot the deceased. The conviction of the appellants was based mainly on the evidence of identification, and recognition by A.A.O (PW1) and ***H.A.M*** (PW3). These two witnesses testified that they recognized the two appellants. ***A.A.O,*** in particular, testified that he knew both appellants and he, indeed, gave their names to the police. There was then the evidence of a charge and cautionary statement made by the 1st appellant. This statement was admitted in evidence without any objection from the 1st appellant. In that statement, the 1st appellant gives a detailed account of how the robbery was planned and executed.

As if that was not enough, there was further evidence of recovery of the items stolen during the robbery.

In this appeal, it is clear that the two courts below were satisfied that the appellants were properly identified. We have reproduced portions from the judgments of the two courts below which show that the conviction of the appellants was based mainly on identification. In ***ANJONONI AND OTHERS V. REPUBLIC*** [1981] Kenya L.R. 594 p. 60 this Court said:-

"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."

Having considered the submissions by Miss Masaka and Mr. Monda we are satisfied that the two appellants were convicted on very sound evidence of recognition. Accordingly, this appeal fails and we order that the same be and is hereby dismissed in its entirety.

Dated and delivered at NAIROBI this 9th day of July, 2010.

E.O. O'KUBASU

…….

JUDGE OF APPEAL

P.N. WAKI

……

JUDGE OF APPEAL

J.G. NYAMU

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR