



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Criminal Appeal 130 of 2005

ZABLON MUNANGWE SHIMOLI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from Judgment of the High Court of Kenya at Nairobi (Kimaru & Makhandia, JJ)
dated 30th April, 2004*

In

H. C. Cr. A. No. 727 of 2001)

JUDGMENT OF THE COURT

In the morning of 23rd December, 2000, there was a robbery in the home of Ashwin Kumar Bhogaita (P.W1) along or off 2nd Parklands Avenue. During that robbery Ashwin lost his motor vehicle, numerous house-hold goods and cash, both local and foreign, all to the total value of K.shs.2,055,800/-. The robbers were armed with pistols and a panga. The appellant Munangwe was employed as a watchman by a security firm called Gallant Security Guards of which Joseph Peterson Muriithi (P.W5) was the Operations Manager. Ashwin, his three employees Wilson Sewe Okongo (P.W2), Michael Kadere Elijah (P.W3), and Muniyoki Murimi (P.W4) all swore that the appellant was the one on guard duties during the robbery. Muriithi also stated they had deployed the appellant to guard the home of Ashwin. Sewe (P.W2) was a shamba-man in the home of Ashwin. Sewe swore that he saw the appellant voluntarily open the gate for three people and that it was the appellant who pointed out to the three persons the house in which Ashwin was. It was those three persons who confronted Ashwin and the other persons with him in the house, tied them up and robbed them of the items listed in the particulars of the charge of robbery with violence under **section 296(2)** of the Penal Code. Two of the robbers were armed with pistols while the third one had a panga. Sewe also swore that the appellant had told him (Sewe) that the three people who had gone into the house were from Gallant Security Guards. That information was clearly false. After the robbery was completed the appellant simply vanished and was not seen again until 8th March, 2001 when P.C. Jones Mamadi (P.W6) arrested him in a house in Kawangware. When put to his defence, the appellant, in a short statutory statement, merely concentrated on the circumstances of his arrest on 8th March, 2001 and said nothing about the events of 23rd December, 2000.

On the state of that evidence the learned trial Magistrate was satisfied.:-

“..... that the accused used to work as a watchman or security guard at the complainant’s premises. The court is also satisfied with the evidence that he was the one who went with 3 men to the complainant’s house and left them in the house. Instead of going back to the gate he disappeared . This disappearance clearly shows that he was not merely acting as a guard when he took the three people to the complainant’s house. There is evidence that at one stage he introduced them as employees of the same company he was working for. His conduct therefore shows guilty knowledge. -----.”

The Magistrate then found the charge of robbery with violence proved against the appellant beyond any reasonable doubt, convicted him and sentenced him to death. The appellant duly appealed to the superior court and having reviewed and re-evaluated the evidence, the superior court (Makhandia and Kimaru, Ag. JJ as they then were) by its judgment delivered on 30th April, 2004 concluded that:-

“..... It is clearly evident that the appellant participated in the robbery either as an accomplice before the fact or as an accomplice after the fact. The appellant therefore participated in the robbery at the house of P.W1. The fact that the appellant disappeared after the robbery points to the fact that indeed the appellant was an active participant in the robbery. -----.”

The superior court then dismissed the appeal against the conviction and confirmed the sentence of death. The appeal now before us is a second appeal and as such, the Court can only deal with issues of law. Mr. Macharia, who appeared for the appellant before us argued four grounds in his supplementary memorandum of appeal. In ground one, the issue of law raised appears to be that the evidence adduced before the Magistrate did not support the particulars of the charge as there was no evidence of a threat to use violence. This ground has no merit at all. The evidence accepted by the two courts below was that the three (3) men whom the appellant himself led to the house of Ashwin had two pistols and a panga. They were three (3) and together with the appellant they were four. Pistols and a panga were clearly offensive weapons, taking into account the circumstances under which they were carried . The robbers were more than one and under all these circumstances, there was no need to allege use of or threat to use force. Even if it was necessary to allege threat to use force, that threat was clearly implicit in the arms carried by the robbers. They also tied up their victims. There is no merit in ground one of the grounds of appeal.

Ground two attacks the superior court for relying:-

“On mere suspicion and the same no matter how strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubts.”

We do not think it was merely suspicion that the appellant voluntarily opened the gate to the three persons; Sewe (PW2) saw him do so and then he led or pointed out the house where Ashwin was to the three people . When Sewe asked him who those people were, the appellant said they worked with him at Gallant Security Guards. That was false. Then he disappeared together with the other robbers and was not arrested until nearly three months later. These were circumstances from which the two courts below were perfectly entitled to draw the inference that the appellant was part of the robbers. The circumstances existing prior to, during and after the robbery were all consistent with his being a participant in the robbery. This conclusion covers grounds three and four in the supplementary grounds of appeal. Mr. Macharia abandoned ground five.

Like the two courts below, we are satisfied the appellant was a participant in the robbery and his conviction was inevitable. We order that his appeal be and is hereby dismissed.

Dated & delivered at Nairobi this 16th day of March, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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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.