



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL AT MOMBASA

Criminal Appeal 130 of 2004

MOHAMED JUMA ALIAS MWANDILO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Mwera, J) dated 13th July, 2004

in

HC.C.CR.A. 463 OF 2003)

JUDGMENT OF THE COURT

This is a second appeal. The appellant, Mohamed Juma alias Mwandilo, whose age was on 2nd February, 2006, at the request of his counsel on record, assessed as 22 years, was convicted upon trial of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code and was thereafter, on 14th November, 2002, sentenced to the mandatory death sentence. His first appeal to the superior court was dismissed and hence this appeal.

The particulars of the charge against the appellant alleged that on 11th June, 2002, at about 9.00 a.m at Mtongwe in Mombasa, jointly with other people not before the court and while armed with knives robbed William Maina Kariuki of Kshs. 4,050/- in cash and two bottles of soda all valued at Kshs, 4,100/-, and at or immediately after the time of the robbery threatened to use actual violence to the said William Maina Kariuki. On the material date and time, William Maina Kariuki (William), was working as a driver with Kareka General Traders, a soda distribution firm. He testified before the Principal Magistrate's Court Mombasa (Mrs L. Achode) that on 11th June, 2002 at 9.00 a.m, he was distributing soda in Mwenza area in Likoni. He was driving a pick up truck which was loaded with sodas. He had two assistants who were riding at the back of the vehicle. As he drove slowly along a rugged murram road three people emerged from a nearby bush, armed with knives and threatened to stab him if he did not surrender all the money he had in his possession from the sale of sodas. When he hesitated, one person opened the left door of the pick up, entered the pick up and tried to forcibly take away the money he had in his pocket. Another person, whom he identified as the appellant, snatched the ignition keys from the ignition switch and at the same time threatened to stab the witness if he continued to resist. William let go. The person who entered the pick up took some money from the witness's pocket and immediately disembarked. While that was going on, the third person was standing guard at the back side of the vehicle to prevent William's assistants from coming to his aid.

The three men thereafter helped themselves with some soda after which, in the language of the trial magistrate, they sauntered away. William testified that two of the people took a soda each while the third one took two. This evidence however differs from what George Ochieng Swayo (George), one of the two assistants, stated in court. George testified that each person took 2 sodas of 1 litre capacity each, clearly contrary to what William said. Mr Wameyo for the appellant made heavy weather of this and the fact that the appellant who, according to the witnesses, was known to them was not arrested promptly. The appellant was arrested on 23rd July, 2002, when he and other young men were seen riding dangerously on the back of a “matatu”. His arrest was not in connection with the alleged robbery of William, but in connection with a similar incident against another person.

The appellant was picked by William and George in an identification parade in which the appellant was the suspect. The appellant admitted this but contended that he was framed up by Police Constable Joseph Kamau (Joseph) who arrested him because of an earlier case concerning which he was acquitted. He also alleged that William had a grudge with him over a woman whom he described as Mama Julius.

Section 361(1) of the Criminal Procedure Court provides:

“A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:-

(a) on a matter of fact, and severity of sentence is a matter of fact; or

(b) against sentence, except where a sentence has been enhanced by the High court, unless the subordinate court had no power under section 7 to pass that sentence.

Mr Wameyo for the appellant was aware of this fact, and submitted before us that the main legal issues, in his view, which are raised by this appeal, are, firstly, whether the appellant was properly identified as one of the people who robbed William. Secondly, whether, in view of the appellant’s age, which learned counsel submitted was under 18 years, the conviction entered against him should stand.

On the first issue, Mr Wameyo expressed the view that the eye witnesses having testified that they knew the appellant before, there is no explanation on record as to why it took quite long before he could be arrested and charged soon after the date of the robbery. Besides, he said, William testified that he recognized one of his attackers as the brother of a driver who was then working with the same firm as himself. If that was so, Mr Wameyo wondered why the police did not look for and arrest the person concerned. On the basis of that lapse and the fact that there was a discrepancy between the testimonies of William and George regarding the number of bottles of soda stolen, Mr Wameyo argued, a doubt was cast on the correctness of the appellant’s identification. He therefore urged the Court to give the appellant the benefit of the doubt, quash his conviction, set aside the sentence of death and set him at liberty.

We have no doubt in our minds that the issue of identification is a point of law. The alleged robbery was committed in broad daylight, in an open place, and in circumstances which from all appearances were not difficult. William testified that the person who confronted him and snatched the car ignition keys was standing close to him, his window was rolled down and he was able to observe the person. He was sure it was the appellant, a person he knew by appearance before. His observation of him was not momentary. He had no difficulty picking him at an identification parade which was organized later after the appellant’s arrest. George testified to the same effect.

The trial and first appellate courts considered all the foregoing facts and circumstances and concurrently made a finding that the appellant was correctly identified as one of the three persons who robbed William. They considered the appellant’s defence and were satisfied it was unmeritorious. We find no basis for faulting both the courts below on this aspect of the matter.

As for the second issue, the appellant was examined by a medical practitioner with regard to his age, on 2nd February, 2006. The doctor assessed the appellant’s age at about 22 years. The appellant first

appeared in the Magistrate's court for plea on 2nd August 2002, which is about four years ago. It then follows that as at the date of plea the appellant was at least 18 years old. Consequently, the complaint that the trial and first appellate court failed to consider that the appellant was then a minor has no merit.

We agree with Mrs Mwangi for the state that the appellant's conviction was based on sound and overwhelming evidence. Whatever discrepancies that exist are curable under the provisions of **section 382** Criminal Procedure Code, which provides thus:-

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice”

In the result the appellant's appeal fails and it is hereby dismissed.

It is so ordered.

Dated and delivered at Mombasa this 21st day of July, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR