



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA
Criminal Appeal 131 of 2006

DOMINIC MUSILA ETUMBO APPELLANT

AND

REPUBLICRESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Mombasa (Khaminwa & Maraga, JJ.)
dated 28th June, 2005*

in

H.C.CR.A. NO. 323 OF 2003)

JUDGEMENT OF THE COURT

This is a second appeal brought by the Appellant ***Dominic Musila Etumbo*** against his conviction of the offence of attempted robbery with violence contrary to ***section 297 (2)*** of the Penal Code for which he was sentenced to death that being the mandatory sentence.

The particulars of the offence set out in the charge sheet were as follows: -

“1. Dominic Musila Etumbo (2) Peter Musyoki Mwendwa (3) Philip Ndungu Mothancha on the night of 29th and 30th day of December, 2002 at Baobab Farm in Bamburi in Mombasa District within Coast Province jointly with others not before the court while armed with offensive weapons namely Rungus, Pangas, Axes, Bows, Arrows and stones attempted to rob Reuben Mzenge of cash Kshs.549,475/= and at or immediately before or immediately after the time of such attempted robbery threatened to use actual violence to the said Reuben Mzenge.”

The evidence of P.W.1 **Reuben Mzenge** described how the events implicating the appellant unfolded at the **Bamburi Baobab Farm** during the night of the 29th to 30th December, 2002. P.W.1 recounted how he worked for Hammar (sic) Group Security of Kenya as a radio controller on duty in Bamburi Baobab Farm where they had offices. He explained that they were situated in a compound along with other offices of Baobab Farm. There were two gates to the compound which had a security wall around it. One of the gates was locked while the other gate was manned by a guard. At about 1.50 a.m. P.W.1 was on duty with a supervisor called **Maritim**. Maritim was out in the compound checking on other guards. P.W.1 was in the office alone. The door was shut but not locked. There were two men outside patrolling the compound.

While in the control room where P.W.1 was working some ten men burst in, dressed normally but armed with pangas, clubs, bows and arrows and axes. They pointed their weapons at P.W.1 and told him not to make any noise and that he should lie down. P.W.1 obeyed because he saw that he was out numbered. There was one of the attackers who P.W.1 recognised. P.W.1 was tied up by the gang. Then one of his colleagues **Nixon Ashiundu** (PW6) was brought into the room. He was also tied up and made to lie down beside P.W.1.

When the other watchmen saw what was going on they ran away shouting “*thieves thieves*” and blowing their whistles. The robbers then left P.W.1 and Ashiundu on the floor and went out leaving two armed men to guard P.W.1 and Ashiundu. These two men put out the lights so that they would not be seen by P.W.1 and Ashiundu. By this time P.W.1 had already seen the two men and identified their faces. P.W.1 then heard the sounds of the robbers breaking the glass door and trying to break the safe. The administration office had two doors. The thieves broke the back door.

The police arrived in a vehicle as the thieves were breaking into the administration office. The robbers guarding the gate and the two guarding P.W.1 and Ashiundu ran away when they heard the police arriving. They could not see what the police were doing but they heard the gun shots.

The police presently came in with one suspect. P.W.1 recognised the suspect as one of the men who had stood guard over P.W.1 and Ashi. P.W.1 testified that he had seen this man when he first came in and also kept seeing his face as he came to the window to tell P.W.1 and Ashiundu to stay down. This man was identified by P.W.1 as the appellant who was the first accused in court. P.W.1 also identified the second accused a second man who was brought in to the room by the police having been arrested outside. P.W.1 was also able to identify the 3rd accused in court as one of the men he saw at the scene.

The Principal Magistrate at Mombasa L. Achode had this to say in her judgment in relation to the issue of the identification of the present Appellant.

“This Court must decide whether the evidence of identification is sufficient to secure a conviction for any of the two accused persons and whether their statements of defence cast reasonable doubt on the prosecution case.

Accused 1:

All the witnesses at the scene purported to have identified him. P.W.1 said he saw and identified the accused at the time of arrival and that he also saw him because he was left behind to guard them in the control room when the rest went next door to break the safe. The court also notes that at no time did he put it to any of the witnesses that he was arrested at Baobab bus stage which is a stage on the main Malindi Mombasa Road.”

The Principal Magistrate further stressed that: -

“PW1, 3, 4, 5, 6 and 8 told the Court that accused 1 (the appellant herein) was arrested within a few yards of the Baobab offices that had been broken into. Accused 1 was found trapped by thorns and bracken. The others in the gang had descended into a deep gully..... the first accused tried to jump but was caught and suspended by the thorns and creepers till the police arrived a few minutes

later.”

The superior court (Joyce Khaminwa and D.K. Marangu, JJ) came to the same conclusion as to the identification of the appellant and his arrest at the scene and stated in their judgment : -

“As a first Appellate court we have carefully examined and re-evaluated the evidence on record as we are duty bound to do – Peter Liningushu & Others vs. Republic Criminal App. No. 52 of 2005 (Nakuru) C.A.

The Baobab premises broken into were well lit by security lights. Some of the guards like P.W.3, P.W.4 and P.W.5 were outside the building at various points. They saw the robbers enter the premises and proceed to the Control Room without themselves being seen except for P.W.6 who was at one of the gates. The robbers frog marched him into the control room, tied him and ordered him to lie down. Before the lights were switched off he and P.W.1 had sufficient time to see the robbers especially the Appellant who was the one left behind to guard them when the others went into the Administration Block where the safe was. They had more time to observe him.

We agree with Mr. Monda that the conditions at the scene were favourable for a positive identification of the Appellant. P.W.1, P.W.3, P.W.4 and P.W.6 all identified the Appellant. When the robbers fled following the gun shots from the police these witnesses together with the police pursued them and found the Appellant trapped in a thicket in the Baobab compound a few metres away. As the trial magistrate remarked that was no place for anyone waiting for a friend could be.”

It is clear from the above that there are firm concurrent findings of fact as to both the identification of the Appellant as one of the gang of robbers and as to the place of the Appellant’s arrest.

We, as the second appellate court, agree with and, in any event, must be loyal to these concurrent findings of fact given further that there are, in our view, no errors of law expressed in the judgment of the superior court.

It will be clear from the above that we do not consider that this appeal has any merit. We therefore hereby dismiss the appeal of the Appellant Dominic Musila Etumbo.

Dated and delivered at Mombasa this 19th day of January, 2007.

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR